CASE NO: CCT47/95

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

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) LIMITED	FOURTH RESPONDENT

FOURTH RESPONDENT'S SUPPLEMENTARY WRITTEN ARGUMENT

INTRODUCTION

1. At the hearing of this matter on 12 March 1996 the applicant abandoned any reliance on the provisions of Chapter 3 of the Constitution of the Republic of South Africa Act 200 of 1993 ("the Constitution") as a basis for challenging the constitutionality of section 2(1)(b) of the Import and Export Control Act 45 of 1963 ("the Act").

2. In consequence the applicant was required to persuade the Court that section 37 of the Constitution invalidated the delegation of power by Parliament to the Minister of Trade and Industry ("the Minister") under s 2(1)(b) of the Act. The applicant's challenge therefore stands or falls on the fate of this argument. The delegation to the Minister, so the applicant contends, amounts to an abdication by Parliament of its legislative power

because the delegation of power is not accompanied by standards to guide its exercise. Such a delegation is in conflict, the applicant concludes, with section 37 of the Constitution.

3. During argument this Honourable Court raised the question whether section 37 of the Constitution could form a basis for invalidating section 2(1)(b) of the Act. The question was raised in light of the following facts:

3.1. The Court was not called upon to evaluate section 2(1)(b) of the Act for its consistency with any of the provisions of the Chapter on Fundamental Rights;

3.2. The Act itself was passed and the delegation of power effected in 1963;

3.3. Government Notice R 2582 which prohibited the importation of tea except under authority of a permit issued by the Minister was published in the *Government Gazette* on 23 December 1988.

4. The parties were granted leave to submit further written argument on the single issue of whether a pre-constitutional statute such as the Act could be challenged and invalidated on the grounds of inconsistency with section 37 of the Constitution.

THE APPLICANT'S ARGUMENT

5. The applicant contends in its supplementary argument that notwithstanding the passage of the Act prior to the commencement of the Constitution the delegation of power pursuant to section 2(1)(b) of the Act may nevertheless be scrutinized for its consistency with section 37 of the Constitution.

6. The reasons for the applicant's contention may be summarized as follows:

6.1. The legislative authority that vests in Parliament is subservient to the provisions of the whole Constitution and not Chapter 3 alone;

Applicant's Supplementary Argument paragraph 11; p. 4

6.2. By virtue of section 229 of the Constitution, the continuation in force of pre-constitutional statutes is subject to this Constitution;

Applicant's Supplementary Argument paragraphs 13-14; pp. 4-5

6.3. Pre-existing laws are subject to section 4(1) of the Constitution so that in the event of inconsistency the pre-existing law or act is of no force and effect to the extent of the inconsistency. The validity of legislation of the previous Parliament, in the absence of any provision to the contrary in the present Constitution, therefore depends upon its consistency with the present Constitution and not simply Chapter 3. There is no provision providing for a contrary result in the Constitution;

Applicant's Supplementary Argument paragraph 4; p. 2; paragraph 15 p. 5; paragraph 22; p. 8; paragraph 21 p. 7

6.4. "...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."

Applicant's Supplementary Argument paragraph 11; p. 4

6.5. By declining to promulgate legislation when it has the power to change the law, this Parliament is exercising its "power to make laws" within the meaning of section 37 of the Constitution.

Applicant's Supplementary Argument paragraph 24; pp. 8-9

THE FOURTH RESPONDENT'S SUBMISSIONS

Section 229 of the Constitution

7. The phrase "subject to this Constitution" in section 229 of the Constitution does establish that the Constitution, and not merely Chapter 3 thereof, is dominant and that pre-constitutional legislation is subordinate or subservient.

S v Marwane 1982 (3) SA 717 (A) at 747H
Zantsi v Council of State, Ciskei, and others 1995 (4) SA 615 (CC) at 624E-G; paragraph 27 (Trengove AJ)

8. However, and for the reasons set out hereunder, section 229 of the Constitution does not have the consequences contended for by the applicant.

