IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NUMBER: CCT47/95

In the matter between:-

YNUICO LIMITED Applicant

and

THE 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 SOUTH AFRICA [PTY] LTD Fourth Respondent

FIRST, SECOND AND THIRD RESPONDENTS' SUPPLEMENTARY HEADS OF ARGUMENT

INTRODUCTION:

1. At the outset, we submit, it must once again be stressed that the only issue referred to this Court for determination in terms of Section 102 of Act 200, 1993 ["the Constitution"] was:

"Whether section 2[1][b] of the Import and Export Control Act, 45 of 1963, is constitutional and valid."

2. During argument before this Court on the aforesaid issue it became clear that the Applicant's challenge as to the constitutional validity of Section 2[1][b] of the Act was not based on the infringement of any rights in terms of Chapter 3 of the Constitution.

3. Having heard full argument on the aforesaid issue, the Court raised the question as to whether the Applicant could rely on the provisions of Section 37 of the Constitution for its attack on the constitutional validity of Section 2[1][b] when regard is had to the following:

3.1 that the Act, and the relevant provision under consideration, was promulgated prior to the date of commencement of the Constitution;

3.2 that the validity of the relevant Government Notice GN2582 was not part of the referral [albeit that same was also promulgated prior to the date of commencement of the

Constitution];

3.3 that Section 229 of the Constitution 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."

3.4 that Section 37 of the Constitution appears to deal only with Parliament's legislative powers in the post-constitutional area;

3.5 that the aforesaid Section 37 is not contained in Chapter 3, which is the chapter dealing with "Fundamental Rights".

4. The Court also raised, *inter alia*, the question as to the applicability of the provisions of Section 4 of the Constitution on the issue of the question referred to this Court for determination and enquired from the parties in what sense this provision comes into play as a ground of attack on the constitutionality of Section 2[1][b] of the Act.

5. It is against this backdrop that the parties were requested by this Court to submit supplementary argument.

6. The parties were requested to confine their arguments only on the abovestated issue.

THE LEGISLATIVE AUTHORITY OF PARLIAMENT IN THE ERA PRIOR TO THE DATE OF COMMENCEMENT OF THE CONSTITUTION; THE COURT'S TESTING POWER REGARDING LEGISLATION PASSED BY LEGISLATIVE AUTHORITIES IN THE ERA AFORESAID:

7.

7.1 We refer the Court to an unreported judgment of Van den Heefer A J, with which Liebenberg A C J agreed, in the Supreme Court of Venda, Case Number 41/994 in the matter of **John Victor Nyadzani Mulaudzi and 21 Others v. Chairman, Implementation Committee and 3 Others** in which judgment, we submit, the abovestated matters were authoritatively canvassed and set out with regard to all the relevant periods prior to the enactment of the present Constitution.

For the convenience of the Court and the parties we will serve a copy of the aforesaid judgment as Annexure "A" on the Registrar of the Court.

7.2 We draw particular attention to the following pages in the aforesaid judgment which, we submit, are relevant and germane to the issues under consideration.

See: pp. 48 - 83

7.3 We submit that the learned Judge, having canvassed and analysed all the relevant authorities applicable, authoritatively summarised the relevant principles applicable in the above regard when he stated the following on pp. 80 - 83:

"1. *As a general rule, Parliament, as the supreme legislative authority, is unfettered in its power regarding the nature and content and subject-matter of its legislation [area of power].*

2. *Regarding procedure prescribed for Parliament*

when functioning as legislature a distinction must be drawn between internal and external procedure.

3. *As to the internal procedure relating to the domestic conduct of its business Parliament is its own master and can amend or ignore such procedural prescriptions or conventions at will and no outside body, including the Courts, will intervene in this regard.*

4. *As to the external procedural rules a further distinction must be made between:*

4.1 rules relating to the form of the legislature [those rules of procedure describing and defining its composition and structure]; and

4.2 those rules of procedure describing the manner in which Parliament, defined as to its form, must function in order to validly enact legislation.

5. *These rules of procedure relating to manner and*

form may be provided for either in the legislative instrument whereby Parliament was created [the Constitution] or any subsequent legislative instrument which was passed by Parliament itself.

6. *These procedural requirements relating to manner or form may be 'entrenched' which would mean that the instrument containing the procedural requirement could only be repealed or amended by following the specifically prescribed procedure or it may be 'unentrenched' which would mean that Parliament could amend or repeal the said procedural provisions by either:*

6.1 *Following the normal procedure prescribed for enacting legislation, thereby expressly repealing or amending the procedural provisions; or*

6.2 *enacting legislation which is <u>in terms</u> contradictory to the prescribed procedural provisions thereby impliedly amending or repealing the said procedural provisions.*

7. *The said prescribed procedural provisions regarding the manner and form of legislation must be complied with by Parliament unless and until it has been expressly or impliedly amended or repealed.*

To hold otherwise, would in my view, make a mockery of the Law.

Regarding the question of the implied repeal or amendment of an Act I will state the legal position as I understand it to be:

[a] *Because Parliament is unfettered and unlimited in its area of power, nothing will prevent it from enacting legislation which is totally or in certain respects contradictory to an earlier enactment.*

[b] *Because the latter Act will be taken to have expressed the will of Parliament, the Courts will apply the latter Act, and in so far as the earlier Act or any provisions thereof are in conflict with the provisions of the latter Act such provisions in the*

earlier Act would be regarded as having been impliedly amended or repealed.

