CONSTITUTIONAL COURT OF SOUTH AFRICA

YNUICO LIMITED — Applicant

versus

MINISTER OF TRADE AND INDUSTRY — First Respondent

DIRECTOR-GENERAL, TRADE AND INDUSTRY — Second Respondent

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA — Third Respondent

TEA COUNCIL OF SOUTHERN AFRICA (PROPRIETARY) LIMITED — Fourth Respondent

Heard on 12 March 1996 — Case CCT 47/95

Decided on 21 May 1996

J U D G M E N T

DIDCOTT J:

[1] This matter has come before us as the sequel to an application which was lodged in the Transvaal Provincial Division of the Supreme Court, where Van Dijkhorst J dealt with it. The judgment that he delivered in adjudicating on the proceedings there has been reported [1]. It tells their story fully and in detail, describing the background to the case, reciting its facts, indicating the relief which was sought then, summarising and discussing the contentions that had been advanced in support of and in opposition to the claim for such, furnishing and explaining the conclusions

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[1] 1995 (11) BCLR 1453 (T).

reached by the Court on them, and ending with the orders which eventually ensued. All that history is obtainable from the report and none of it needs to be repeated now, besides the few parts that I shall proceed at once to highlight.

[2] By one of those orders, which was granted under section 102(1) of the interim Constitution (Act 200 of 1993), Van Dijkhorst J referred to us and sought our ruling on the question "whether section 2(1)(b) of the Import and Export Control Act (No 45 of 1963) is constitutional and valid". Section 2(1)(b) decrees that:

> "The Minister may, whenever he deems it necessary or expedient in the public interest, by notice in the Gazette prescribe that no goods of a specified class or kind or no goods other than goods of a specified class or kind ... shall be imported into the Republic, except under the authority of and in accordance with the conditions stated in a permit issued by him or by a person authorized by him."

The Minister thus mentioned, the one now cited as the first respondent, exercised the power gained from the section by causing Government Notice R2582 to be published in the Gazette on 23 December 1988. It prohibited the importation into South Africa, without a permit, of various commodities which it listed. They included tea. Both the section and the provisions of the notice relating to tea are still in operation. The applicant does business in this country as a supplier of tea. It has been refused a permit to import tea from a foreign source prior to its purchasing a percentage of the domestic product that satisfies the requirements protecting local growers which the trade imposes on all such merchants *pro rata*.

[3] The applicant's counsel contended in the Court below that section 2(1)(b) was incompatible with sections 24 and 26(1) of the Constitution. It clashed with section 26(1), he maintained, by empowering the Minister to invade the right to free economic activity which was guaranteed there. It also fell foul of section 24, he added, because the power conferred on the Minister was insufficiently defined and circumscribed to meet the standards of lawful administrative action which that section set. The arguments were advanced, as the judgment of Van Dijkhorst J shows, in order to demonstrate the prospect that was then envisaged of our holding section 2(1)(b) to be unconstitutional on those grounds. In the event, however, counsel persisted with neither contention in this Court. Indeed he disavowed, unequivocally and repeatedly, all reliance here on either. He did not tell us the reason for his retreat, whether the doubts which his side apparently entertained by that stage had to do with the effect of the rights asserted previously or with their limitation under section 33(1) of the Constitution. But the explanation does not matter. The abandonment of the points, whatever accounted for that, has made it unnecessary for us to consider those now, and unwise too when the result was that we heard no argument on them. The issues thus raised had better therefore be left open until some future occasion arrives when we have to decide them and they are thoroughly explored.

[4] Before us counsel concentrated instead on, and confined his client's case to, a third attack launched on section 2(1)(b). It invoked no fundamental right proclaimed and protected by chapter 3 of the Constitution, but concerned the topic of legislative power and was based on section 37 of that charter, which declares that:

> "The legislative authority of the Republic shall, subject to this Constitution, vest in Parliament, which shall have the power to make laws for the Republic in accordance with this Constitution."

The gist of the argument which counsel presented on the ostensible strength of section 37 was this. The section entrusted Parliament, and Parliament alone, with plenary legislative power. Neither there nor elsewhere did the Constitution allow Parliament to surrender or transfer any portion of that omnipotence to a Minister. Such a surrender or transfer was consequently unconstitutional. Yet for so much, in effect, section 2(1)(b) provided. For it gave the Minister *carte blanche* in empowering him to legislate within the area that it demarcated. No objective guidelines or criteria for his exercise of the power were prescribed. Nor was its exercise limited by aught but the condition that he believed the fiat which he had in mind to be "necessary or expedient in the public interest", a restriction so general, so indefinite and so subjective that it amounted to none in either substance or worth.

