Registrar's OFFICE

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(b)

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No. CCT47/95

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 SUPPLEMENTARY ARGUMENT

THE ISSUE

1. To determine whether an Act, promulgated prior to the date of commencement of the present Constitution, would be invalid, if to apply it now constitutes an abdication by Parliament of its legislative function, one has to examine the effect of the present Constitution on such legislation.

2. The majority of this court have already held in the Western Cape case that an abdication by Parliament as constituted under the present Constitution, of its legislative functions, would be unlawful, as it is a violation of section 37.

3. The court was not, however, concerned in that case with a pre-constitution statute.

SECTION 37

4. The said provision states the following:

"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." (our emphasis)

5. Section 4 of the Constitution is also relevant for the purpose of this discussion:

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

(2) This Constitution shall bind all legislative, executive and judicial organs of State and all levels of government."(our emphasis)

6. The current Constitution was an Act passed by the previous Parliament. The power of the Parliament immediately preceding the

present one, in regard to the promulgation of legislation, was set out in section 30 of the South Africa Constitution Act 110 of 1983 and it provided as follows:

"The legislative power of the Republic is vested in the State President and the Parliament of the Republic, which, as the sovereign legislative authority in and over the Republic, shall have full power to make laws for the peace, order and good government of the Republic: Provided that the powers of Parliament in respect of any bill contemplated in section 31 shall be exercised as provided by that section."

7. Section 31 is not relevant for present purposes as it dealt with the procedure for dealing with bills affecting the own affairs of certain population groups.

8. The legislative power of Parliament under the present Constitution, is circumscribed, in that it has to be exercised "subject to" the Constitution. The significance thereof is dealt with in,

Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others 1995 (4) SA 877 (CC) at 904 D - F, Chaskalson P

9. Similarly, Amissah JP stated the following:

"Instead of the supremacy of Parliament, we have, if anything, the supremacy of the Constitution."

See: *The Attorney General v Dow 1994 (6) BCLR 1 (Botswana)*

Zantsi v The Chairman of the Council of State & Another 1994 (6) BCLR 136 (Ck) at 156 F

10. The present Parliament cannot therefore claim greater powers, than are provided in the present Constitution, even if for example an Act passed by a previous Parliament, if applied stricto sensu, would result in Parliament having greater powers than contemplated in the present Constitution. That was in fact the conclusion of the majority of this court in the Western Cape case ie. whilst in the past Parliament had wide powers to delegate, that was changed under the present Constitution.

11. The converse must also hold true, if a previous Parliament abdicated its legislative function, by delegating such function to a member of the Executive, it would not be a proper delegation by which the present Parliament carries out its legislative functions. To conclude otherwise, would be to ignore the words *"subject to this Constitution"* in section 37. The legislative authority that vests in Parliament, is subservient to the provisions of the whole Constitution, and not Chapter 3 alone. That which it cannot do by its own act, it also cannot do by the act of another.

12. Where any of these consequences arise, it must follow that there is a conflict between the Constitution and such Act.

13. The status of the pre-constitution statutes, is dealt with in section 229 of the Constitution.

SECTION 229

14. It provides as follows:

"Subject to this Constitution, all laws which immediately before the commencement of this Constitution were in force in any area which forms part of the national territory, shall continue in force in such area, subject to any repeal or amendment of such laws by a competent authority."(our emphasis)

15. One of the provisions to which the pre-existing laws would be subject, is section 4 (1) of the Constitution, so that in the event of inconsistency, the inconsistent law or act is of no force and effect.

16. Section 230 expressly repeals various Acts, but not the Import and Export Control Act.

THE WORDS "SUBJECT TO THIS CONSTITUTION"

17. The effect of the words *"Subject to this Constitution..."*, are of crucial importance in the determination of the status of the pre-constitution statutes.

18. This question is not res nova, and has arisen in regard to the status of the Terrorism Act 83 of 1976 which conflicted with the Republic of Bophuthatswana Constitution Act 18 of 1977, but was not expressly repealed by the latter. Section 93 (1) of the latter Act provided as follows:

"Subject to the provisions of this Constitution -

(a) *all laws which immediately prior to the commencement of this Constitution were in operation in any district of Bophuthatawana, and*

(b) *all laws which, upon the addition of any land to Bophuthatswana, apply on or in respect of such land,*

shall continue in operation and continue to apply except in so far as such laws are superseded by any applicable law of Boputhatswana or are amended or repealed by parliament in terms of this Constitution...." (our emphasis)

19. Miller JA in his judgment, which was concurred in by the majority of the court, placed particular emphasis upon those identical words which also appeared in the Bophuthatswana Constitution, in finding that the Terrorism Act was not adopted by the new state. He said the following in this regard:

"The words 'subject to the provisions of this Constitution' in s 93 (1) of the Constitution clearly govern the provision that laws in operation immediately prior to the commencement of the Constitution are to continue in operation. The purpose of the phrase 'subject to' in such a context is to establish what is dominant and what is 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 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."