[c] ..."

7.4 We also refer to **Baxter: Administration Law, pp. 195 - 198** where the learned author deals with the *"Scope of delegated legislation"* in the era prior to the enactment of the present constitution.

MAIN SUBMISSION REGARDING THE ISSUES REFERRED FOR SUPPLEMENTARY ARGUMENT:

8. We submit that from an analysis of the aforegoing the following submissions can be made:

8.1 Wide delegation of legislative powers by Parliament was lawfully possible, not only to the executive but also to other delegatees.

8.2 Such delegation of wide plenary powers was lawfully possible to an extent much wider than as envisaged by Section 2[1][b] of the Act.

8.3 The Court's testing power was curtailed to the extent as appears from the summary by Van den Heever A J referred to above.

8.4 As regards Acts promulgated prior to the date of commencement of the present Constitution, we submit that Section 229 clearly intended to provide that such Acts are to *"continue in force ..., subject to any repeal or amendment of such law[s] ..."*.

8.5 Chapter 3 of the Constitution dealing with "Fundamental Rights" has been provided as the only means of attack as regards pre-constitutional statutes which have been given continuation through the provisions of Section 229 of the Constitution, as there are no other criteria in the Constitution against which existing legislation should be tested. If the Constitution envisaged such other criteria, it would have spelt it out.

8.6 Section 4 of the Constitution, in our submission, ties Chapter 3 as the relevant means to give the Court the necessary testing right as to the continuation of such Acts

and the administrative functions flowing therefrom.

8.7 It is clear, in our submission, that the Applicant did not base its attack on the provisions of Chapter 3 [there being any infringement of any such fundamental rights of the Applicant] but based its attack on general dogmatic principles which are not provided for in the Constitution itself, either expressly or by necessary implication.

8.8 We submit that the Constitution does not make provision for Parliament to review and amend such legislation which has been given continuation through the provisions of Section 229 of the Constitution.

8.9 We submit that, only if such legislation offends the provisions of Chapter 3, a cause of action arises for an attack on its constitutionality, apart from the previous powers of the Supreme Court.

8.10 We submit that if it was the intention of the drafters of the Constitution to provide otherwise, and to give the Courts a testing power over and above the provisions of Chapter 3, it would have provided specifically for such additional

testing rights, and would, for example, have created a body to revise existing legislation.

8.11 We submit that the provisions of Section 98[5] support the above contentions in that the Court is provided with a discretion to keep such a law [which infringes any fundamental rights envisaged in Chapter 3] in force pending correction.

8.12 We submit that Section 98[5] contradicts the Applicant's submission that Parliament is obliged by the Constitution to review all pre-constitutional laws with a view to assessing whether it conforms to the new constitutional order [irrespective of any alleged Chapter 3 infringement] and to amend such laws accordingly.

8.13 We submit that this obligation, which the Applicant wants to construe on dogmatic principles, is misconceived for, *inter alia*, the following further reasons:

8.13.1 It will, for obvious reasons, be practically impossible for Parliament to undertake such a vast and onerous task.

8.13.2 If that were the intention of the drafters of the Constitution, we submit, such an obligation would have been dealt with specifically in the Constitution.

8.14 For example, specific provisions would have been enacted for a committee or other body provided with the task to scrutinise such legislation and to make recommendations to Parliament in this regard, similar to the functions given by the Constitution to the Public Protector and the Human Rights Commission.

8.15 We submit that an omission by Parliament [as contended for by the Applicant] can never be construed as a legislative function. Mere inaction cannot constitute legislation or a legislative action if Parliament did not convene to discuss the matter.

8.16 We submit that where the Constitution itself failed to place such an obligation on Parliament it would be inappropriate for the Applicant to argue that the Court should place such an obligation on Parliament.

8.17 We submit that only Parliament itself can decide what priorities it wants to place on its tasks during the period of the interim Constitution.

8.18 We submit that Section 37 is not capable of an interpretation other than it being applicable to Parliament's power of legislation as from the date of commencement of the Constitution. We submit that Section 37 does not relate to legislation passed prior to the commencement of the Constitution and to the Acts envisaged by Section 229 of the Constitution. We submit that Section 37 can thus not be interpreted as having any bearing on such legislation.

8.19 As regards this Court's testing power pertaining to pre-constitutional laws, which have been given continuation through the provisions of Section 229 of the Constitution, we submit:

8.19.1 that "the manner and form provisions" relating thereto have been sanctioned to be legally complied with in that Section 229 specifically provided for the continuation of such Acts pending amendment by

the present Parliament in terms of its constitutional functions;

8.19.2 that, thereby, full force and effect has been given to these laws by the Constitution;

8.19.3 that the Court's testing right has been provided for through the provisions of Chapter 3 read with Section 4 of the Constitution.

8.20 In this regard we refer to all the relevant authorities mentioned and discussed in the judgment of Van den Heever A J and the authorities referred to in **Baxter**, *supra*.

CONCLUSION:

9. We submit that the Court should conclude that Section 2[1][b] of the Act does not offend the Constitution of any on the grounds contended for.

SIGNED AT PRETORIA THIS 22ND DAY OF MARCH 1996

J L VAN DER MERWE SC

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Counsel for First to Third Respondents
Chambers
Pretoria