CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 13/99

GERHARDUS FRANCOIS JANSE VAN RENSBURG NO	First Applicant
OMEGA TRUST POWER MARKETING CC	Second Applicant
versus	
MINISTER OF TRADE AND INDUSTRY NO	First Respondent
LOUISE ARLENE TAGER NO	Second Respondent

Heard on : 31 August 2000

Decided on : 29 September 2000

JUDGMENT

GOLDSTONE J:

Introduction

[1] These proceedings concern the constitutionality of two provisions of the Consumer Affairs (Unfair Business Practices) Act[1] (the Act). The first is section 7(3) which authorises investigating officers appointed by the Consumer Affairs Committee[2] (the Committee) to

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1 Act 71 of 1988. The original name of the Act was the Harmful Business Practices Act. The name was changed by section 13 of the Harmful Business Practices Amendment Act 23 of 1999 (the Amendment Act), as were some of the provisions in the Act, including section 7(3).

2 The Committee is established by section 2 of the Act and consists of nine members appointed by the

conduct searches and seizures for the purpose of ensuring that the terms of the Act are being observed, or to obtain information relevant to an investigation launched by the Committee. The second is section 8(5)(a) which makes provision for the Minister of Trade and Industry (the Minister), on the recommendation of the Committee, to:

a. stay or prevent, for a period not exceeding six months, any unfair business practice which is the subject of an investigation; and

b. attach money or property related to an investigation.

Both of these procedures are effected by a notice issued by the Minister.

Minister of Trade and Industry ─

> "on the grounds of their special knowledge or experience of consumer advocacy, economics, industry, commerce or law, taking into account the need to ensure equitable representation."

Prior to the amendment of section 2 by the Amendment Act, the Committee consisted of between four and seven members who were appointed by the Minister─

> "on the grounds of their special knowledge of consumer affairs or knowledge of or experience in economics, industry, commerce, law or the conduct of public affairs . . ."

[2] On 26 October 1998, section 7(3) and section 8(5)(a) were declared to be constitutionally invalid by Van Dijkhorst J in the Transvaal High Court.[3] The declaration was ordered to take effect only from the date of confirmation by this Court. Further relief claimed by the applicants in respect of the constitutionality of the whole Act or alternatively in respect of other provisions of the Act was denied. The applicants were granted leave to appeal to the Supreme Court of Appeal (the SCA) against such denial.

[3] On 30 May 2000, when it became apparent that the applicants had abandoned their appeal, these confirmation proceedings were set down and the registrar was requested to bring directions relating to the hearing to the attention of the applicants and the respondents. That was done and the first applicant informed the director of this Court telephonically on 7 July 2000 that neither he nor the second applicant would be participating in the confirmation proceedings. An undertaking to confirm this in writing was not fulfilled. In the circumstances the Minister was the only party who participated in the hearing in this Court.

[4] Rule 15(1) of the rules of this Court requires the registrar of a court that has made an order of constitutional invalidity to lodge a copy thereof with the registrar of this Court within 15 days of such order. The registrar of the Transvaal High Court was under the impression that, as there was an appeal to the SCA, its registrar would have the duty of lodging with this Court any order of constitutional invalidity that might be made by the SCA. That is clearly incorrect and

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3 *Gerhardus Francois Janse Van Rensburg NO v Die Minister van Handel en Nywerheid NO* (TPD) Case No 22658/98, 22 October 1998, unreported.

the order made in this case should have been lodged by the registrar of the High Court within 15 days of the order made by Van Dijkhorst J.

[5] The provisions for the lodging of orders of constitutional invalidity with this Court are of substantial importance. Public interest dictates that there should be certainty as to the constitutionality of all legislation, and one of the reasons for the rule is that the operation of such orders should not be held in abeyance for longer than necessary. The registrar of any court that has made an order of constitutional invalidity should thus adhere strictly to the provisions of rule 15(1).

