CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 59/06
[2007] ZACC 17

MICHAEL HERMANN ARMBRUSTER	First Applicant
MA TECHNOLOGIES CC	Second Applicant
versus	
THE MINISTER OF FINANCE	First Respondent
THE DIRECTOR-GENERAL, DEPARTMENT OF FINANCE	Second Respondent
THE SOUTH AFRICAN RESERVE BANK	Third Respondent
ANITA LOUISE BIRKENBACH NO	Fourth Respondent

Heard on : 21 November 2006

Decided on : 25 September 2007

JUDGMENT

MOKGORO J:

Introduction

[1] This case deals with the seizure and forfeiture of foreign currency under the Exchange Control Regulations[1] (the regulations) and the constitutional validity of the

[1] Promulgated under section 9 of the Currency and Exchanges Act 9 of 1933 (the Act), which empowers the Governor-General to make Exchange Control Regulations. The regulations were published under GN R1111 in *GG Extraordinary* 123 of 1 December 1961.

forfeiture provision. It is an application for leave to appeal against a judgment and order of the Pretoria High Court.[2]

[2] Mr Michael Hermann Armbruster is the first applicant; the second applicant is MA Technologies CC, a closed corporation of which Mr Armbruster is the sole member. The first respondent is the Minister of Finance; the second respondent is the Director-General of the Department of Finance; the third respondent is the South African Reserve Bank (SARB); and the fourth respondent is a manager in the Exchange Control Department of the Treasury and the functionary designated to apply and administer the regulations.[3]

Background

[3] On 18 June 2004, the first applicant was found in possession of a large amount of foreign currency at a security checkpoint in the international departure section of O R Tambo Airport in Johannesburg.[4] The currency, with a rand value of R102 675, 65, was subsequently seized by a customs official of the Department of Customs and Excise of the South African Revenue Services (SARS).

[4] Following the seizure, the official, Mr Collen Khoza, made an affidavit stating:

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[2] *Michael Hermann Armbruster and Another v The Minister of Finance and Others* Case No 6325/2005, 9 May 2006, unreported.

[3] This application was heard on the same day as that of *Gary Walter Van der Merwe and Another v Inspector Taylor and Others* CCT 45/06 (the *Van der Merwe* matter) which also concerned the seizure of foreign currency.

[4] Then called the Johannesburg International Airport.

"I asked him for proof from an authorised dealer; he told me that he does not have the proof since the money was not used from his previous travel."

[5] On 23 June 2004 Mr Armbruster wrote to SARS explaining that he wanted to take the money out of the country to expand his new business in the United Arab Emirates (UAE). The Treasury[5] responded in writing and informed him that the seizure was based on his violating Regulations 3(1)[6] and/or 3(3)[7] and/or 3(6) and the

[5] SARS is part of the Treasury.

[6] Regulation 3(1) provides:

"(1) Subject to any exemption which may be granted by the Treasury or a person authorised by the Treasury, no person shall, without permission granted by the Treasury or a person authorised by the Treasury and in accordance with such conditions as the Treasury or such authorised person may impose—

(a) take or send out of the Republic any bank-notes, gold, securities or foreign currency, or transfer any securities from the Republic elsewhere; or

(b) send, consign or deliver any bank-notes, gold, securities or foreign currency to any person for the purpose of taking, sending or removing such bank-notes, gold, securities or foreign currency out of the Republic; or

(b) *bis* take any South African bank-notes into the Republic or send or consign any such notes to the Republic; or

(c) make any payment to, or in favour, or on behalf of a person resident outside the Republic, or place any sum to the credit of such person; or

(d) draw or negotiate any bill of exchange or promissory note, transfer any security or acknowledge any debt, so that a right (whether actual or contingent) on the part of such person or any other person to receive a payment in the Republic is created or transferred as consideration—

(i) for the receiving by such person or any other person of a payment or the acquisition by such person or any other person of property, outside the Republic; or

(ii) for a right (whether actual or contingent) on the part of such person or any other person to receive a payment or acquire property outside the Republic;

or make or receive any payment as such consideration; or

(e) grant any financial assistance to any person in the Republic, where as security for such financial assistance, the person granting the financial assistance in turn relies on any security, guarantee, undertaking or financial assistance, directly or indirectly furnished by—

(i) any person resident outside the Republic; or

(ii) an affected person;

(f) grant any financial assistance to any person in the Republic, where such person—

(i) is not resident in the Republic; or

currency would be forfeited under Regulations 3(5)[8] and/or 3(8), unless the Treasury decided that the currency would not be forfeited and would be returned to him. Mr Armbruster was invited to make written representations to the Treasury on why the currency should not be forfeited.