8.1. In interpreting the phrase "subject to this Constitution" in **S v Marwane supra at 747H**, the Court held that "that to which a provision is `subject', is dominant - in the case of conflict it prevails over that which is subject to it." In that case, certain provisions of the Terrorism Act 83 of 1967 were in conflict with the provisions of Chapter 2 of the Republic of Bophuthatswana Constitution Act 18 of 1977 entitled "Declaration of Fundamental Rights".

8.3. In **Zantsi supra at 624G; paragraph 27** the Court held that sections 98(2) and (3) of the Constitution were plainly dominant provisions and would prevail over section 101(2) of the Constitution in the event of a conflict.

8.4. It is clear, therefore, that before the phrase "subject to this Constitution" in section 229 of the Constitution may be invoked so as to subordinate section 2(1)(b) of the Act to section 37 of the Constitution, it must be demonstrated that the two provisions are in conflict.

8.5. There can be no conflict between section 2(1)(b) of the Act and section 37 of the Constitution unless these provisions share the same field of operation. If the constitutional provision in question governs a field of operation which is different from that governed by the relevant statutory provision, for example because the two provisions regulate different subject matter, time-period, institution or object, there can be no conflict between them.

8.6. Thus, for example, section 60 of the Constitution is a `manner and form' provision. It governs the procedure which Parliament is required to follow in passing Money Bills. A pre-constitutional statute for the appropriation of revenue which was passed without compliance with the requirements of section 60 of the Constitution could not be invalidated by reason of such non-compliance. This is not because the pre-constitutional statute is not "subject to this Constitution". It is because there is simply no conflict between a preconstitutional revenue statute and section 60 of the Constitution. The field of operation is different. Section 60 of the Constitution is limited to prescribing the manner and form in which the post-constitutional Parliament is to exercise its power to make laws when acting to pass Money Bills.

8.7. Similarly, section 37 of the Constitution is of limited application. It applies to the vesting of legislative authority in the new Parliament, and to the grant and exercise of law making power by that Parliament. It cannot apply to the vesting, grant or exercise of power by a pre-constitutional Parliament. Consequently, although section 2(1)(b) of the Act is subject to the Constitution there is simply no conflict between that provision and section 37 of the Constitution. The field of operation of section 37 is limited to the post-constitutional Parliament and to

the exercise by that institution, and not its predecessors, of the power to make laws. It is not open to the applicant to complain that section 2(1)(b) is unconstitutional because it does not conform to the allocation of powers to which the post-constitutional Parliament, in the exercise of its law-making powers, is required by section 37 to conform. In order to challenge the lawfulness of a delegation of power to the executive under a pre-constitutional statute it is therefore necessary to allege and prove that the delegation of power infringes one or more fundamental rights.

Section 4(1) of the Constitution

9. Similarly, before any law, whether pre- or post-constitutional, will be of no force and effect in terms of section 4(1) of the Constitution it is necessary that:

9.1. the law must be inconsistent with the provisions of the Constitution;

9.2. there must be no provision to the contrary, either expressly or by necessary implication.

10. It is submitted that section 2(1)(b) of the Act and section 37 of the Constitution are not inconsistent. The provisions simply do not come into contact with one another. In short, even in the event that the allocation of power effected by section 2(1)(b) of the Act differed from the allocation of power required by section 37 of the Constitution, that difference does not amount to an inconsistency because there is no incompatibility or opposition between the two provisions.

11. **In the alternative** and in the event that this Honourable Court determines that there is indeed an inconsistency between the relevant provisions, it is submitted that it is a "necessary implication" within the meaning of section 4(1), that any inconsistency between the allocation of powers under a preconstitutional statute and the allocation

required under section 37 in respect of post-constitutional statutes does not have the effect of rendering the allocation of powers under the preconstitutional statute of no force and effect.