[6] On 21 August 2000, ten days prior to the hearing of this matter, the Law Review Project (the LRP), a non-profit association which promotes the free participation by all persons in the economy, sought leave to be admitted as an *amicus curiae* and to make representations in support of the order of constitutional invalidity. The director of this Court referred the LRP to the provisions of rule 9 of the rules of this Court and advised it to seek the consent of the Minister to its admission as an *amicus curiae*.[4] The LRP approached the state attorney but

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[4] In so far as is relevant, rule 9 provides:

> ". . . any person interested in any matter before the Court may, with the written consent of all the parties in the matter before the Court, given not later than the time specified in sub-rule (5), be admitted therein as an *amicus curiae* upon such terms and conditions and with such rights and privileges as may be agreed upon in writing with all the parties before the Court or as may be directed by the President in terms of sub-rule (3)."

Where the other parties do not consent, the President of the Court may nonetheless, on application, admit the person as an *amicus curiae* on such conditions as he or she may determine.

Sub-rule (6) provides:

> "An application to be admitted as an *amicus curiae* shall -
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> (a) briefly describe the interest of the *amicus curiae* in the proceedings;
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> (b) briefly identify the position to be adopted by the *amicus curiae* in the proceedings;
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> (c) set out the submissions to be advanced by the *amicus curiae*, their

received no response prior to the hearing of the matter. When the matter was called, Mr Tee, on behalf of the LRP, sought leave for its admission as an *amicus* despite the failure to comply with the provisions of rule 9. Had the applicants been represented in the appeal, the leave sought by the LRP may well have been denied. The fact that the LRP had not been aware of these proceedings until shortly before 21 August 2000, and the absence of argument in support of the order of constitutional invalidity, constituted exceptional circumstances. Moreover, counsel for the Minister indicated that he was ready to deal with the arguments of the *amicus* and did not oppose the application. We thus agreed to admit the LRP as an *amicus curiae* and to hear oral argument from its counsel.

The Proceedings in the High Court

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relevance to the proceedings and his or her reasons for believing that the submissions will be useful to the Court and different from those of the other parties."

Under sub-rule (8), unless otherwise ordered, the *amicus curiae* may not advance oral argument.

[7] The first applicant is a trustee of the second applicant. According to him, the business of the second applicant is to market the Omega Trust, an organisation which aims to promote consumer power by means of collective bargaining. It is not necessary, for the purposes of this judgment, to consider the method of business adopted by the second applicant. Suffice it to say that, after conducting an informal investigation into the business of the second applicant, the Committee decided to launch a formal investigation under section 8(1)(a) of the Act to determine whether the business of the second applicant constituted what was then called a "harmful business practice".[5] Thereupon the applicants launched urgent proceedings in the High Court in which they sought an order declaring the whole Act or specific provisions thereof to be constitutionally invalid. Although the powers of the Committee under sections 7(3) and 8(5) of the Act had not been used or threatened, the applicants feared that they would be used against them. The learned judge in the High Court held that their fear was reasonable and that they had standing to claim the relief they sought. After considering the attacks made by the applicants against the Act, Van Dijkhorst J held that the provisions of sections 7(3) and 8(5)(a) were unconstitutional and invalid.

The Declaration of Invalidity in Respect of Section 7(3)

[8] Van Dijkhorst J held that section 7(3) of the Act, as it then read, constituted a clear

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5 Since the amendment of the Act by section 1 of the Amendment Act, it has been called an "unfair business practice". "Unfair business practice" is defined in section 1 of the Act as follows:

> "[A]ny business practice which, directly or indirectly, has or is likely to have the effect of—
> (a) harming the relations between businesses and consumers;
> (b) unreasonably prejudicing any consumer;
> (c) deceiving any consumer; or
> (d) unfairly affecting any consumer."

infringement of the right to privacy guaranteed by section 14 of the Constitution,[6] because it sanctioned search and seizure without any judicial authorisation. He held further that it was not

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[6] Section 14 provides:

"Everyone has the right to privacy, which includes the right not to have—

(a) their person or home searched;
(b) their property searched;
(c) their possessions seized; or
(d) the privacy of their communications infringed."

saved by the limitation provisions contained in section 36 of the Constitution.[7]

[7] Section 36 provides:

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

Subsequent to the judgment of Van Dijkhorst J, the provisions of section 7(3) of the Act were amended by the Amendment Act.[8] The primary change introduced by the amendment is that any search or seizure conducted by an investigating officer in the absence of the written consent of the owner or person in charge of the premises now requires a search warrant to be issued by a magistrate.[9]

