IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No. CCT 47/95

In the matter between:

YNUICO LIMITED	Applicant

and

MINISTER OF TRADE AND INDUSTRY	First Respondent
DIRECTOR-GENERAL TRADE AND INDUSTRY	Second Respondent
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent
THE TEA COUNCIL OF SOUTHERN AFRICA (PTY) LTD.	Fourth Respondent

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APPLICANT'S HEADS OF ARGUMENT

INTRODUCTION

1. The Transvaal Provincial Division of the Supreme Court of South Africa has referred the following issue to this court for determination, in terms of section 102 of the Constitution:

"Whether section 2 (1) (b) of the Import and Export Control Act 45 of 1963 is constitutional and valid."

See: *Vol 1, p 293*

2. Such issue arises in the context of an application brought by the Applicant to inter alia:

2.1 interdict and restrain the First, Second and Third Respondents from requiring the Applicant to purchase a pro rata percentage of locally grown tea, prior to the First and Second Respondents giving consideration to issue the Applicant with permits to import tea under tariff heading 09.02;

2.2 review and set aside the decisions of the First Respondent or any delegee, refusing the Applicant permits to import tea unless it purchased a prescribed quota of locally grown tea.

3.1 The Applicant challenges the constitutional validity of section 2 (1) (b). The First Respondent relies on section 2 (1) (b) for the power to determine the criteria which are to be applied in giving consideration to the issue of permits in terms of G.N. 2582. The validity of such section is vital to the enforcement of the "tea agreement", the policy adopted by government.

3.2 A finding that section 2 (1) (b) is invalid, would not affect the validity of G.N. 2582, since such finding would only operate ex nunc, in terms of section 98 (6) (b) of the Constitution (assuming the absence of an order in terms of the preamble to the said section).

THE FACTUAL BACKGROUND

4.1 This is set out adequately in the judgment and does not require repeating.

See: *Vol 1, p 250 - 257*

4.2 It is self evident from the application papers and the record that the First Respondent has used his powers in section 2 (1) (b), as far as this matter is concerned, primarily to prevent competition and thereby afford protection to local growers of tea. The manner in which the policy has been effected, is to require applicants to qualify for the issue of permits according to the particular threshold. The power in section 2 (1) (b) was not conferred for the purpose of controlling competition.

4.3 The legislation which deals with the determination of economic policy in regard to imports that compete unfairly with local goods, is the Board on Tariffs and Trade Act 107 of 1986.

See: *Van Heerden & Neethling, Unlawful Competition, (Butterworths), p 46 - 49*

4.4 What is relevant for present purposes, is that the Minister's powers, in terms of that Act, to deal with such practices, is confined to requesting the Minister of Finance to amend the relevant Schedule to the Customs and Excise Act 91 of 1964.

See: *section 4 (2) (b)*

4.5 The power of the Minister is confined to tariff protection for the local goods.

4.6 The Minister does not have the power under that Act to impose qualifying conditions for the issue of the necessary permits, and thereby in effect curtail the right to import the goods.

4.7 The Minister has used the power in section 2 (1) (b) for the purpose of imposing qualifying conditions, relying on the wide discretion conferred on him.

4.8 The provisions of section 2 (1) (b) does not empower the imposition of qualifying conditions to obtain a permit. Such conditions as the Minister may wish to impose must form part of the permit.

4.9 Having prescribed that tea could only be imported with a permit, without prescribing that the permit would be subject to the purchase of a quota of local tea, the "tea agreement" cannot be enforced within the provisions of section 2 (1) (b). The condition imposed by

the Minister is one precedent to the issue of the permit, and not one prescribed by notice in the Gazette as a condition of the permit itself.

See: *annexure "B", p 40 - 4, section (i) (a) and (iii)*

THE APPLICANT'S LOCUS STANDI

5. The Applicant is a tea blender and packer. It markets a blend of tea under the trade mark "RED LABEL TEA". It is a product aimed at the price conscious consumer, which enjoys a not insubstantial portion of the tea market. The Applicant is the owner of the incorporeal rights comprising the goodwill and reputation in its product, and is the proprietor of the business which it conducts.

6. The policy has been implemented against the Applicant, and it has been precluded from obtaining a permit to import tea in terms of that policy. The necessary direct and substantial interest exists for it to challenge the validity of the empowering law under which the policy has been implemented.

See: *Natal Organic Industries (Pty) Ltd. v Union Government 1935 NPD 701 at 708*

Henri Viljoen (Pty) Ltd. v Awerbuch Bros. 1953 (2) SA 151 (O) at 169 H

THE APPLICANT'S RIGHT IN TERMS OF SECTION 26 OF THE CONSTITUTION

7. Under the common law, the Applicant has the right to carry on such business without unlawful interference and competition.

See: *Sanachem (Pty) Ltd. v Farmers Agri-Care (Pty) Ltd. and Others 1995 (2) SA 781 (A) at 789 D - G*

Report of the Competition Board published under G.N. 2251 in G.G. 9959 of the 4 October 1985

8. Section 26 (1) of the Constitution recognises the right to *freely* engage in economic activity. The use of the word *freely* must encompass the common law right to do so without unlawful interference. This does not do violence to the provisions of subsection (2), if it is borne in mind that a proper curtailment of the right in terms of subsection (2), would be justified and therefore lawful. This approach best accords with section 35 (3) of the Constitution and with the broad approach towards the interpretation of fundamental rights.

