

NO TAXATION WITHOUT REPRESENTATION: AN ANALYSIS OF SHUTTLEWORTH V THE SOUTH

AFRICAN RESERVE BANK

The South African Reserve Bank, represented by Mohamed Husain and Nicholas Taitz of Knowles Husain Lindsay Inc. Attorneys, was recently successful against South African billionaire Mark Shuttleworth after he challenged the constitutional validity of certain aspects of the South African exchange control system. The case arose subsequent to Mr Shuttleworth's decision to emigrate from South Africa and take a significant portion (approximately R2.5 billion) of his wealth with him. The Reserve Bank authorised the export of capital. However, it levied an exit charge of 10% on the amount that Mr Shuttleworth intended to export. Having paid approximately R250 million as an exit charge, Mr Shuttleworth approached the courts seeking an order setting aside the exit charge as well as much of the exchange control system contending these to be unconstitutional.

At the core of the matter was the decision of the Minister taken in February 2003 to relax exchange controls and allow the outflow of capital from South Africa. The forefront of the Court's scrutiny of the Minister's decision involved an analysis of two key questions: first, the characterisation of the power delegated to the Reserve Bank to impose the exit charge, and second, the extent of the powers conferred on the Minister to make the decision in the first place. These questions will form the focus of this discussion.

THE POWER DELEGATED TO THE RESERVE BANK

One of the principal remedies sought by Mr Shuttleworth was an administrative review of the decision that – he contended – had been taken by the Reserve Bank to impose the exit charge on his outgoing capital. As Mr Shuttleworth saw it, the Minister had, in 2003, set in place a guideline for the Reserve Bank to assess and apply in appropriate cases. Concomitant with this, the Minister must therefore have delegated a power to the Reserve Bank that incorporated a discretion to vary, or even void, the exit charge in deserving cases.

The Reserve Bank and the Minister on the other hand argued that the decision in question was one made by the Minister of Finance and the Reserve Bank had merely been empowered with the *implementation* of this decision. The Reserve Bank was required to do this mechanically, as a functionary of the Minister, and without discretion.

Thus, the Court was tasked with determining who was responsible for the decision to impose an exit charge on Mr Shuttleworth's outgoing capital.

In Mr Shuttleworth's case, the Court found that the decision in question was one taken by the Minister. In this regard, Moseneke DCJ held that, "the Reserve Bank was only responsible for mechanically applying the policy decision of the Minister and had no discretion when implementing the decision." This is because the Exchange Control Circulars issued pursuant to the Minister's policy did not permit any discretion on the part of the Reserve Bank. Instead, a departure from the conditions set out in the Circulars would be outside of the powers conferred on the Reserve Bank and therefore unlawful.

Having found that the Reserve Bank had not come to the decision that Mr Shuttleworth challenged, the Court dismissed Mr Shuttleworth's administrative challenge in its entirety. This case therefore provides an important reminder to all persons wishing to take administrative decisions on review, that one must challenge the correct decision and, accordingly, the correct decision maker. A failure to do so, as Mr Shuttleworth discovered, would be fatal to an administrative attack.

THE POWERS CONFERRED ON THE MINISTER OF FINANCE

Following the conclusion that Mr Shuttleworth's case should be dismissed on administrative grounds, the Court then turned to evaluate Mr Shuttleworth's broader challenge to the exchange control system and the powers of the Minister of Finance.

It is trite that one of the fundamental principles of any democracy is that there should be "no taxation without representation". As Moseneke DCJ observed, "the power to tax residents is an incident of, and subservient to, representative democracy." The Constitution of the Republic of South Africa, 1996 reflects this principle by placing special safeguards on the formation of taxes. Furthermore, the Currency and Exchanges Act prescribes additional prerequisites for the validity of regulations in terms of the Act that are "calculated to raise revenue".

With the safeguards in place to protect against the undue imposition of taxes, Mr Shuttleworth contended that a charge of 10% on his exported capital constituted a tax on his funds. Therefore, the exit charge should be set aside since the necessary safeguards in imposing the charge had not been adhered to. In other words, without compliance with the necessary legal requirements, the Minister did not have the power to impose the exit charge.

In assessing whether the legal requirements in respect of taxes should have been complied with in the present matter, Moseneke DCJ held that the deciding factor is a determination of the *dominant object* or, in other words, the *intended purpose* of the of the legislation or the regulation (as the case may be). In essence, the question before the court was whether the exit charge (in the context of exchange control as a whole) had been imposed with the intention of gathering income for the fiscus. If this were the case, then the exit charge ought to be classified as a fiscal measure (a tax), and subject to special scrutiny and protocol.

The exit charge undisputedly did have the effect of raising revenue for the fiscus – approximately R2.9 billion worth. It was on this basis that the Supreme Court of Appeal found the exit charge to be a tax. However, Moseneke DCJ held that the raising of revenue was not the dominant or intended purpose of the exit charge. Instead, the exit charge had been established during a time of progressive liberalisation of South Africa's exchange control policies and therefore provided a necessary disincentive to the export of capital from the country.

The analogy of a speeding fine, raised in the High Court, provides a useful benchmark for determining whether a measure that raises revenue is a tax or not. In the case of a speeding fine, the object of the fine is to dissuade certain behaviour – driving over the prescribed maximum speed limit. While speeding fines contribute to the fiscus, the intention behind their creation is that no one should drive in such a manner as to incur a speeding fine and therefore, if the fine is completely successful, no money should be raised.

The conclusion reached by the Constitutional Court was that the exchange control legislation as well as the regulations thereto were not fiscal measures subject to any additional safeguards or legal requirements. Accordingly, the powers that they conferred upon the Minister to impose an exit charge were upheld along with the charge itself. The levy of approximately R250 million imposed on Mr Shuttleworth for the remittance of his capital from the country was accordingly lawfully imposed.

CONCLUSION

At the core of Mr Shuttleworth's case was a question of the appropriate limitations on executive power. In the first instance, the executive should not be afforded the power to impose taxes without adequate legislative oversight. Such authority will come with a compromise on the foundational principle that there should be no taxation without representation. As the court found in this regard,

such authority had not been usurped by the executive and that the policy decision taken by the Minister was within his prerogative. In the second instance, the Reserve Bank had not been neglectful in rigorously applying the exit charge, but that the power that had been delegated to it was a non-discretionary power. With these two findings against Mr Shuttleworth, the Constitutional Court upheld the lawfulness of the exit charge.

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