8 Above n 1.

9 Section 7(3A) of the Act.

[9] Counsel for the Minister submitted that the provisions of the amended section 7(3) were not before the High Court and that the declaration of invalidity of the original provision had become moot. More specifically, he submitted that the High Court was not called upon to consider the provisions of section 7(3) as they now read, nor were they before this Court in these confirmation proceedings. I agree. This Court has held that an issue is moot if it does not present an existing or live controversy; such an issue is not justiciable.[10] Here we cannot consider the constitutionality of section 7(3) in its amended form and we should accordingly express no opinion thereon. The only persons who could now be prejudiced by the section as it previously read would be those who might have been subjected to a search or seizure executed prior to 14 May 1999, the date of commencement of the Amendment Act. No such person approached this Court and there is nothing before us to suggest that there is anyone in that position. In any event, if any person has been prejudiced by any action taken under section 7(3) in its original form, that is a matter that could be considered by an appropriate court. The basis on which the applicants approached the High Court in respect of section 7(3) of the Act has fallen away and the confirmation of the order can serve no purpose.[11]

[10] Mr Tee, however, sought to persuade us that we should confirm the order of constitutional invalidity of section 7(3) on a different basis. He submitted that the High Court erred in not holding the definition of "harmful business practice" unconstitutional, and that this

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10 *President, Ordinary Court Martial and Others v Freedom of Expression Institute and Others* 1999 (4) SA 682 (CC); 1999 (11) BCLR 1219 (CC) at para 8; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 21 n 18.

11 *President, Ordinary Court Martial* above n 10 at paras 16-18.

error opened section 7(3) to a constitutional attack that remained live despite the amendment. This argument is untenable. The concept and definition of "harmful business practice" have been replaced with those relating to "unfair business practice". The finding of the High Court in relation to the former is thus also moot. It follows that we should make no order in respect of the confirmation proceedings relating to section 7(3).

The Declaration of Invalidity in Respect of Section 8(5)(a)

[11] Section 8(5)(a) of the Act was not amended by the Amendment Act and we are thus called upon to consider whether the order made in respect of its constitutionality by the High Court should be confirmed. In order to appreciate the terms of the section it is necessary to locate its provisions in the scheme of the Act.

[12] Under the Act, the Committee is charged with investigating what are now called "unfair business practices". In terms of section 8(1) of the Act the Committee may institute such investigations into an unfair business practice on its own initiative and can be obliged to do so by the Minister. Under section 5 the Committee is given wide powers to summon people to testify for the purposes of an investigation and can compel them to produce any book, document or object in their possession which might relate to such an investigation. A refusal to comply with a summons is visited with criminal sanction. I have already referred to the search and seizure powers conferred on investigating officers appointed by the Committee.[12] Under section 8(4) the Committee is obliged to make known, by notice in the Government Gazette, any investigation it proposes to undertake. The notice must also state that any person affected by such an

12 Above para 8.

investigation may make representations in writing to the Committee regarding the investigation. A period of not less than fourteen days must be afforded for the submission of such representations.

[13] The President is authorised by section 13(2) of the Act to establish a special court. This court consists of a president, who is required to be a judge of a High Court designated by the Chief Justice, and two other members appointed by the president of the court from nominees on a list compiled by the Minister after holding interviews. Under section 13(13)(a) the decision of a special court is subject to appeal. The appeal procedures are those applicable to a special income tax court.[13]

[14] After receiving a report of an investigation by the Committee the Minister is empowered by section 12 of the Act to declare the unfair business practice unlawful by notice in the Government Gazette, and to direct any person involved in such unfair business practice to take such action as the Minister may consider necessary to ensure the discontinuance or prevention of such practice. The powers conferred on the Minister are very wide and include, for example, the power to dissolve any body, corporate or incorporate.[14] If money was accepted from consumers,

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13 Under section 86A(2) of the Income Tax Act 58 of 1962, such an appeal shall lie:

> "(a) to the provincial division of the High Court having jurisdiction in the area in which the sitting of the special court was held; or
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> (b) where the President of the special court has granted leave under subsection (5), to the Supreme Court of Appeal, without any intermediate appeal to such provincial division."