See: *S v Makwanyane 1995 (6) BCLR 665 (CC) at para 100 p 707; 1995 (3) SA 391 at 435 C - D*

9. The right in section 26, with the built in limitation, is a fundamental right which may only be infringed if it accords with the prescription in the Constitution. Under the common law no impediment on the legislature exists, such as is provided in section 26 (2) and 33 (1)

of the Constitution. The Constitution therefore strengthens the said right.

See: *Waltons Stationery Co (Edms) Bpk v Fourie en 'n Ander 1994 (4) SA 507 (O) at 511 C - D*

Kotze & Genis (Edms) Bpk en 'n Ander v Potgieter en Andere 1995 (3) SA 783 at 786 E

10.1 Subsection (2) does qualify the right in subsection (1). Any measures designed to promote the said values, must however be justifiable in an open and democratic society based on freedom and equality.

See: *Du Plessis & Corder, Understanding South Africa's Transitional Bill of Rights, p 179 - 180*

10.2 The justification for the limitation on such measures, is the recognition that the legislature's concern to improve social conditions by interfering with economic activity, must take place in a democratic manner, with due regard to what is fair and reasonable, as the converse will be arbitrary and undemocratic.

See: *Dumbutshena CJ, The Rule of Law in a Constitutional Democracy with Particular Reference to the Zimbabwean experience, (1989) SAJHR 311 at 312*

Marinus Weichers, Administrative Law and the Benefactor State, (1993) Acta Juridica p 248 at 259 - 60, where he deals with the English concept of 'proportionality'

11. Unlike some of the other rights entrenched in the Constitution, the ambit of the right in section 26 cannot be determined abstractly from the infringement which has occurred. The ambit of the right in section 26 will have be decided on a case by case basis, with regard to the particular measure that limits the scope of economic activity and employment. It is in that sense that section 26 has been described as having a built in limitation.

12. In casu the measure is section 2 (1) (b). It limits the right to import goods and thereby curtails the right to economic activity.

13.1 In the first instance, the measure must be lawful ie. according to the principle of legality.

13.2 The referral court saw this as being part and parcel of the question, whether the section is justifiable in an open and democratic society.

See: *vol 1 p 277*

13.3 If the section is unlawful because it is an improper delegation of power, or because it infringes the Applicant's rights in other respects which are not justifiable in an open and democratic society based on freedom and equality, it cannot be a "measure".

See: *the judgment of the referral court , vol 1 p 276 - 277*

14. The question as to whether the "measures" in a particular case stifle or leave unscathed the right sought to be protected, arises if the "measure" (in casu section 2 (1) (b)) is one that is lawful.

15. The enquiry initio litis, is thus whether there has been a lawful delegation of power to the Minister. The further question as to whether section 2 (1) (b) is justifiable in an open and democratic society based on freedom and equality, arises if the court concludes that such a delegation is permissable under the Constitution. That is a requirement in section 26 (2) and 33 (1). It would follow that if it isn't so justifiable, then the section would be an impermissible infringement of the Applicant's right to freely engage in economic activity.

WHETHER SECTION 2 (1) (b) IS A PROPER DELEGATION OF POWER

16.1 Section 2 (1) (b) vests in the First Respondent the power to prescribe by notice in the Gazette:

16.1.1 the kind of goods that can be imported into the country only under the authority of a permit;

16.1.2 the conditions on which such goods may be imported, which are to be stated on the permit.

16.2 Section 2 (3) sets out some criteria by which the conditions are to be determined, but it also has a plenary discretionary element ie. ***"such other conditions of whatever nature as the Minister may direct".***

17. The above powers are to be exercised by him ***"whenever he deems it necessary or expedient in the public interest".***

18. The jurisdictional fact which is a pre-requisite for the exercise of the power, is the formation and existence of the requisite opinion.

See: *South African Defence and Aid Fund and Another v Minister of Justice 1967 (1) SA 31 (C) at 35 B - C*

State President and Others v Tsenoli; Kerchhoff and Another v Minister of Law and Order and Others 1986 (4) SA 1150 (A) at 1187 B - C

United Democratic Front and Another v State President and Others 1987 (3) SA 296 (N) at 308 E - 310 G (and the cases there cited)

Omar and Others v Minister of Law and Order and Others; Fani and Others v Minister of Law and Order and Others; State President and Others v Bill 1987 (3) SA 859 (A) at 892 B - G

Minister of Law and Order and Another v Dempsey 1988 (3) SA 19 (A) at 38 B - I

During N.O. v Boesak and Another 1990 (3) SA 661 (A) (which overturned Dempsey's case on the question of onus)

G.M. Nienaber, Discretions, Ouster Clauses and The Internal Security Act, 1983 Tydskrif 211 at 212

Basson & Viljoen, South African Constitutional Law, p 273 - 277

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19. The power vested in the First Respondent, is legislative power which is subordinate to an Act of Parliament. The grounds on which its exercise would have been subject to review, prior to the Constitution, would be confined to the "formal grounds" for review and on the grounds of ultra vires (in the narrow sense).

See: *Jacobs en 'n ander v Wacks en andere 1992 (1) SA 521 (A) at 550 D - 551 C*

A Breitenbach, The Justification for Judicial Review, (1992) 8 SAJHR 512 at 518

20.1 Such power is, both in effect and in substance, plenary. The First Respondent is the sole arbiter of:

20.1.1 who is to be included in the category "the public";

20.1.2 what constitutes *the public interest*;

20.1.3 what factors are to be considered in the determination of what is *necessary* in the public interest;

20.1.4 what factors are to be considered in the determination of what is *expedient* in the public interest;

20.1.5 how he is to go about to gauge the public interest;

20.1.6 what test is to be applied before he can be satisfied that he should exercise his powers (more especially where public opinion may differ);

20.1.7 what action is *necessary* in the public interest (ie. should a permit be necessary, and if so what conditions should attach thereto);

20.1.8 what action is *expedient* in the public interest;

20.1.9 what goods can be imported and what cannot, and in the case of the former which goods would require a permit and which wouldn't;

20.1.10 in the case of goods which require a permit, what conditions would apply.