No Preconstitutional Abdication of Legislative Power

12. It is doubtful whether any meaning can be given to the claim by the applicant that a previous Parliament might abdicate its legislative function by delegating such function to a member of the executive. It is submitted that our pre-constitutional law did not include a doctrine that Parliament may not abdicate its legislative functions by delegating power to the executive.

13. The applicant provides no basis, whether in logic or authority, for the existence in our pre-constitutional law of a doctrine limiting the actions of Parliament by requiring that Parliament may not abdicate its powers by delegating power to the executive. While the pre-constitutional Parliament was required to follow its own prescribed 'manner and form' procedures before its legislative products would enjoy the status of Acts of Parliament, the applicant points to no rule of law which would have prevented a pre-constitutional Parliament from delegating power in the manner contemplated in section 2(1)(b) of the Act.

14. It is submitted that any prohibition against Parliamentary abdication of its law making powers derives from the interpretation of section 37 of the Constitution and from the replacement of the doctrine of parliamentary sovereignty with a system of government in which the Constitution is both entrenched and supreme.

See e.g. **Executive Council, Western Cape Legislature v President of the Republic of South Africa 1995 (4) SA 877 at 899; paragraphs 51-52 (Chaskalson P)**

15. If it is meaningless to talk of an abdication of power resulting from a legislative delegation of power to the executive prior to the commencement of the Constitution, then that pre-constitutional delegation, effected in 1963, does not become an abdication by the new Parliament upon the passage of section 37 of the Constitution. While Chapter 3 affords new rights which may not be infringed except in accordance with the criteria established by Chapter 3 itself, section 37 determines the scope for the exercise of law making powers by a post-constitutional Parliament.

16. If it were demonstrated that our preconstitutional law embodied a rule of law prohibiting Parliament from abdicating its powers by delegation to the executive, the conclusion that section 37 provides no basis for impugning section 2(1)(b) of the Act would remain unaltered.

17. Furthermore, it is submitted that this Court does not have jurisdiction to determine whether the delegation of power under section 2(1)(b) of the Act was inconsistent with any preconstitutional rule of law, whether under the Constitution Act of 1961 or otherwise. This is because the jurisdiction of the Constitutional Court is limited by section 98(2) to "all matters relating to the interpretation, protection and enforcement of this Constitution".

This Parliament has not Exercised its Powers Under Section 37 With Respect to Section 2(1)(b) of the Act

18. The applicant appears to recognize that it is necessary, in order to bring section 2(1)(b) of the Act within the field of operation of section 37 of the Constitution, to point to some exercise by the post-constitutional Parliament of its power to make laws under section 37 of the Constitution. Consequently the applicant is forced to resort to a strained and artificial construction of section 37.

Applicant's Supplementary Argument paragraph 24 pp. 8-9

19. The essence of the applicant's argument appears to be that by omitting to exercise its power to make laws with respect to section 2(1)(b) of the Act, Parliament is nevertheless exercising its power to make laws. In the circumstances of this case it is submitted that such an argument is completely untenable.

19.1. Section 37 of the Constitution spells out the powers which are vested in Parliament expressly or by necessary implication.

Executive Council, Western Cape Legislature supra at 904D-E paragraph 62 (Chaskalson P)

19.2. Section 37 provides that Parliament "shall have the power to make laws for the Republic in accordance with this Constitution." The section is an empowering provision. It requires that when Parliament exercises its conferred power to make laws, it must do so in accordance with this Constitution. Section 37 does not *per se* oblige Parliament to make laws but requires that when Parliament exercises its power it does so in accordance with the Constitution. The Constitution "entrusts the legislative authority to Parliament in an open-ended way, without seeking to define specific terms of competence. The assumption is that Parliament will do what Parliaments do, namely make laws for the governance of the country, and find the necessary funds for their implementation."

