

20/96

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

GLYNN RUDOLPH

First Applicant

GLYNN RUDOLPH & CO LTD

Second Applicant

and

THE COMMISSIONER FOR INLAND REVENUE

First Respondent

J F C HEYDENRYCH N O

Second Respondent

R J BEUKES N O

Third Respondent

J J HOLTZHAUSEN N O

Fourth Respondent

K STEYN N O

Fifth Respondent

P DU PLESSIS N O

Sixth Respondent

T J FRATES N O

Seventh Respondent

M M J VAN WYK N O

Eighth Respondent

ORDER OF COURT

For reasons to be filed later, the following order is made in this

matter:

(1) In this order the words "common law grounds of invalidity" mean the

contentions -

- (a) that an authorization in terms of sec 74(3) of the Income Tax Act 58 of 1962, once issued and executed, may not be used in

perpetuity and that the use in April 1994 of the authorizations originally issued and executed in October 1993 was an unlawful administrative action;

(b) that the power to issue such warrants was vested in the Commissioner for Inland Revenue, that the delegation of this power to Mr C T Prinsloo under sec 3(1) of the Act was invalid and that, therefore, the authorizations were invalid; and

(c) that the authorizations were invalid on the ground that they were too vaguely and imprecisely worded.

(2) In terms of sec 102(6) of the Constitution of the Republic of South Africa Act 200 of 1993 ("the Constitution"), read with Rule 23(4) of the Rules of the Constitutional Court, the following issues in this case are referred for decision to the Constitutional Court, viz:-

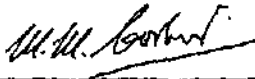
(a) whether sec 74(3) of the Income Tax Act 58 of 1962 is contrary to the provisions of chapter 3 of the Constitution and accordingly invalid;

(b) in view of the provisions of the Constitution, and in particular sec 24 thereof, whether it is competent for this Court (the Appellate Division) to adjudicate upon and determine on appeal the common law grounds of invalidity or whether these matters fall within the

exclusive jurisdiction of the Constitutional Court;

- (c) if it is competent for the Appellate Division to adjudicate upon and determine on appeal the common law grounds of invalidity, what further directions for the disposal of the appeal should be given; and
- (d) if the common law grounds of invalidity fall within the exclusive jurisdiction of the Constitutional Court, whether these grounds, or any of them, are well-founded.

- (3) The costs of the hearing before the Appellate Division on 12 March 1996 shall be costs in the cause.


 M M Corbett
 CHIEF JUSTICE

SMALBERGER JA)
 VIVIER JA) **CONCUR**
 NIENABER JA)
 PLEWMAN AJA)

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

G RUDOLPH
GLYNN RUDOLPH & CO (PTY) LTD

First Appellant
Second Appellant

and

COMMISSIONER FOR INLAND REVENUE
J F C HEYDENRYCH N.O.
R J BEUKES N.O.
J J HOLTZHAUSEN N.O.
K STEYN N.O.
P DU PLESSIS N.O.
T J FRATES N.O.
M M J VAN WYK N.O.

First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent
Seventh Respondent
Eighth Respondent

CORAM: CORBETT CJ, SMALBERGER, VIVIER,
NIENABER JJA et PLEWMAN AJA
HEARD ON: 12 MARCH 1996
REASONS FILED ON: 25 MARCH 1996

REASONS FOR JUDGMENT

PLEWMAN AJA

On 22 March 1995 this Court made an order in terms of sec 102(6) of the Constitution of the Republic of South Africa Act 200 of 1993 referring this case to the Constitutional Court. The reasons were to be filed later. These are the reasons for the order.

The first appellant, a businessman, and the second appellant, a company of which the first appellant is the sole director, applied on motion to the Court below for interdicts restraining the respondents, the Commissioner for Inland Revenue (the "Commissioner") and seven of his officials, from exercising the powers of search given to the Commissioner by sec 74(3) of the Income Tax Act 58 of 1962 (the "Act").

The facts are that first appellant had, during the years 1988 to 1992, failed to render proper returns of his income for income tax purposes. He had also failed, despite numerous promises to do so, to

remedy this situation. Such information as he had given to the Commissioner indicated that his financial affairs and those of certain of the companies and trusts in which he was interested were in a state of confusion.

On 20 October 1993 a Mr C T Prinsloo, Chief Director of Administration in the service of the Department of Finance, who acted as the head of what is described as "Afdeling Spesiale Ondersoeke by die Tak Binnelandse Inkomste", issued fourteen authorizations in terms of sec 74(3) of the Act to a number of named officials of the Revenue Department, including the second to eighth respondents, authorizing them to exercise, in relation to the appellants and various other of the first appellants companies and trusts, the powers prescribed in the section. Acting under these authorizations certain of the Commissioner's officials interviewed the first appellant at his house on 21 October 1993 and

seized a number of documents.