See: *Argus Printing and Publishing Co. Ltd. v Darby's Artware (Pty) Ltd. and Others 1952 (2) SA 1 (C) at 8 - 10 (where the court held that such words are incapable of a settled or certain meaning.)*

Leicester Properties (Pty) Ltd v Farran 1976 (1) SA 492 (D) at 494 H - 495 C

Ex Parte President of the Conference of the Methodist Church of Southern Africa N.O.: In re William Marsh Will Trust 1993 (2) SA 697 (C) at 703 C - D

20.2 The Minister, in his discretion, can determine both the means and method with which to regulate the import and export of goods subject to what is stated in paragraph 4.8 hereof.

See: *Omar/Fani case (supra) at 892 I*

21.1 There are no criteria or standards in the Act to circumscribe or guide the Minister in the exercise of the discretion. The reference to *what he deems to be necessary or expedient in the public interest*, is not an intelligible standard to provide the framework within which the discretion must be exercised. In effect, the rights of the citizenry to import goods are limited to rights which the Minister may in his subjective discretion permit.

22.2 The discretion to implement measures which he considers *expedient* broadens the scope of the discretion.

See: *the Omar/Fani case (supra) at p 892 D - E*

23. In the United States of America, it has been held that Congress can delegate legislative power, provided Congress lays down intelligible standards for the exercise of the power.

See: *Yakus v United States 321 U.S. 414 at 424 - 5, 426*

Panama Refining Co. v Ryan 293 U.S. 388 at 420 - 21, 430, 434

Schechter Poultry v United States 295 U.S. 495

Mistretta v United States 488 U.S. 361, 102 L Ed 2d 714

K.C. Wheare, Modern Constitutions, 113 - 115

Laurence H. Tribe, American Constitutional Law, 2d edition, at 362 -9

24. The following considerations are said to justify the said doctrine:

24.1 **"that the important choices of social policy are made by Congress, the branch of ... Government most responsive to the popular will";**

24.2 **"it provides the recipient of that authority with an 'intelligible principle' to guide the exercise of the delegated discretion" ;**

24.3 **"the courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards".**

See: *Industrial Union Department, AFL-CIO v American Petroleum Institute 448 U.S. 607 (1980) at 672*

American Textile Manufacturers Institute v Donovan 452 US 490 at 546 - 47

R B Stewart, The reformation of American administrative law, (1975) 88 Harvard L R 1669 at 1671 - 81

Pierce, Shapiro & Verkuil, Administrative Law and Process, 2d, (Foundation Press), at 50 - 59

25. The first and third of the above principles, has been referred to with approval in the judgment of Mahomed DP (Makgoro J and Sachs J concurring), albeit in the context of deciding the validity of legislation which delegates legislative power to amend Acts of Parliament.

See: *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others 1995 (10) BCLR 1289 (CC) at paragraph 131; 1995 (4) SA 877 (CC) at 927G - 928A*

26.1 As far as the first principle is concerned it is relevant to mention that the policy presently implemented is said to be justified largely on the basis:

26.1.1 that some 18 000 employees in the rural areas benefit from the tea estates, in the form of employment and ancillary benefits;

26.1.2 that the tea estates provide certain secondary economic benefits to those areas;

26.1.3 that the local production of tea protected the country's foreign exchange reserves (although the First, Second and Third Respondents do not rely on this ground but the Fourth Respondent did).

26.2 The implementation of such a policy in a democratic state, should not depend on the subject discretion of a member of the executive, but on the legislature or if it chooses to delegate such function, then it ought to stipulate intelligible standards. The reasons therefor are inter alia that:

26.2.1 the proper appraisal of all the necessary information and factual data (including the financial statements relating to the operation of the tea estates by the government) requires a rational and coherent assessment of a complex matrix of data, which thereafter requires a fine balancing of interests taking into account inter alia :

26.2.1.1 whether the situation at hand warranted an interference with competition;

26.2.1.2 the reasons for the poor performance of the local tea estates in competing with their overseas counterparts (in this regard the manner of operation of the tea estates ought to be subject to a more critical evaluation than has been done to date);

26.2.1.3 the economic viability of that enterprise both in the short and long terms, and having regard to the matters in 26.2.1.2 hereof, what would be the best option to implement ie. to terminate the enterprise, to privatise it so that it could be run on a more competitive basis or to continue the enterprise with protection thereto or perhaps some other option;

26.2.2 if protection was opted for, a fine balancing of interests would be required to determine what measures would be proportional to the objective sought to be achieved, so as to cause minimal interruption to the forces of effective competition.

26.3 The proper balancing of the benefits to be gained from the protection of a monopoly against the detrimental effects arising from the interference with free and effective competition, is of crucial importance to the country, and should not be left by Parliament to the vague and imprecise discretion of a member of the Executive.

See: *Retrofit (Pvt) Ltd v Posts and Telecommunications Corporation (Attorney-General intervening) 1995 (9) BCLR 1262 (Z)*

R B Stewart, (supra) at 1676

27. The second and third principles are not alien to our law. They have been applied in regard to the validity of subordinate legislation.