See: *S v Marwane 1982 (3) SA 717 (A) at 747 H - 748 A*

19. This court has held that the words *"subject to"* in our Constitution, bear the same meaning, and has adopted and applied such meaning.

See: *Zantsi v Council of State, Ciskei & Others 1995 (10) BCLR 1424 (CC) at 1434 G - I*

20. Miller JA concluded at 752 H that,

> *"There is no question here of repeal with retrospective effect; the conflicting law is excluded by s 93 (1) from the body of existing law taken over by the new state."*

21. In this respect the result of the inconsistency is different from the Boputhatswana Constitution. The provisions of section 4 (1) of the present Constitution provides that the inconsistent act is of no force and effect, unless otherwise provided expressly or by necessary implication in the Constitution. There is no provision providing for a contrary result in the Constitution, relating to the consequence of the abdication of the legislative function.

22. Dealing with a similar problem in regard to the applicability of the Terrorism Act in South West Africa/Namibia, after the promulgation of the South West Africa Legislative and Executive Authority Establishment Proclamation R101 of 1985, which provided for the transition of that territory to independence, Levy J followed a similar

line of reasoning to Miller JA, in,

S v Heita 1987 (1) SA 311 (SWA)

22. The validity of the legislation of the previous Parliament, in the absence of any provision to the contrary in the present Constitution, therefore depends upon its consistentcy with the present Constitution and not simply Chapter 3. For the reasons mentioned in paragraph 11 hereof, the Import and Export Control Act is inconsistent with the Constitution, and is therefore invalid.

PARLIAMENT'S LEGISLATIVE AUTHORITY

23. If the Import and Export Control Act remains a valid Act ie. it passes the scrutiny of section 229, it is not a valid argument to say that the said Act is not an Act passed by this Parliament, therefore this Parliament has not abdicated its legislative functions. Such an argument is met as follows.

24. This Parliament does abdicate its legislative functions if it allows the abdication to occur through the said Act when it has the power to change the law. The power to change the law falls within its legislative authority. The present legislature can legislate both by the promulgation of legislation, and by declining to promulgate legislation ie. to allow the status quo to remain and not to amend the

Act. The attitude of the Government, in these proceedings, is that the Import and Export Control Act is a valid delegation, hence there is no need to change the Act. By not changing the Act it is still legislating ie. it has provided that the law will be that which is stated in the Act, and that is just as much the exercise of its *"power to make laws"*.

SECTION 4 (1) OF THE IMPORT AND EXPORT CONTROL ACT

25. As has already been submitted in the Applicant's main heads of argument, that the provisions of section 4 (1) of the Import and Export Control Act renders it an offence for an individual not to comply with the Minister's decision. It has also been submitted that in the absence of any standard or guidelines, legislation so formulated is arbitrary.

26. The effect of interpreting section 37 so as to confine it to legislation passed by the present Parliament leads to an infringement of the constitutional principle that is evident from the United States and Canadian cases referred to hereafter.

27. The following hypothetical example demonstrates the anomalous results which arise. Assume that the Minister decided in terms of section 2 (1) (a) of the Import and Export Control Act, to prohibit the importation of certain overseas newspapers and tabloids because its editors have expressed views therein particularly critical of a member

of the Executive or the government in general, which the Minister considered undermines the confidence of the public in the government and that it was in the public interest to prohibit the importation thereof for sale locally. The local newsagents could not then import such publications for sale locally. Notwithstanding a Government Notice prohibiting such import the newsagent nevertheless imports the same. The newsagent is then prosecuted in terms of section 4 (1).

28. The prohibition could not be regarded as being ultra vires since there are no standards to confine the policy of the Act to economic considerations, the Minister's decision therefore falls within the terms of the Act.

29. The policy which the Minister considered sufficient to exercise the power ie. the protection of the integrity of the government and the executive, is not open to question by a court. The question of the sufficiency of evidence is one left to the determination of the Minister, which to a large extent is to be determined on the basis of matters of policy. The court cannot intervene so as to question the reasonableness or rectitude of such a determination, as it would in the case of the determination of an objective fact which does not involve choices of policy. As was stated by De Kock J, Baker and Vivier JJ (the latter as he then was) concurring:

"The situation here is that the relevant authorities exercise a general power of control in their administration of matters affecting education. It is the respondents who are charged with the responsibility and duty of deciding, as a matter of policy, what is or is not in the interests of sound education.