The information thus obtained was not sufficient to enable the Commissioner to unravel first appellant's affairs. On 21 April 1994 the Commissioner received information that a large quantity of additional documents relating to the first appellant's affairs were to be located at the place of business of one of the first appellant's companies in Parktown, Johannesburg. On the following day, Friday 22 April 1994, members of the investigating team went to this place and acting under the authority of the original written authorizations searched for and found a mass of relevant documents. The first appellant was not present but he was represented. As a practical step the documents were placed in a storeroom on the premises to enable the respondents to list what had been seized and to enable the first appellant to make copies of the documents which were to be removed. There was then some discussion

and negotiation about the procedures to be followed. It is unnecessary to give an account of all these matters. The culmination of the debate was that the first appellant was informed that the documents would be removed at 17h00 on 28 April 1994. On 29 April the application was brought as a matter of urgency. It was called before Nugent J who made an order giving procedural directions. This order took the form of an agreement between the parties. After the filing of answering and replying affidavits the matter came before Goldblatt J on 4 May 1994. On 13 May 1994 he dismissed the application with costs. The judgment has been reported. (See Rudolph and Another v Commissioner for Inland Revenue and Others NNO 1994 (3) SA 771 (W).)

Leave to appeal was sought and was refused but a petition to the Chief Justice was successful. On appeal appellants' argument was directed to an attack on the validity of the written authorizations on what

was said to be "common law grounds". Counsel for the appellants contended that sec 74(3) of the Act was unconstitutional and invalid but he recognized that this Court could not pronounce on that issue. Counsel according asked that this Court, in terms of sec 102(5) of the Constitution, adjudicate on the common law grounds of invalidity and if appellants were to fail on these issues that this Court refer the issue of the constitutionality of sec 74(3) to the Constitutional Court under sec 102(6) of the Constitution.

The so-called common law grounds, stated briefly, are -

- (1) that an authorization once issued and executed may not be used in perpetuity and that in this case the use of the original authorizations (issued and executed in October 1993) in April 1994 was an invalid procedure;
- (2) that the power to issue such authorizations was vested in the

Commissioner that the delegation of this power to Prinsloo under sec 3(1) of the Income Tax Act was invalid and that, therefore, the authorizations were invalid; and

- (3) that the authorizations were invalid on the ground that they were vaguely and imprecisely worded.

It is however apparent that these issues are covered or also covered by sec 24 of Chapter 3 of the Constitution. Sec 24 under the heading "Administrative Justice" provides, *inter alia*, that -

"Every person shall have the right to -

- (a) lawful administrative action where any of his or her rights or interests is affected or threatened;
- (b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened; ..."

It is necessary to refer to sec 98(2) of the Constitution. This provides -

- "(2) The Constitutional Court shall have jurisdiction in the

Republic as the court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of this Constitution, including -

- (a) any alleged violation or threatened violation of any fundamental right entrenched in Chapter 3;

....."

Sec 98 must be read with sec 101(5) of the Constitution which provides:

"(5) The Appellate Division shall have no jurisdiction to adjudicate any matter within the jurisdiction of the Constitutional Court."

Counsel for the appellants conceded that the common law grounds of attack upon the validity of the authorizations and any actions taken in terms thereof could, if his arguments were well - founded, constitute a breach of appellants' constitutional rights under sec 24 of the Constitution. He contended however that this Court enjoyed some form of parallel jurisdiction which entitled it to entertain the appeal.

I am not satisfied that this Court does indeed have a parallel common law jurisdiction in the circumstances I have outlined. But it

seems to me, in any event, that in order to decide whether this Court would have a jurisdiction such as is contended for this Court would be obliged to interpret the Constitution which it is not entitled to do.

Sec 102(6) of the Constitution requires that this Court refer an appeal to the Constitutional Court where it is necessary for the purposes of disposing of an appeal for a constitutional issue to be decided. This is the case with the present appeal. It is for this reason that the order above referred to was made. What I have said is also for the purpose of Rule 23(4) read with Rule 22(2) of the Rules of the Constitutional Court this Court's reasons for concluding that it will be in the interests of justice that the issues as formulated in the order be so referred.

A handwritten signature in dark ink, appearing to read 'C. Plewman', is written over a horizontal line.

C PLEWMAN AJA

CONCUR:

CORBETT CJ)
SMALBERGER JA)
VIVIER JA)
NIENABER JA)