See: *Stanton v Johannesburg Municipality 1910 TPD 742 at 749, 752-4*

Molife v Municipality of Potchefstroom 1930 TPD 197 at 200

Ermelo Municipality v Ismail Ibrahim 1913 TPD 353 at 360 - 1

Benoni Town Council v Mallella 1930 TPD 671 at 680 - 1

Natal Organic Industries (Pty) Ltd. v Union Government 1935 NPD 701 at 713 - 715

Rex v Mafutsami and Another 1936 TPD 18 at 21

R v Zondo 1942 TPD 187 at 189

Arenstein v Durban Corporation 1952 (1) SA 279 (AD) at 296 H - 297 H

R v Dembo 1952 (2) SA 244 (T) at 248 A

Natal Newspapers (Pty) Ltd. v State President of the Republic of South Africa and Others 1986 (4) SA 1109 (N) at 1118 I - 1120 C

28. The underlying justification therefor is to be found inter alia in the recognition that, in the absence of clear language to the contrary:

28.1 Parliament could not have intended to confer authority to act unreasonably (it being implicit therefrom that the act of the delegator in failing to stipulate standards, is unreasonable);

See: *Kruse v Johnson [1898] 2 Q.B.D. 91 at 99*

R v Abduraham 1950 (3) SA 136 (A) at 143 C - E (where the above dicta was approved)

28.2 the separation of powers between the legislature and executive should be adhered to;

See: *the Natal Organic Industries case at 715*

Arenstein's case (supra) at 297 H

28.3 the delegation of plenary discretionary powers without standards amounts to vagueness and uncertainty in the law.

See: *Stanton v Johannesburg Municipality (supra) at 749, 752-4*

Molife v Municipality of Potchefstroom (supra) at 200

Ermelo Municipality v Ismail Ibrahim (supra) at 360 - 1

Benoni Town Council v Mallella (supra) at 680 - 1

Rex v Mafutsami and Another (supra) at 21

R v Zondo (supra) at 189

29.1 Even where the empowering enactments have provided for wide discretionary power, they have not been applied uncritically.

See: *Ismail v Union Government & Another 1912 AD 605 at 617 - 8*

Shidiack v Union Government (Minister of Interior) 1912 AD 642 at 653 - 4

In re Daya Ratanjee (1913) 34 NLR 467 at 475 - 6

R v Padsha 1923 AD 281 at 294

Natal Indian Congress v State President 1989 (3) SA 588 (D) at 594 H - 595 B

29.2. Such wide powers have also been condemned extra curially by Didcott J (then a puisne judge of the Natal Provincial Division of the Supreme Court).

See: *Salvaging the Law, (1988) 4 SAJHR 355*

30.1 The main criticism of such legislation has been the observation that it results in a government which is not subject to constitutional controls but one subject to administrative controls.

See: *Anthony Mathews, Freedom, State Security and The Rule of Law, p 26*

Lawrence Baxter, Administrative Law, p 194

Jeremy Gauntlett, The Satisfaction of Ministers: Judicial Review of 'Subjective' Discretions in South Africa, published in The Quest for Justice, Essays in Honour of Michael McGregor Corbett Chief Justice of the Supreme Court of South Africa, p 208 at 210 - 211

W H B Dean, Whither the Constitution, (1976) THRHR 266 at 287

Arthur Chaskalson SC (as he then was), Legal Control of the Administrative Process, (1985) 102 SALJ p 419 at 432 - 3

Catherine O'Regan (as she then was), Rules for Rule-Making: Administrative Law and Subordinate Legislation, Acta Juridica (1993), p 157 at 162

The Breakwater Declaration of 1993, para (i) of the Areas of Agreement, Acta Juridica (1993), p 18 - 19

30.2 The shortcomings in a government subject to administrative controls, are well recognised and has been the object of much of the criticisms of the decline at a stage of this country's history, towards a totalitarian state, and the perceived supine stance, in certain instances, of the judiciary towards that evil.

See: *Salvaging the Law (supra) at 359*

I Mahomed SC (as he then was), Disciplining Administrative Power - Some South African Prospects, Impediments, and Needs, (1989) 5 SAJHR 345

Sydney Kentridge SC, Concluding Remarks, (1989) 5 SAJHR 355

H Corder, The record of the judiciary (2), published in Democracy and the Judiciary, (Idasa), p 46

E Mureinik, Judicial Review and the emergency: the record of the Appellate Division, published in Democracy and the Judiciary, (Idasa), p 135

31. In the past, prior to the enactment of the present Constitution, the courts were powerless in suits where administrative actions were challenged, to exercise control (save on the formal grounds of review and on the grounds that the action was ultra vires) where such plenary discretion empowered the functionary to act, no matter how iniquitous the result. The principle of Parliamentary sovereignty precluded the court from reviewing Acts of Parliament which provided for the delegation of such power.

See: *Basson & Viljoen (supra) at 277*

Gretchen Carpenter, Introduction to South African Constitutional Law, at p 79 and 259

32.1 The present Constitution creates a new legal order which holds Parliament accountable to act under and subject to the provisions of the Constitution.

See: *the Western Cape case (supra), para 62*

32.2. The Constitution provides for the division of power and functions of the legislature, the executive and the judiciary.

See: *The Western Cape case (supra), para 52 p 1312 and para 62 p 1317 - 8 (BCLR)*

32.3 Since this is entrenched in the Constitution, where Parliament fails to adhere thereto, the Constitutional Court can declare such Acts to be inconsistent with the Constitution, under its powers of review, and therefore invalid. In that, there is an identity of principle between the restrictions imposed on subordinate law making power as described above, and primary legislative power.