14 Section 12(1)(b) of the Act provides:

> "(1) If the Minister, after consideration of a report by the committee in terms of section 10(1) in relation to an investigation in terms of section 8(1)(a), is of the opinion that a unfair business practice exists or may come into existence and is not satisfied that the unfair business practice is justified in the public interest,

the Minister may:

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and has not confirmed an arrangement which may have been made in terms of section 9(1) or 11(1)(a) in respect of the unfair business practice, the Minister may—

(a) . . .

(b) by notice in the *Gazette* declare the said unfair business practice to be unlawful, and direct any person who in the opinion of the Minister is concerned in the unfair business practice to take such action, including steps for the dissolution of any body, corporate or unincorporate, or the severance of any connection or form of association between two or more persons, including any such bodies, as the Minister may consider necessary to ensure the discontinuance or prevention of the unfair business practice."

"appoint a curator, with the concurrence of the special court, in order to realize the assets of the person involved in the unfair business practice and to distribute them between the consumers concerned and to take control of and manage the whole or any part of the business of such a person."[15]

[15] I turn now to consider section 8(5)(a) of the Act:

> "After such a notice relating to an investigation in terms of subsection (1) (a) has been published and before the relevant report is submitted to him the Minister may, on the recommendation of the committee—
>
> (i) prescribe by notice in the *Gazette*, for a period specified in the notice, but not exceeding the period of six months referred to in subsection (3), such action as in the opinion of the Minister shall be taken to stay or prevent any unfair business practice which is the subject of the investigation and which the Minister has reason to believe exists or may come into existence;
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> (ii) by notice in writing or by notice in the *Gazette*—
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> (aa) attach any money or other property whether movable or immovable which is related to such investigation and which is held by any person on account or on behalf of or for the benefit of a person mentioned in the notice, or of a customer, debtor or creditor of the person mentioned in the notice, until a curator referred to in section 12 (2) takes that money or other property into his possession;
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> (bb) prohibit a person mentioned in the notice from withdrawing or otherwise dealing with any money or movable or immovable property mentioned in the notice."

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15 Section 12(1)(d) of the Act.

Section 8(7) provides that any person who fails to comply with a notice under section 8(5) is guilty of an offence. The penalty provided by section 15 is a fine not exceeding R20 000 or imprisonment for a period not exceeding two years, or both.

[16] Section 13(1) of the Act confers a right of appeal to the special court upon any person affected by a notice under section 8(5)(a). In terms of section 13(5) notice of such an appeal must be lodged in writing with the Minister who is required to give notice of that lodging in the Government Gazette. The president of the special court then determines the date, time and place for the hearing of the appeal.[16]

16 Section 13(6) of the Act.

[17] Van Dijkhorst J held that section 8(5)(a) is a drastic and absolutely discretionary provision that does not provide for the application of the *audi alteram partem* principle, and that empowers the Minister to act on untested allegations and a preliminary opinion. Therefore the judge held that section 8(5)(a) violates the provisions of the following sections of the Constitution: section 22 (freedom of trade, occupation and profession),[17] section 25(1) (property),[18] and section 33 (just administrative action).[19] During argument in this Court there was debate as to whether the provisions under consideration also violated section 34 (access to courts)[20] of the Constitution. As I have come to the conclusion that the provisions of section 8(5)(a) violate section 33 of the Constitution it is not necessary to consider whether they are also inconsistent with the other provisions of the Bill of Rights to which I have just referred.

[18] Section 33 of the Constitution provides:

> "(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
>
> (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

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17 Section 22 provides:
"Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."

18 Section 25(1) provides:
"No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

19 Below paras 18-19.

20 Section 34 provides:
"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

(3) National legislation must be enacted to give effect to these rights, and must—

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration."

Item 23(1) of the Sixth Schedule to the Constitution provides that the national legislation envisaged in section 33(3) of the Constitution must be enacted within three years of 4 February 1997, the date on which the Constitution took effect. Item 23(2)(b) provides that until the legislation envisaged by section 33(3) of the Constitution has been "enacted", section 33(1) and (2) must be regarded to read as follows:

"Every person has the right to—

(a) lawful administrative action where any of their rights or interests is affected or threatened;

(b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;

(c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and

(d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened."