Executive Council, Western Cape Legislature supra at 954I paragraph 200 (Sachs J)

19.3. The applicant's argument is based upon the inarticulate premise that section 37 imposes on Parliament a duty or obligation to revise every pre-constitutional statute so as to make such statute conform with the Constitution. In the absence of a duty or obligation of this nature it is untenable to suggest that the failure to change a law is an exercise of the power to make laws and therefore that

Parliament's inaction with respect to section 2(1)(b) of the Act amounts to an abdication.

19.4. There may be circumstances where the silence or inaction of Parliament becomes actionable. Such circumstances may only arise, however, where there is an obligation to act. Thus, for example, it is arguable that sections 15(2) and 29 of the Constitution may impose positive obligations on the State to act.

19.5. It is submitted, however, that neither the language nor the purpose of section 37 permit an interpretation of section 37 of the Constitution that would impose upon Parliament the kind of duty or obligation considered above.

19.6. It is submitted, furthermore, that to derive from section 37 of the Constitution a doctrine that Parliament exercises its law making power by inaction would lead to absurdity and would not be inconsistent with the purpose of the section.

THE APPLICANT'S EFFORTS TO REARGUE ITS CASE

20. At paragraphs 25 to 39, pp. 9-17 of its supplementary argument, the applicant attempts to reargue its case and to escape the implications of having abandoned its challenges to the Act based on Chapter 3 of the Constitution.

21. In response to this attempt the fourth respondent submits:

21.1. The authority to make administrative rules is not a delegation of legislative powers, nor are such rules raised from an administrative to a legislative character because violation thereof is punishable as a public offence.

United States v Grimaud 55 L.ed 563 (1920) at 569

21.2. Section 4(1) of the Act and the applicant's submissions with respect thereto are irrelevant to the issues before the Court. The applicant's challenge to the constitutional validity of section 2(1)(b) of the Act arises in the context of a refusal by the Minister to issue the applicant with a permit. It does not arise in the context of a criminal prosecution. If the applicant was charged with an offence, it would be entitled to assert its fundamental rights in resisting any prosecution. Until such time, the applicant's focus upon criminal prosecution is irrelevant and is not part of the referral to this Court.

21.3. The applicant's reliance on **R v Morales [1992] 3 SCR 711, 12 CRR (2d) 31 at 44-5** is misplaced. **Morales supra** concerned a fundamental right which had purportedly been infringed by the denial of bail. It is not applicable in the context of an argument about the limits of lawful delegation. It is submitted, furthermore, that the dissent in **Morales supra** has the better of the argument.

21.4. The simple answer to the applicant's hypothetical example is that the validity of the Minister's exercise of his power, and of the empowering legislation itself, would be subject to scrutiny, *inter alia*, under section 15(1) read with section 33(1) of the Constitution. It is conceivable that in the circumstances hypothesized by the applicant, section 2(1)(b) of the Act may be declared unconstitutional, not because it is an unlawful delegation of power, but because it constitutes a limit upon the right to freedom of expression which is not justifiable in terms of section 33(1) of the Constitution.

CONCLUSION

22. It is readily conceded that section 2(1)(b) of the Act is "subject to this Constitution". Nevertheless, the applicant's argument that section 37 of the Constitution renders unconstitutional a delegation of power pursuant to a pre-constitutional Act cannot succeed. There is no conflict or inconsistency between the provisions in question.

Section 37 of the Constitution allocates to the post-constitutional Parliament the power to make laws, and subjects that post-constitutional Parliament, in the exercise of its law making powers, to the dictates of the Constitution. No exercise of its powers by the post-constitutional Parliament is before this Court in this application.

23. In consequence the application should be dismissed, and the applicant should be ordered to pay the costs incurred under case No 12348/95 in the Transvaal Provincial Division and those occasioned by the referral to this Court, including in both instances, the costs of two counsel.

D M Fine SC

D B Spitz

CHAMBERS
JOHANNESBURG
22 March 1996