See: *Project 24 of the South African Law Commission, (supra) p 157, para 4.4.33*

33. The Constitution furthermore provides in section 98 (2) and 101 (2) for the power and functions of the judiciary. The court's powers of review are severely curtailed by legislation which confers on a member of the executive a plenary discretion to be exercised without

intelligible standards. The absence of intelligible standards is thus an incursion upon such power and offends the division of power in terms of the Constitution.

See: *Project No. 24 of the South African Law Commission, Report on an Investigation into the Court's Powers of Review of Administrative Acts at p 126-132, p 146-149, para 7.4 p 208, p 209, para 7.5.2*

34. According to much of the literature dealing with the position prior to the promulgation of the Constitution, the systems of control of the exercise of administrative power, in this country, were inadequate.

See: *The Breakwater Declaration (supra)*

Project No. 58 of the South African Law Commission, Final Report on Group and Human Rights, p 76, para 4.142

Catherine O'Regan, (supra) at p 168

35.1 There was, prior to the promulgation of the present Constitution, a clear distrust of the executive and of its ability to act democratically, fairly and with due regard to the Rule of Law. The present Constitution was intended to provide the necessary law to move away from a government by decree, to a government accountable in the full democratic sense.

See: *preamble of Constitution*

Shabalala and Others v Attorney General of Transvaal and Another, 29 November 1995 (CC) at para 26

35.2 In the United States of America there has been a sense of distrust of wide delegations of power. The fear was that administrative decisions would be taken arbitrarily, if no standards were prescribed.

See: *Michael Asimow, Delegated Legislation: United States and United Kingdom, (1983) Oxford Journal of Legal Studies 266 at 272 - 3*

35.3 This makes the United States approach to some extent more relevant.

35.4 The distinguishing features between this country and the United States, however, bears mentioning:

35.4.1 section 2 (1) (b) was not passed by a democratic legislature;

35.4.2 some legislation in the United States are deliberately passed by Congress in vague and imprecise terms as a political compromise;

See: *Michael Asimow, (supra) at 270*

35.4.3 a system of consultation with those who would be affected by the proposed regulation to provide comments and objections, prior to the promulgation of regulations, exists in the United States, thus making the system more democratic than here;

See: *Michael Asimow, (supra) at 255 - 7, 267*

35.4.4 legislation in the form of the Administrative Procedure Act, provided the gateway for wide powers of 'review' and further safeguards, thus allowing for greater tolerance for such delegations, as is evident from more recent Supreme Court judgments (especially in the post 'New Deal" era)

See: *R B Stewart (supra) at 1679*

Pierce, Shapiro & Verkuil (supra) at 50 - 55

Michael Asimow (supra) at 257 - 9

Project No. 24 of the South African Law Commission, (supra) at 218-220

35.5 The insistence upon intelligible standards is all the more profound, where the conditions for proper democratic decision making, and the effective testing thereof, are absent.

See: *Project No. 58 of the South African Law Commission, (supra) at para 4.147 p 78, para 4.152 p 80*

36.1 In Canada, there is a similar insistence upon standards for a valid delegation of legislative power.

See: *Irwin Toy Ltd. v Quebec (Attorney General) (1989) 39 CRR, (1989) 1 SCR 9-7,*

Re Ontario Film and Video Appreciation Society and Ontario Board of Censors 147 DLR (3d) 58

R v Butler 8 CRR (2d) 1

R v Morales [1992] 3 SCR 711, 12 CRR (2d) 31

Hogg, Constitutional Law of Canada, 3d, vol 1 para 35.7(a) p 35-11 - 35-14

36.2 The delegation of plenary power without intelligible standards, has been held to violate the principles of fundamental justice and the requirement that the law be demonstrably justified in a free and democratic society.

37. In Canada it has been held that the concept of "public interest", is wholly discretionary, has no "constant and settled meaning" and lacks intelligible standards.

See: *R v Morales (supra) at 41 - 45*

38. It is not without significance that underlying the approaches of both the United States and Canadian courts, is the emphasis upon standards to enable the court to exercise its powers of review. If the functionary has no guide or an imprecise guide as to the exercise of the powers, the court is equally disadvantaged in testing whether the power has been exercised in accordance with the empowering law. As was stated by Herbstein J. :

"The court might find that it was laying down what it thinks the public interest should be and not what it really is."

See: *the Argus Printing and Publishing case (supra) at 10 A*

39.1 To place greater emphasis on the provision for powers of review and their effectiveness, is to look at the 'pathology' of administrative action, and tends to overlook the equally important principle, which is to have systems in place to ensure proper and correct administrative decision making.

See: *Catherine O'Reagan, (supra) at 160*

Michael Asimow (supra) at 1673 - 4

39.2 This is obviously what the second principle aforementioned is all about.

39.3 If one is to pay more than lip service thereto, it is necessary that the legislature stipulate standards when delegating plenary discretionary powers.

40. The cumulative effect of the aforegoing is that section 2 (1) (b) is unconstitutional simply on the grounds that it is a delegation of power without intelligible standards.

<u>THE RIGHTS IN TERMS OF SECTION 24 OF THE CONSTITUTION</u>

41.1 Section 24 of the Constitution protects the right inter alia to "lawful administrative action" and to "administrative action which is justifiable in relation to the reasons given for it". These are controls

designed to regulate the exercise of administrative power so as to prevent its abuse. The effect of it being entrenched in the Constitution, is that these are fundamental rights, which may only be curtailed under the circumstances permitted in the Constitution.