[19] This matter came before the High Court during the three-year period referred to in item 23(1) of the Sixth Schedule and accordingly the provisions of item 23(2)(b) were applicable then. In this case the analysis and conclusions which follow would be no different whether we apply the provisions of section 33(1) of the Constitution as they read or as they are deemed to read

under item 23(2)(b). Under both, the provisions of section 8(5)(a) fail to meet the requisites of administrative action that is "lawful, reasonable and procedurally fair" on the one hand, or "lawful" and "procedurally fair" on the other. Consequently it is not necessary to decide which of the two provisions is applicable here.

[20] Counsel for the Minister submitted that the provisions of section 8(5)(a) must be read subject to the relevant provisions of the Constitution, and specifically that the requirements of procedurally fair administrative action must be read into the section. He therefore submitted that:

a. the Committee is obliged to grant a hearing to persons who would be affected by a decision to hold an investigation under section 8(1)(a) prior to making a decision to hold such an investigation;

b. the Committee is obliged to grant a hearing to the affected persons before it recommends to the Minister that a section 8(5)(a) notice should be published; and

c. the Minister is obliged to grant a hearing to persons affected by an order that the Minister might wish to make under section 8(5)(a) prior to making it or, if that is impracticable, after it has been made.

[21] In order to evaluate these submissions it is necessary to consider the purpose of the provisions of section 8(5)(a). Commercial schemes calculated to take unfair advantage of members of the public have long been a common feature in many business communities. And so, too, have been statutory attempts to curb them.[21] One of the difficulties in this branch of the

[21] See, for example, in Australia, the Trade Practices Act of 1974; in Canada, the Competition Act of 1985; in

law is that it is necessary to protect the public not only from unlawful schemes but also from those that, although lawful, are unfair or harmful to members of the public. This is especially so in relation to those members of the public who can least afford to part with their scarce and hard-earned money.

[22] Section 8(5)(a) was designed to protect the public by giving the Minister the power to stay business practices and to attach assets or prohibit their being dealt with. These powers ensure that during the period of investigation by the Committee, the persons subject to that investigation are prevented from continuing the allegedly unfair practices, and alienating or hiding assets in order to defeat prospective claims by or on behalf of members of the public. The purpose is to protect the possible victims of any unfair business practice. By its very nature it must be an urgent and incisive procedure if it is to have the desired effect. If notice is given to the person or persons against whom the section is to operate, the purpose of the action under the section will more than likely be frustrated. It follows that if the section were to be read as requiring the hearings referred to by counsel for the Minister, the whole purpose of the provision would be defeated. The section is accordingly not reasonably capable of the construction that the

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India, the Monopolies and Restrictive Trade Practices Act 54 of 1969; in New Zealand, the Fair Trading Act of 1986; in the United Kingdom, the Fair Trading Act of 1973; and in the United States, the Federal Trade Commission Act of 1914 and associated legislation. The first attempt by the South African parliament to control unfair business practices is to be found in the Trade Practices Act 76 of 1976. It was replaced by the Act.

Minister's counsel seeks to place on it.[22]

22 *Dzukuda and Others* (CC) Case CCT 23/00, 27 September 2000, as yet unreported, at para 37 and the authorities there cited.

[23] I am prepared to assume in favour of the Minister that it is reasonably necessary to make provision in the Act for an urgent procedure to suspend the allegedly unfair business practice and to ensure that the property of persons who conduct business in such a way as to constitute an unfair business practice is not alienated or hidden.[23] However, the way in which this has been done in section 8(5)(a) has the following features:

a. the Minister is empowered to stay a business practice and attach or freeze assets merely by giving notice of his or her decision under section 8(5)(a)(i) and (ii) to do so;

b. the Minister can take this action immediately after he or she gives the notice and before the expiry of the 14 day period allowed by section 8(4) for any person to make representations to the Committee regarding its proposed investigation;

c. these actions may be taken without prior warning to persons affected by them;

d. the Minister may stay or prevent a business practice for a period of up to six months;

e. the persons who might be affected by action under section 8(5)(a)(ii) include anyone who possesses property, movable or immovable, that is related to the investigation. In other words, the assets of persons who are not even mentioned in the section 8(5)(a)(ii) notice may be attached and frozen, and the owners