Although the courts may control the legality of administrative behaviour, they have no power, as I see it, to dictate to administrative authorities as to the expediency or desirability of their actions."

See: *Cape Teachers Professional Association and Others v Minister of Education and Others 1986 (4) SA 412 (C) at 418 F - G*

D.J. Galligan states the following which is apposite in this regard:

"... how the discretionary power is exercised in substance is a matter between Parliament and the authority, a matter for control and criticism through the political process, subject only to the court's review on recognised grounds. It is inappropriate on constitutional principles for the courts to enter into the merits of policies as to how discretionary powers are to be exercised."

See: *The Nature and Functions Of Policies Within Discretionary Power, [1976] P.L. 332 at 353*

See also: *Sagnata Investments v Norwich Corporation [1971] 2 Q.B. 614*

Brind and Others v Secretary of State for the Home Department [1991] 1 All ER 720 HL

30. The newsagent may possibly challenge the decision as an infringement of Chapter 3, possibly section 15. It is unimportant for the discussion which right in particular it is. It would then be arguable that following *R v Morales [1992] 3 SCR 711, 12 CRR (2d) 31*, since the concept of *"public interest"* in section 2 (1) does not prescribe an intelligible standard it constitutes an impermissible infringement of the right. In R v Morales (supra) at 44 - 5 C.R.R. 2d, the court concluded that:

"public interest imports a standard which is completely discretionary.... The term authorizes a standardless sweep, as the court can order imprisonment whenever it sees fit. According to Nova Scotia Pharmaceutical Society, at p 58 C.R.R., p 642 S.C.R., such unfettered discretion violates the doctrine of vagueness: 'What becomes more problematic is not so much general terms conferring broad discretion, but terms failing to give direction as to how to exercise this discretion, so that this exercise may be controlled. Once more, an impermissibly vague law will not provide a sufficient basis for legal debate, it will not give sufficient indication as to how decisions must be reached, such as factors to be considered or determinative elements."

31. If that argument is upheld, the provisions of section 2 (1) would be inconsistent with the Constitution. The underlying reason therefor is that the section does not prescribe an intelligible standard. That is just as much due to an abdication of the legislative function as it is of promulgating a law which fails to provide any direction as to the exercise of the wide discretion. The distinction that may be sought to be drawn between a violation of Chapter 3 and the abdiction of the legislative function, is the argument which Seervai confronts and rejects. Since the law (section 2 (1)) emasculates the court's power to protect against abuse, due to the scope and nature of the section ie. the lack of guidelines or standards, the law has to be struck down.

See: *H.M. Seervai, Constitutional Law of India, 4 ed, vol 1, p 545 - 550*

32. It could hardly be suggested that the Act being one promulgated by a previous legislature, it is not open to attack under this Constitution. The short answer to such an argument is that the earlier legislation cannot rely on the earlier Constitution for its validity since under the present Constitution the provision relating to the

continuation of the existing laws is qualified. For its validity, consistency with the present Constitution, and not Chapter 3 alone, is essential. Where as a matter of policy Parliament has changed its own status from it being the supreme law maker, to one where its law making power is subservient to the Constitution, the underlying policy for statutes such as the Import and Export Control Act, has been abrogated.

33. The following dicta of Clark J in *Hamm v Rock Hill* is apposite in this regard:

> *"In short, now that Congress has exercised its constitutional power in enacting the Civil Rights Act of 1964 and declared that the public policy of our country is to prohibit discrimination in public accommodations as therein defined, there is no public interest to be served in the further prosecution of the petitioners. And in accordance with the long-established rule of our cases they must be abated and the judgment in each case is therefore vacated and the charges are ordered dismissed."*

34. To a similar effect is the following dicta of Chief Justice Marshall:

> *"But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional ... I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospection operation, affect the rights of parties, but in great national concerns ... [the law] ought always to receive a construction conforming to its manifest import ... In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside."*

See: *United States v Schooner Peggy 1 Cranch 103, 110; 2 L ed 49, 51 (1801)*

35. An interpretation of section 37 which allows the present Parliament to enforce laws of a previous Parliament in a manner which amounts to the abdication of its legislative power, would be to impose criminal sanctions for non-compliance with legislation formulated in an arbitrary manner. The formulation of legislation under a policy that is prohibited under the present Constitution, is antithetical to its purpose. The enforcement of such legislation is all the more antithetical, hence the newsagent could not be prosecuted for the said infringement. As was stated by Levy J :