41.2 The effect of these provisions has clearly been to open administrative actions to greater scrutiny and make the functionaries more accountable, than was permissable prior to the Constitution.

See: *Hugh Corder, Administrative Justice, in Rights and Constitutionalism, The New South African Legal Order, 387 at 389, 399 - 400*

Du Plessis & Corder, Understanding South Africa's Transitional Bill of Rights, at 168 - 9

Cachalia, Cheadle et al, Fundamental Rights in the New Constitution, at 72 - 4

Jacques De Ville, The Right to Administrative Justice: An Examination of Section 24 of the Interim Constitution, (1995) 11 SAJHR 264 at 268 - 274

E Mureinik, A Bridge to Where? Introducing the Interim Bill of Rights, (1994) 10 SAJHR 31 at 38 - 43

CAN IT BE SAID THAT SINCE SECTION 24 ENTRENCHES THE RIGHTS THEREIN, THE COURT OUGHT TO REGARD SUCH WIDE DELEGATIONS OF POWER MORE BENEVOLENTLY?

42.1 Section 24 affords protection at different levels relative to whether rights, interests or legitimate expectations are infringed.

See: *Hugh Corder (supra) at 399*

Du Plessis & Corder (supra) at 167 - 8

Cachalia, Cheadle et al (supra) at 73 - 4

Jacques De Ville (supra) 267 - 8

E Mureinik (supra) at 42 - 3

42.2 A person who complains of anything less than a right that was infringed, is not entitled to the protection in section 24 (d).

42.3 A person who complains of anything less than a right or legitimate expectation that was infringed, is not entitled to the protection in section 24 (b).

42.4 A person who complains of anything less than a right or interest that has been infringed, is not entitled to be furnished with reasons for the action.

42.5 It is therefore incorrect to see section 24 as the cure for all ills arising from such a delegation. Members of the public, like consumers and employees of tea blenders, are also affected by the exercise of the discretion, the former in the form of higher prices and the latter through the ebb and flow of the viability of the employer's business caused by the Minister's decision. No recourse is permitted to them because their *'rights, interests or legitimate expectations'* have not been infringed.

43.1 The right in section 24 (d) is limited to administrative action which is *justifiable* in relation to the reasons given for it. This is not the same as a right to administrative action which is reasonable.

See: *Du Plessis & Corder, (supra) at 169*

Cachalia, Cheadle et al, (supra) at 74

Jacques De Ville, (supra) at 272 - 4

Project 58 of the South African Law Commission (supra) at p 76-82

43.2 The opposite view expressed by Mureinik, ignores the difference in meaning between 'justifiable' and 'reasonable', and the use of those words in various sections of the Constitution (sometimes in the same section) to denote different meanings (eg. sections 26 (2), 33 (1) (a) and 35 (2)).

See: *Mureinik (supra) at 39 - 40*

S v Zuma and Others 1995 (4) BCLR 401 (CC) at para 36 p 420

Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others 1995 (10) BCLR 1382 (CC) at para 50 - 60, p 1407 - 1412

Project No. 58 of the South African Law Commission, (supra) at 16-6

R v Oakes (1986) DLR (4th) 200 at 277 - 8, (1986) 19 CRR 308

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Stuart Woolman, Riding the push-me pull you: Constructing a test that reconciles the conflicting interests which animate the limitation clause, (1994) 10 SAJHR 60

43.3 It has also been held recently that the common law grounds of review ought to be extended to include as a ground for review "the concept of 'unsupported by evidence'", thus bringing the common law more in line with the Constitution which requires 'justifiable' administrative action.

See: *Standard Bank of Bophuthatswana Ltd v Reynolds N.O. and Others 1995 (3) BCLR 305 (B) at 325H - I; 1995 (3) SA 74 at 96I - 97A*

A Chaskalson SC (as he then was), Legal control of the administrative process, (1985) SALJ 422

44. Administrative action that is justifiable in relation to the reasons, postulates 'a rational and coherent decision making process, which will tend to produce a reasonable result, but which may on occasion not do so', which is what a court of review would have to be satisfied about, thus still maintaining the distinction between appeal and review.

See: *Du Plessis & Corder (supra) at 169 para 18.3.2.5*

Cachalia, Cheadle et al, (supra) at 74

R B Stewart (supra) at 1673 - 4

Project 24 of the South African Law Commission, (supra) at para 2.4.2 p 19-20, para 8.3.11 p 220

45.1 The manner in which the Minister's discretion in terms of section 2 (1) (b) has been exercised, would be subject to review, under the Constitution, subject to what is said above.

45.2 This would limit the ambit of review under section 24 (d), to whether the Minister had a justifiable basis to reach the decision he did, on the question of what is in the public interest.

C/f: *Minister of Law and Order v Hurley 1986 (3) SA 568 (A) at 578A - D*

45.3 Where the standard is imprecise and incapable of a certain and settled meaning (as the one in casu), there is no provision for a rational and coherent decision making process, and the result is an ineffective system of review.

45.4 The failure to provide for intelligible standards, is a failure to provide for *lawful and justifiable* administrative action.

See: *Collins Parker, The "Administrative Justice" provision of the Constitution of the Republic of Namibia: a constitutional protection of judicial review and tribunal adjudication under administrative law, (1991) 24 CILSA 88 at 89, 96 -7 and 104*

Geoff Budlender, Law and Lawlessness in South Africa, (1988) 4 SAJHR 139

M Weichers, Administrative Law, 206 - 9

R B Stewart (supra) at 1675

46. If such subjective and arbitrary power is to be countenanced, it would amount to a reversion to the system described above, prior to the promulgation of the present Constitution. It would be a retrogressive step rather than a progressive one, contrary to what was desired in the Constitution.