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23 *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC) at para 27.

thereof may be prohibited from dealing freely with the property referred to in the notice;

f. depending upon the proper interpretation of section 8(5)(a)(i) and (ii), (an issue not now before us), attachment of property by the Minister persists for a period of up to six months or for an indefinite period;

g. ministerial action under either section 8(5)(a)(i) or (ii) may be fatal to the businesses affected thereby;

h. whilst the powers given to the Minister to stay or prevent an allegedly unfair business practice, or to attach or freeze assets are sweeping and drastic, the legislature has failed to provide sufficient guidance for their exercise;

i. notice under sections 8(5)(a)(i) or (ii) need not specify any reasons for the stay or prevention of the allegedly unfair business practice or the attachment or freezing of assets;

j. the irreparable harm that is likely to follow upon a notice might not be averted by an appeal in due course to a special court.

[24] These features must be weighed against the requirements of administrative justice.[24] In doing so it must be appreciated that one of the enduring characteristics of procedural fairness is its flexibility. The application of procedural fairness must be considered with regard to the facts and circumstances of each case.[25] In modern states it has become more and more common to

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24 Above paras 18-19.

25 *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 216.

grant far-reaching powers to administrative functionaries.[26] The safeguards provided by the rules of procedural fairness are thus all the more important, and are reflected in the Bill of Rights. Observance of the rules of procedural fairness ensures that an administrative functionary has an open-mind and a complete picture of the facts and circumstances within which the administrative action is to be taken.[27] In that way the functionary is more likely to apply his or her mind to the matter in a fair and regular manner.

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26 See Galligan "Discretionary Powers in the Legal Order: The Exercise of Discretionary Powers" in Galligan (ed) *A Reader on Administrative Law* (Oxford University Press, Oxford 1996) at 274.

27 Wiechers *Administrative Law* (Butterworths, Durban 1985) at 226-7.

[25] Every conferment by the legislature of an administrative discretion need not mirror the provisions of the Constitution or the common law regarding the proper exercise of such powers. However, as this Court has already held (in the context of a limitations analysis), the constitutional obligation on the legislature to promote, protect and fulfil the rights entrenched in the Bill of Rights entails that, where a wide discretion is conferred upon a functionary, guidance should be provided as to the manner in which those powers are to be exercised.[28] The absence of such guidance, together with the cumulative effect of the other features referred to in paragraph 23 above, render the procedure provided in section 8(5)(a) unfair and a violation of the protection afforded by section 33(1),[29] whichever text is applicable.[30]

[26] Counsel for the Minister conceded that if the provisions of section 8(5)(a) were inconsistent with the Bill of Rights it is not possible to justify them under the limitation provisions contained in section 36 of the Constitution. No evidence was placed before the High Court to justify the violation and none was placed before this Court. A case for justification was not established. The order of constitutional invalidity made by the High Court in respect of section 8(5)(a) of the Act should thus be confirmed.

An Appropriate Order

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28 *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (8) BCLR 837 (CC) at paras 42-48.

29 The powers conferred upon the Minister by section 12(1) of the Act may also be of concern because they too confer a wide discretion without any guidance as to their exercise by the Minister.

30 Above paras 18-19.

[27] The Minister has requested that, in the event of this Court confirming the order of invalidity, it should suspend the effect of the order and allow the legislature a period of one year to amend section 8(5)(a). If that is not done, so it was submitted, unscrupulous people might well take advantage of the chink in the armour of the Committee and the Minister, to the detriment of members of the public. This is a legitimate concern and will be addressed in the order.