[5] A question that calls for no answer at present is how an attack like that would have fared had it been aimed at a similar delegation of legislative power which was sanctioned by a statute passed after the Constitution came into force on 27 April 1994, or even at the exercise of a comparable power delegated earlier but wielded later than that date. The question does not arise in this case, where the power bestowed on the Minister was both delegated to and exercised by him before the Constitution entered the picture, the enactment of the statute containing section 2(1)(b) and the publication of the notice issued under it having each preceded that event.

[6] The chronology is crucial because it means, in my opinion, that section 37 has no bearing on the matter. The section, as I construe it, deals with the location and source of legislative power solely from the time when the Constitution began to operate, leaving untouched the state of affairs that prevailed previously. That it cannot rightly be interpreted otherwise is clear, I am satisfied, from both its text and its context. Its predominant verbs speak in the future tense and accordingly with reference to the future. It talks about Parliament, which the section immediately preceding it identifies as the Parliament consisting of "the National Assembly and the Senate", a description that does not cover our old and defunct legislature but fits only the reconstructed one. The setting in which all those features are seen is chapter 4, a cluster of sections that refer unmistakably to the new Parliament alone when they fix its duration and regulate elections to its membership. And the power to legislate "in accordance with this Constitution" which the section grants can hardly be attributed to an earlier Parliament that was about to die when the Constitution took effect. Counsel's latest contentions therefore rested on a foundation which had no substance[2].

[7] Section 2(1)(b) and the ensuing notice were products of an era when the reign of Parliament was subject substantively to no constitutional discipline or control. In exercising the sovereignty which it thus enjoyed Parliament could competently confer on a Minister or somebody else whatever legislative powers it chose to assign to him,

[2]Marais J rejected similar contentions and reached the same conclusion in an unreported judgment delivered by him on 28 September 1995 in *S v Coetzee and Others*, a case heard in the Witwatersrand Local Division of the Supreme Court which was numbered 70/92.

including plenary ones, and it did so not infrequently. Of the instances that spring to mind the most notorious was probably the occasion when the Native Administration Act (No 38 of 1927) appointed the Governor-General as the "Supreme Chief" of those whom it called "natives" and equipped him with a power to legislate for them which was virtually absolute. That provision has become a dead letter by now and will no doubt be removed from the statute book in due course. Still active there, however, are plenty of others less anachronistic which authorised the delegation of legislative power in terms quite as broad as and no less consequential than the ones of section 2(1)(b). Their current status, shared with the rest of the statutory survivors, has been settled by section 229 of the Constitution, which stipulates in its relevant parts that:

> "Subject to this Constitution, all laws which immediately before the commencement of this Constitution were in force... shall continue in force..., subject to any repeal or amendment of such laws by a competent authority."

The explanation for that was obviously the impracticality of dismantling all our old statutory law in one fell swoop when nothing had yet been constructed to replace it, a treatment which would have thrown the governmental, administrative and economic infrastructure and functioning of the country into immediate chaos. Those who cannot readily imagine that the framers of the Constitution intended even in the interests of stability to perpetuate measures of the particular kind now under discussion should remind themselves of something else, of a flaw much worse and more fundamental in every statute then in force which was nevertheless thought not to disqualify it from retention. I refer, of course, to its enactment by a Parliament that had been elected

undemocratically and was not representative of all our people. The genesis of a statute and its contents give rise, to be sure, to conceptually separate criticisms. It seems scarcely surprising all the same that, having swallowed the camel of illegitimate origin, those concerned saw no need to strain at the gnat of unbridled delegation. Nor do we in turn have any reason to shrink from attaching to the words of section 229 their natural and ordinary meaning. Its only word that looks like calling for some comment is "laws". Section 2(1)(b) amounts to a "law" as defined in section 2 of the Interpretation Act (No 33 of 1957). So does the notice, given its regulatory character. Section 229 contains nothing which indicates that "laws" are mentioned there in a sense different from the one thus defined. Both section 2(1)(b) and the notice are therefore "laws" for the purposes of section 229. The result is that it has preserved each of them.

[8] In stating that I have not overlooked the qualification expressed in the opening words of section 229, according to which the continued force of the old laws that it perpetuates is "subject to this Constitution". Miller JA analysed and discussed such qualifications in *S v Marwane*[3], saying about the phrase "subject to the provisions of this Constitution" which appeared in the Constitution of Bophuthatswana:

> "The purpose of the phrase 'subject to' in such a context is to establish what is dominant and what subordinate or subservient; that to which a provision is subject is dominant - in case of conflict it prevails over that which is subject to it. Certainly, in the field of legislation, the phrase has this clear and accepted

[3] 1982(3) SA 717 (A) at 747 H to 748A.