47. In the United States of America an intelligible principle has been held to be present if the law sufficiently identifies:

47.1 the persons and activities potentially subject to regulation;

47.2 the harm that is sought to be prevented; and

47.3 the general means intended to be available to the administrator to prevent the identified harm.

See: *Stofer v Motor Vehicle Cas. Co. 68 Ill 2d 361, 369 N.E. 2d 875 (1977)*

Pierce, Shapiro & Verkuil (supra) at 57

Gellhorn, Byse et al, Administrative Law, (Foundation Press) 8th ed. at 96 - 98

48. Applying those criteria to the present situation, the section fails to meet the said requirements in that:

48.1 the persons and activities subject to the regulation;

48.2 the harm sought to be regulated; and

48.3 the measures, at least one category thereof (see paragraph 16.2 hereof);

are not identified, but left to the determination of the Minister.

49.1 The Canadian Constitution, in section 7 of the Charter of Rights and Freedom, refers to "*the principles of fundamental justice*". *In its* context, such principles include, but are not limited to, the principles of natural justice and those which are encompassed in the Rule of Law.

See: *Ref. re Section 94(2) of the Motor Vehicle Act (1985) 24 D.L.R. (4th) 536 at 550*

Re Kodellas et al and Saskatchewan Human Rights Commission et al; Attorney-General of Saskatchewan, Intervenor (1989) 60 D.L.R. (4th) 143 at 175 - 6

Hogg (supra) vol 2 para 44.10 p 44-15 - 16

49.2 Those same values are enshrined in our Constitution, inter alios, in the provision for the separation of powers and in sections 24, 26 (2), 33 and 35 (1).

50. In Zimbabwe, similar principles have been articulated in determining the validity of legislation.

See: *Dumbutshena CJ, The Rule Of Law in a Constitutional Democracy (supra) at 317 - 9*

Woods and Others v Minister of Justice, Legal and Parliamentary Affairs 1995 (1) BCLR 56 (ZS) at 59; 1995 (1) SA 703 (ZS) at 706E

The latter dicta was referred to with approval in the judgment of Sachs J.

See: *Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others 1995 (10) BCLR 1382 (CC) at para 46 p 1404 note 46 (BCLR); 1995 (4) SA 631 (CC) at 657*

51. In Namibia, it has been held that legislation which results in inequality, is permissable provided, inter alia, such differentiation is based on intelligible differentia. This principle also demonstrates the significance and acceptance of the fundamental principle that, in the absence of standards, any derogation of rights is arbitrary and therefore unconstitutional.

See: *Mwellie v Ministry of Works, Transport and Communication and Another 1995 (9) BCLR 1118 (NmH) at 1132 E - F*

THE APPLICATION OF SECTION 33 (1)

52. The Canadian approach that such wide delegation of powers does not fall within the purview of "prescribed by law", and the United States approach that such delegations do not constitute "due process of law", are both rational, logical and represent the prevailing mores of what is justifiable in an open and democratic society.

53. Moreover, there are sufficient indiciae, as referred to above, in our Constitution that it shares those mores. In terms of section 35 (1) of the Constitution, this court ought to have regard thereto.

54. Section 2 (1) (b) cannot constitute law in the sense used in Section 33 (1) where it provides that the rights in our Constitution may be *"limited by law"*.

See: *Jacques De Ville, (supra) at 277 - 8*

55. It is only necessary to consider this question if the court concludes that the delegation of power was permissable under the Constitution.

See: *the Western Cape case (supra) at para 64 p 1318 - 9 (BCLR), p 906 C - D (SALR)*

56. Such a limitation of rights must meet the criteria in section 33 (1) of the Constitution.

See: *S v Zuma and Others 1995 (4) BCLR 401 (CC) at para 35 p 419 I - J; 1995 (2) SA 642 (CC) at 660 E*

S v Makwanyane (supra) at para 110 p 711 (BCLR), p 439 F - H (SA)

Coetzee's case (supra) at para 11 p 1390 (BCLR), p 642 B - F (SA)

57.1 Section 33 (1) (a) prescribes that the law must be of general application, and the limitation shall be permissable only to the extent that it is reasonable and justifiable in an open and democratic society based on freedom and equality, and provided further that it does not negate the essential content of the right.

57.2 In addition, such limitation must be *necessary*, as provided in section 33 (1) (aa) of the Constitution, since it infringes the rights in section 10 and 11 thereof for the reasons mentioned in paragraph 59 hereof.

A DEMOCRATIC SOCIETY BASED ON FREEDOM AND EQUALITY AND THE QUESTION OF REASONABLENESS

58. The delegation of wide discretionary power, without any standards, renders the official unaccountable and the law uncertain. The result is, an ineffective system of review and government contrary to the Rule of Law. That is the antithesis of the attributes of a free and fair society and government according to the Rule of Law.

See: *A Rabie & G Erasmus, When Delegated Powers Become Plenary Powers, (1989) 5 SAJHR 440*

Hon M Kirbey, Effective Review of Administrative Acts: The Hallmark of a Free and Fair Society, (1989) 5 SAJHR 321 at 341

Geoff Budlender (supra)

Dumbutshena CJ, The Rule of Law in a Constitutional Democracy with Particular Reference to the Zimbabwean Experience, (1989) 5 SAJHR 311 at 312

59.1 The present Act doesn't stop at conferring these wide powers, it goes even further. It introduces severe penal sanctions for any infringement of the regulations promulgated by the Minister in the exercise of his discretion.