[28] When deciding a constitutional matter within its power, this Court has broad remedial discretion to make a just and equitable order.[31] In *Dawood* we made an order of constitutional invalidity based on a legislative omission to provide criteria guiding the exercise of a statutory discretion.[32] This Court determined that it would be inappropriate in that case to remedy the omission in the legislation.[33] The order of invalidity was suspended subject to appropriate conditions pending legislative remedial action. Here too, the inconsistency with the Constitution lies in a legislative omission. As such it cannot be cured by actual or notional severance.[34] The task of determining what constitutional procedure should be put in place to enable an urgent injunctive order to be made where there is a suspected unfair business practice is primarily a matter for the legislature and not for this Court. The legislature might decide that, as in some

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[31] In terms of section 172(1)(b) of the Constitution:

> "When deciding a constitutional matter within its power, a court—
> (b) may make any order that is just and equitable, including—
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[32] *Dawood* above n 28 at para 61.

[33] Id at para 63.

[34] *National Coalition for Gay and Lesbian Equality* above n 9 at paras 63-64; *Dawood* above n 28 at para 61.

other jurisdictions, it should be left to the courts or special tribunals to consider and make such orders,[35] or it might wish to continue to vest that power in the Minister subject to appropriate legislative guidance. There are a range of legislative choices.

[29] In the circumstances of this case, I agree with counsel for the Minister that it would not be in the public interest simply to strike down section 8(5)(a) and create a situation, until remedial legislation is enacted, in which persons who are under investigation for unfair business

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35 For example, in Australia, the Trade Practices Act of 1974 establishes an Australian Competition and Consumer Commission and empowers the Commission, the requisite Minister, or "any other person" (including private persons and organisations and even trade competitors) to obtain an injunction from a Federal Court to prohibit actual or prospective unfair business conduct. See Taperell et al *Trade Practices and Consumer Protection: A Commentary on the Trade Practices Act 1974* 3ed (Butterworths, Sydney 1983) at paras 1631-3; and Turner *Australian Commercial Law* 22ed (LBC Information Services, Sydney 1999) at 349-52. In Canada, the Competition Act R.S.C. 1985, c. C-34, as amended, allows the Director of the Competition Bureau to conduct preliminary investigations and if appropriate, apply to the Competition Tribunal for interim orders. The Tribunal considers the application with regard to the "principles ordinarily considered by superior courts when granting interlocutory or injunctive relief." See Flavell and Kent *The Canadian Competition Law Handbook* (Carswell, Ontario 1997) at 47.

practices are able to continue those business practices, or to dissipate or hide assets with impunity. At the same time it is inappropriate that the Minister should be able to exercise an unfettered and unguided discretion in situations so fraught with potentially irreversible and prejudicial consequences to business people and others who may be affected. It would be more appropriate to adopt the *Dawood* approach and suspend the order of invalidity on condition that the Minister exercises the powers under section 8(5)(a) subject to the guidance given in the order.

[30] Before turning to these appropriate conditions I wish to emphasise that they are not intended to be a guide to the legislature in its consideration of legislation to replace the provisions which have been held to be unconstitutional and invalid. They are intended to be no more than a temporary measure applied during the period the legislature might require to give appropriate consideration to remedial legislation.

[31] In other common law jurisdictions relief is granted by courts or special tribunals applying common law principles. Over a period of many years, in situations similar to those envisioned in section 8(5)(a), our common law has contemplated injunctive relief.[36] It seems appropriate to look there for guidance and borrow from it to the extent that it is compatible with the Constitution and the purposes of the Act. In doing so we are not, nor should we be understood to be, attempting in any way to develop or influence the common law in relation to interdicts: what follows should not be used as precedent in that area of the law.

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[36] *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) at 371G-373H.

[32] As stated recently by the SCA:

> "The legal principles governing interim interdicts in this country are well known. They can be briefly restated. The requisites are:
>
> (a) a *prima facie* right;
>
> (b) a well-grounded apprehension of irreparable harm if the relief is not granted;
>
> (c) that the balance of convenience favours the granting of an interim interdict; and
>
> (d) that the applicant has no other satisfactory remedy."[37]

Similar requirements have been applied for the grant of interim interdicts restraining unlawful business conduct.[38]

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37 *Hix Networking Technologies v System Publishers (Pty) Ltd and Another* 1997 (1) SA 391 (A) at 398I-J.

38 Joubert "Unlawful Competition" in Joubert et al, *The Law of South Africa* (*Lawsa*) first reissue (Butterworths, Durban 1998) vol 2 at par 399 n 70.