> *"The reasoning appears to be based on the fact that constitutional change rendering previous laws invalid necessarily involves a fundamental policy choice introduced for policy reasons. For prosecutions to proceed under the prior law would frustrate the implementation of society's new substantive policy and, in this particular case, it would frustrate the effectual application of certain fundamental human rights."*

See: *S v Heita 1987(1) SA 311 (SWA) at 326 G*

SIMILAR PRINCIPLES IN THE UNITED STATES

36. In,

United States v Chalmers (1934) 291 US 217

a prosecution was pending relating to a contravention of the National Prohibition Act, when the twenty-first amendment was ratified which rendered the prohibition inoperative. The Supreme Court held that the prosecution could not continue.

37. In,

Hamm v Rock Hill (1964) 379 US 306 13, 13 L ed 2d 300

prosecutions were pending relating to state trespass statutes, which rendered it an offence for Negroes who sought service in racially discriminatory lunch counters to refuse to leave on request. Before their convictions, the Civil Rights Act was passed which forbid racial discrimination in such places and removed peaceful attempts to be served on an equal basis in such places, from the category of punishable offences. Clark J stated the following:

"Since the provisions of the Act would abate all federal prosecutions it follows that the same rule must prevail under the Supremacy Clause which requires that a contrary state practice or state statute must give way. Here the Act intervened before either of the judgements under attack was finalized. Just as in federal cases abatement must follow in these state prosecutions. Rather than a retroactive intrusion into state criminal law this is but the application of a long standing federal rule, namely, that since the Civil Rights Act substitutes a right for a crime any state statute, or its application, to the contrary must by virtue of the supremacy Clause give way under the normal abatement rule covering pending convictions arising out of a pre-enactment activity. The great purpose of the civil rights legislation was to obliterate the effect of a distressing chapter of our history. This demands no less than the application of a normal rule of statutory construction to strike down pending convictions inconsistent with the purposes of the Act."

SIMILAR PRINCIPLES IN CANADA

38. S. 2 of the Canadian Constitution provides as follows in regard to pre-constitution legislation:

> *"Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to..."*

39. In,

R v Drybones [1970] S.C.R. 282

it was held by the Supreme Court that the above section had the effect of overriding inconsistent federal statutes by rendering them inoperative. The case related to s 94 (b) of the Indian Act which rendered it an offence for an "Indian" to be intoxicated anywhere off the reserve. This provision was held to be inconsistent with the provisions of s 1 (b) of the Canadian Constitution which provided for equality before the law.

THE LEGISLATIVE AUTHORITY OF PARLIAMENT PRIOR TO 1961

40. The decisions prior to the promulgation of the 1961 Constitution, concerning disputed legislative acts, dealt not so much with the separation of powers, but with the court's power to enquire into and determine the validity of Acts of Parliament. This is understandable seeing that South Africa was governed by a British Act, the South Africa Act, with the constitutional principles of that country. This significantly influenced later decisions which showed little concern for the disregard of the separation of powers.

41. In earlier cases the court had no difficulty in finding that it had the power to determine whether an Act had been validly passed by Parliament.

See: *R v McChlery 1912 AD 199 at 125*

R v Ndobe 1930 AD 484 at 496

42. In 1931 the Statute of Westminster was passed. The very next case which concerned the validity of a legislative act, was met with the response that the Statute of Westminster had rendered the Union legislature *"the supreme and sovereign law making body in the Union"*. Stratford A.C.J. at 237 further held that the effect of this Statute was as follows:

"Parliament's will, therefore, as expressed in an Act of Parliament cannot now in this country, as it cannot in England, be questioned by a Court of Law whose function it is to enforce that will not to question it. ... It is obviously senseless to speak of an Act of a Sovereign law making body as ultra vires. There can be no exceeding of power when that power is limitless."

See: *Ndlwana v Hofmeyer N.O. and others 1937 AD 229 at 237*

43. A case decided in 1934 concerned a delegation of wide power to the Minister to prohibit a person from being in any particular area if he was satisfied that such person was promoting feelings of hostility between certain race groups. The delegation was not challenged on the grounds of it being an improper delegation, but the decision of the Minister was challenged. Stratford A.C.J. disposed of such challenge as follows:

"One further general observation I would make is this: that once we are satisfied on a construction of the Act, that it gives to the Minister an unfettered discretion, it is no function of a Court of law to curtail its scope in the least degree, indeed it would be quite improper to do so. The above observation is, perhaps so trite that it needs no statement, yet in cases before the Courts when the exercise of a statutory discretion is challenged, arguments are sometimes advanced which do seem to me to ignore the plain principle that Parliament may make any encroachment it chooses upon the life, liberty or property of any individual subject to its sway, and that it is the function of the courts of law to enforce its will."