> connotation. When the legislator wishes to convey that that which is now being enacted is not to prevail in circumstances where it conflicts, or is inconsistent or incompatible, with a specified other enactment, it very frequently, if not almost invariably, qualifies such enactment by the method of declaring it to be 'subject to' the other specified one."

Trengove AJ quoted that passage with approval in *Zantsi v Council of State, Ciskei, and Others*[4]*.* Continuing, Miller JA cited the judgment delivered in *C and J Clark Ltd v Inland Revenue Commissioners*[5]*,* where Megarry J had remarked:

> "In my judgment, the phrase 'subject to' is a simple provision which merely subjects the provisions of the subject subsections to the provisions of the master subsections. Where there is no clash, the phrase does nothing: if there is collision, the phrase shows what is to prevail."

The effect of the qualification encountered at the beginning of section 229 can easily be illustrated in the light of that analysis. No perpetuated law is immune to subsequent nullification once it violates a fundamental right entrenched in chapter 3, the dominant part. It remains open to attack on those grounds notwithstanding its preservation by section 229, the subordinate one. Indeed we have already struck down a number of preserved laws on that very score. Others may lend themselves to constitutional challenges that lie outside chapter 3. No extra challenge occurs to me at present. But I shall assume, without deciding, that some are duly cognizable.

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[4]Paragraph [27]: 1995(4) SA 615 (CC) at 624 F; 1995 (10) BCLR 1424 (CC) at 1434 H-J.

[5][1973]2 All ER 513 (Ch D) at 520 e-f.

[9] Counsel seized on the qualification introducing section 229 and set out from that point on an alternative route which approached section 37 indirectly this time. It passed through section 4(1) of the Constitution, which ordains that:

> "This Constitution shall be the supreme law of the Republic and any law... inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force or effect to the extent of the inconsistency."

The destination then reached was this. Section 37 enunciated a cardinal constitutional value, so counsel argued, even if it did not apply in its terms to the situation preceding the operation of the Constitution. For the reasons mentioned earlier section 2(1)(b) was inconsistent with that value, and accordingly with section 37. It followed that section 4(1) deprived section 2(1)(b) of all force and effect.

[10] I see no merit in that argument either. The pair of judgments to which I have referred demonstrate that, before one provision can rank as dominant over or subordinate to another, there must be a conflict, an inconsistency or an incompatibility between them, as Miller JA put it, or the clash or collision of which Megarry J spoke synonymously. None emerges here. Section 37 goes no further, on my reading of it, than the limited distance measured already by me. It and section 229 have separate fields of operation and deal with different topics, the former looking only to the future and governing legislative power there alone, the latter focussing on the past and preserving the statutory legacy of that. Nor, once the two sections are thus reconciled

with each other, can any inconsistency be found between section 37 and section 2(1)(b). The applicant then gains no assistance from section 4(1), which specifies such disharmony as the very cause of nullity.

[11] A third attempt at bringing section 37 to bear on the case for the applicant was ventured when counsel took yet another alternative tack. Since the Constitution came into force, he contended, our new Parliament had tacitly voted in favour of section 2(1)(b), or likewise adopted its provisions, by neither repealing nor suitably amending them. The contention depended on the idea propounded by him that an acquiescent silence could well be a factor no less legally telling in the work of Parliament than it sometimes became in the world of contracts. That proposition strikes me as a most extraordinary one. It implies that Parliament's power to legislate can be exercised by not legislating. In their significance it equates Parliamentary debates on legislative proposals, and their culmination in the due consideration of those, with a total lack of both. And a positive decision gets imputed to Parliament in ignorance of what it would have actually decided on applying its mind to the matter. The notion is untenable.

[12] The applicant's case must therefore fail on all its individual counts. In the result an order is now made in the terms that follow.

(a) Section 2(1)(b) of the Import and Export Control Act (No 45 of 1963) is declared not to be inconsistent with section 37 of the interim Constitution (Act 200 of 1993), and therefore not to be invalid on the score of any such inconsistency.

(b) The applicant is directed to pay the costs of the proceedings in this Court, including those incurred by each respondent which were occasioned by his or its employment of the services of two counsel.

(c) The case is remitted to the Transvaal Provincial Division of the Supreme Court for the determination by it of any issue in the matter that remains to be resolved, including the question of the costs previously incurred there which it reserved for the decision of this Court or, in the absence of that, for its own future decision.

Chaskalson P, Mahomed DP, Ackermann J, Kentridge AJ, Kriegler J, Langa J, Madala J, Mokgoro J, O'Regan J and Sachs J concurred in the judgment of Didcott J

Counsel for the applicant :	N Singh SC, with him K Govender, instructed by Asif Essa and Co.
Counsel for the first, second third respondents :	J L van der Merwe SC, with him N J Louw, and instructed by PRT Rudman Attorneys.
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