[33] However, the common law governing interdicts to restrain the alienation or free use of assets has a further requirement. In the context of an application for an ex parte interdict to restrain the respondents from dissipating or hiding assets, E M Grosskopf JA referred with approval to the general requirements for an interim interdict.[39] He also emphasised an additional factor to be considered where an interdict is sought to prevent a respondent from "freely dealing with his own property to which the applicant lays no claim." He held that such an applicant:

> "[needs to] show a particular state of mind on the part of the respondent, ie that he is getting rid of the funds, or is likely to do so, with the intention of defeating the claims of creditors."[40]

[34] Having regard to the approach of the common law, I would suggest that the guidance contained in the order below in paragraph 36 will, in the interim, provide adequate protection against an arbitrary exercise of power to a person against whom action may be taken under section 8(5)(a). In particular, the standards are objective and can therefore be made the subject of review proceedings.

[35] Given the nature and effect of the action taken and especially the risk of irreparable harm

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39 *Knox D'Arcy* above n 36 at 361C-F.

40 Id at 372F-G.

to a person who may well be innocent of any wrong-doing, such action under section 8(5)(a) should be taken by the Minister with extreme caution. Furthermore, the person against whom such action has been taken should be placed in a position to contest the basis upon which it was issued at the earliest appropriate time. In order to achieve this end the Minister should be obliged to inform the person against whom the notice is issued, in a written statement, of the facts on which he or she relied to satisfy himself or herself of the factors referred to below in paragraph 36. This statement should also advise the recipient that he or she has the right under section 13(1) of the Act to appeal the action of the Minister to the special court or to take it on review to an appropriate court. The written statement should be furnished at the same time as the notice is given under section 8(5)(a).

The Order

[36] The following order is made:

1 No order is made regarding the confirmation proceedings in respect of the declaration of constitutional invalidity of section 7(3) of the Consumer Affairs (Unfair Business Practices) Act 71 of 1988 (the Act).

2 The order of constitutional invalidity in respect of section 8(5)(a) of the Act is confirmed.

3 The order of constitutional invalidity referred to in paragraph 2 of this order is suspended for a period of 12 months from the date of this order to enable Parliament to correct the defects that have resulted in the declaration of invalidity.

4.1 Pending the enactment of legislation by Parliament or the expiry of the period

referred to in paragraph 3 of this order, whichever is the sooner, the Minister of Trade and Industry (the Minister) may not take action under section 8(5)(a) of the Act unless he or she:

a has a reasonable suspicion that there exists an unfair business practice involving the person under investigation;

b has a reasonable apprehension that without such action the public will be irreparably harmed;

c is satisfied that there is no alternative remedy; and

d is satisfied that, having weighed the foregoing factors, the prospect of harm to the public if the order were not granted outweighs the harm to the interests of the affected person or persons if the order were granted.

4.2 The Minister may not take action under section 8(5)(a)(ii) unless, in addition to satisfying the conditions stipulated in paragraph 4.1 of this order, he or she also has a reasonable suspicion that the person to be interdicted has or will have the intention to defeat the claims of the public by concealing or dissipating assets.

5 At the same time that the notice under either section 8(5)(a) subparagraph (i) or (ii) of the Act is issued, the Minister must furnish any person named in the notice with a written statement containing the facts on which he or she relied to satisfy himself or herself of the factors referred to in paragraphs 4.1 and 4.2 of this order. This statement should also advise the recipient that he or she has the right under section 13(1) of the Act to appeal the action of the Minister to the special court or to take it on review to an appropriate court. The written statement should be furnished at the same time as the notice is given under section 8(5)(a).

6 There is no order as to costs.

Chaskalson P, Langa DP, Ackermann J, Kriegler J, Mokgoro J, Ngcobo J, O'Regan J, Sachs J, Yacoob J and Madlanga AJ concur in the judgment of Goldstone J.

For the respondents: Advocate JL van der Merwe SC and Advocate O Matjila instructed by the State Attorney, Pretoria.

For the *amicus curiae*: Advocate NJ Tee instructed by the Law Review Project.