See: *section 4 (1) (a), (b) and (2)*

59.2 It is therefore an offence to fail to comply with what the Minister deems is necessary or expedient in the public interest.

59.3 The delegation of such power to arbitrarily decide what is or is not an offence, with the consequences it entails, is, in addition to those mentioned already, a violation of the rights in sections 10, 11, 25 (3) (ie. the right to a fair trial) and 28 (2) of the Constitution.

See: *Hogg (supra) at para 46.3 p 46-2 - 46-4.1 (and the cases there cited and discussed)*

Stanton v Johannesburg Municipality (supra) at 752 - 4

59.4 The said infringement must therefore also be necessary.

60.1 The delegation of such wide powers was effected with the object of regulating the import and export of goods. That objective could have been achieved with the delegation of narrower powers, or with the delegation of powers subject to intelligible standards.

60.2 Legislation already exists to protect local industry from imports which compete unfairly with the local product. It follows that the present powers in section 2 (1) (b), if they are capable of properly being applied to prevent such a mischief, are unnecessary.

60.3 The alternative procedure in the Board on Tariffs and Trade Act, has a greater semblance to a democratic process, in providing for an investigative process before the decision making process, and has not been shown to be ineffective.

61. It follows that the said delegation is overbroad and the means adopted, disproportional to the ends sought to be achieved in an open and democratic society based on freedom and equality. The said delegation is therefore not reasonable, nor justifiable in an open and democratic society based on freedom and equality, nor necessary.

See: *Coetzee's case (supra) at para 13 p 1391, para 60 p 1411 (BCLR)*

62. Where the legislation violates the Constitution in so many respects, it cannot be recognised as the "measures" contemplated in section 26 (2) of the Constitution, nor can it be considered to be justifiable in an open and democratic society based on freedom and equality.

WHETHER SECTION 35 (2) CAN BE OF APPLICATION TO ABATE THE VIOLATIONS

63.1 The principle of "reading down" in section 35 (2) of the Constitution, cannot be applied to a law such as this. To read it down, there must be language in the section reasonably capable of a more restricted

interpretation. Where, as in this case, there is a casus omissus (ie. the lack of standards), rules of interpretation do not assist in confining the language to a lesser object.

63.2 To cure the deficiencies would require legislative power, and that is outside the scope of this court's functions.

See: *Coetzee's case (supra) at para 17 p 1392 - 3, para 27 p 1396 - 7, para 62 p 1413 - 4 (BCLR); p 645 C - D, p 649 B, p 666 E - F (SA)*

Hunter et al v Southam Inc (1984) 9 CRR 355, (1984) 2 SCR 145

64.1 Even if one read in the requirement that the power must be exercised reasonably, that does not answer the above shortcomings.

See: *the Panama Refining Co. case (supra) at 420*

the Western Cape case (supra) at para 64 p 1318 - 9 (BCLR), p 906 C - D (SA)

64.2 The matter is one of Constitutional competence.

65. If on the other hand it is found that the delegation was constitutionally competent, for the reasons already mentioned, one cannot by applying the standard of reasonableness determine the boundaries to the discretion.

RELIEF SOUGHT

66. The limitation in section 98 (5) of the Constitution, requires that the declaration of invalidity be restricted to the extent of the inconsistency. The mischief which causes the infringement of the Applicant's rights, is the enforcement of the "tea agreement" by the First Respondent or his delegate, in terms of the powers created in section 2 (1) (b). A declaration that the implementation of such policy in terms of section 2 (1) (b), is unlawful and invalid, would fulfil the following purposes:

66.1 restricting the declaration of invalidity to the precise mischief without being overbroad;

66.2 ensuring good government and that the interests of justice are served; and

66.3 at the same time afford the Applicant meaningful relief.

67.1 More importantly, it has to be considered whether an order in terms of the proviso in section 98 (5) ought to be made.

67.2 If an order as is suggested in paragraph 66 hereof is made, the Applicant can have no objection thereto.

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67.3 If an order in terms of paragraph 66 is not made, the result cannot be regarded as being in the interests of justice and good government, *inter alia for the reasons mentioned in paragraphs* 4.2 to 4.9 hereof.

68. The Applicant submits that an order in the following terms would meet the needs of the case:

"(a) It is declared that the policy adopted and implemented by the First Respondent or his delegate, of requiring the purchase of a prescribed quota of local tea prior to the giving of consideration to the issue of a permit to import tea under tariff heading 09.02 of G.N. 2582, is invalid and unlawful.

(b) Subject to paragraph (c) hereof, it is declared that section 2 (1) (b) of the Import and Export Control Act 45 of 1963 is invalid by reason of its inconsistency with the Constitution.

(c) In terms of the proviso to section 98 (5) of the Constitution, Parliament is required to correct the defect in section 2 (1) (b) within three months of the date of this order.

(d) That the matter is remitted back to the Transvaal Provincial Division of the Supreme Court of South Africa, for the adjudication of the remaining issues between the parties.

(e) An order directing,

(i) the First, Second and Third Respondents, and

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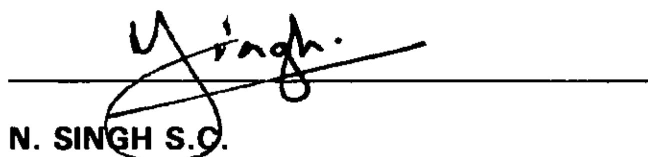
(ii) the Fourth Respondent, in the event of it opposing the matter in this court,

to pay the costs occasioned by the referral, jointly and severally."

Dated at Durban this 11th day of January 1996.



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