See: *Sachs v Minister of Justice 1934 AD 11 at 36 - 37*

44. Similar views were expressed in 1953. Centlivres C.J. stated the following:

"But the mere fact that autocratic powers are conferred by the section on the Minister does not mean that the section is ambiguous. In my opinion it is clear that Parliament intended to confer autocratic powers upon the Minister and it is the duty of courts of law to give effect to the intention of Parliament."

See: *R v Sachs 1953 (1) SA 392 (A) at 400 F - G*

45. Some semblance of justice was restored in the two Harris judgments, when the court asserted and confirmed that it had the power to determine whether Acts of Parliament had been validly passed.

See: *Harris & Others v Minister of the Interior & Another 1952 (2) SA 428 (A)*

Minister of the Interior and Another v Harris and Others 1952 (4) SA 769 (A)

46. The first Harris judgment held that its judgment in Ndlwana, that Parliament could act contrary to the South Africa Act and that the court had no power to enquire into and decide upon the validity of the procedure adopted by Parliament, was wrong, and overruled it.

47. In the second Harris judgment, although a proper opportunity presented itself for the court to affirm the separation of powers in the

South Africa Act, by finding that Parliament's attempt to set itself up as a High Court was an infringement of the separation of powers, the court (save for Greenberg JA) instead found on other grounds that the said enactment was invalid.

48. In the Collins case the court recognised Parliament's legislative authority to pass any legislation it wished, provided it did not transgress the provisions of the South Africa Act, irrespective of the motive therefor. Centlivres C.J. stated the following:

"If a legislature has plenary power to legislate on a particular matter no question can arise as to the validity of any legislation on that matter and such legislation is valid whatever the real purpose of that legislation is."

See: *Collins v Minister of Interior 1957 (1) SA 552 (A) at 565 D*

THE LEGISLATIVE AUTHORITY OF PARLIAMENT IN TERMS OF THE 1961 CONSTITUTION

49. The Constitution Act 32 of 1961, did provide for a separation of powers. The legislature consisted of the House of Assembly, the Senate and the State President who had to give his assent to all bills. The executive consisted of the State President acting on the advice of the Executive Council (also known as the Cabinet). The Judiciary was headed by the Supreme Court.

50. Section 59 (1) dealt with Parliament's legislative power. The supremacy of Parliament was established. It provided as follows:

"Parliament shall be the sovereign legislative authority in and over the Republic, and shall have full power to make laws for the peace, order and good government of the Republic."

51. The court's power to enquire into the validity of Acts of Parliament was circumscribed in section 59 (2) as follows:

"No court of law shall be competent to enquire into or to pronounce upon the validity of any Act passed by Parliament, other than an act which repeals or amends or purports to repeal or amend the provisions of section one hundred and eight or one hundred and eighteen."

52. The court clearly had no power to investigate whether Parliament had abdicated its power to legislate by a wide delegation of power.

THE LEGISLATIVE AUTHORITY OF PARLIAMENT IN TERMS OF THE 1983 CONSTITUTION

53. The South Africa Constitution Act 110 of 1983 provided for a single Parliament comprising three chambers, separated on an ethnic basis. The legislative authority in terms of section 30 vested in the State President and Parliament, and the legislature was the sovereign legislative authority. In general affairs the executive authority vested

in the State President and the Cabinet. The State President was head of the legislature and the executive. The judiciary was headed by the Supreme Court.

54. The division of powers between the legislature and executive was tenuous due to the position of the State President as head of the legislature and the executive.

55. The court's power to enquire into the validity of Acts of Parliament was curtailed in terms of section 34 (2).

THE PRINCIPLE OF IMPLIED REPEAL

56. The division of powers both under the 1961 and 1983 Constitutions, were not entrenched, hence as and when the legislature abdicated its legislative responsibility by delegating wide legislative authority, that could not be assailed because it was an accepted principle that the legislature impliedly repealed the provision requiring it to act in a particular manner, when it acts contrary thereto.

See: *Savvas v Government of the Republic of South Africa and Others 1988 (2) SA 327 (T) at 330 E - G*

CONCLUSION

57. It is submitted that section 2 (1) (b) is inconsistent with Section 37 of the Constitution and for the reasons aforementioned, it is not a valid argument that Section 37 is only relevant to Acts passed by the present Parliament.

Dated at Durban this 18th day of March 1996.

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