[6] On 8 August 2004 Mr Armbruster made representations on affidavit explaining that the money was meant for expanding his new UAE business venture, that the money spent to buy the foreign currency had been lawfully earned from his previous employment, and included his retrenchment remuneration. He added that he had had "bad experiences" with South African commercial banks, trying to purchase foreign currency in the official way and had, over a substantial period, been approaching German tourist groups to obtain foreign exchange from them. He had not kept detailed record of these transactions. He says that it is only now that he recognises that his conduct might not have been entirely consistent with the provisions of the regulations.

[7] Less than a week later, the applicants' attorney sent another letter to SARS stating that setting up business in the UAE would cost approximately R300 000, but the regulations generally prohibited the transfer of this amount to foreign operations. Although there were procedures which he could have followed to legalise the transfer,

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(ii) is an affected person."

[7] See para [38] below.

[8] Id.

he was not aware of them and had not made any inquiries in that regard as he had been under pressure of time. The letter concluded:

> "5.1 . . . . The tax legally owed by Mr Armbruster to the South African Revenue Services in respect of the monies earned by him was paid and the foreign exchange obtained does not represent so-called 'hot money' or funds gained from illegal activities.
>
> 5.2 Mr Armbruster has never before contravened any laws of the Republic of South Africa or Foreign Exchange Regulations.
>
> 5.3 To a large extent the reason as to why Mr Armbruster contravened the Foreign Exchange Regulations was ignorance. Had he followed the proper procedure and had he made a properly motivated application to yourselves he would in all probability have been granted permission to obtain the necessary foreign currency so as to set up a sister company in the United Arab Emirates.
>
> 5.4 In the event of the foreign currency confiscated being forfeited Mr Armbruster will, by implication, be penalised and/or fined for an amount equal to this currency, which, having regard to the nature of Mr Armbruster's offence/contravention seems inappropriate as the punishment will not suit the 'crime'. In fact, it would impose a punishment that would shock the South African society's norms of justice and fairness.
>
> 5.5 It is our respectful submission that a fine of approximately R2000.00 would be a suitable punishment for the offence committed and we would suggest that an amount of R2000.00 of the foreign exchange confiscated be forfeited to the State."

[8] The Treasury by letter conveyed the reasons for its decision not to refund the currency:

> "No annotation has been made in the records of the South African Reserve Bank that any exemption from the provisions of the Exchange Control Regulations has been granted to Mr Armbruster;

contraventions or suspected contraventions of Exchange Control Regulations 2(1),[9] 3(1)(a), 10(1)(c)[10] read with 22."[11] (Footnotes added.)

[9] The applicants subsequently launched an application in the High Court for essentially the review and setting aside of the Treasury's decision. The first and second respondents did not oppose the application stating they would abide the Court's decision. The SARB opposed the application stating that:

> "2.2 After considering all of the abovementioned documentation and the applicable Exchange Control Regulations in terms of the provisions of Regulation 3(5), I made the decision not to refund the foreign currency which had been seized as I was of the opinion that the facts before me justified the retention of the foreign currency. My opinion was based on the fact that

[9] Regulation 2(1) provides:

> "Except with permission granted by the Treasury, and in accordance with such conditions as the Treasury may impose, no person other than an authorised dealer shall buy or borrow any foreign currency or any gold from, or sell or lend any foreign currency or any gold to any person not being an authorised dealer."

[10] Regulation 10(1)(c) provides:

> "No person shall, except with permission granted by the Treasury and in accordance with such conditions as the Treasury may impose-
>
> (c) enter into any transaction whereby capital or any right to capital is directly or indirectly exported from the Republic."

[11] Regulation 22 provides:

> "Every person who contravenes or fails to comply with any provision of these Regulations, or contravenes or fails to comply with the terms of any notice, order, permission, exemption or condition made, conferred or imposed thereunder, or who obstructs any person in the execution of any power or function assigned to him by or under these Regulations, or who makes any incorrect statement in any declaration made or return rendered for the purposes of these Regulations (unless he proves that he did not know, and could not by the exercise of a reasonable degree of care have ascertained, that the statement was incorrect) or refuses or neglects to furnish any information which he is required to furnish under these Regulations, shall be guilty of an offence and liable upon conviction to a fine not exceeding two hundred and fifty thousand rand or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment; provided that where he is convicted of an offence against any of these Regulations in relation to any security, foreign currency, gold, bank-note, cheque, postal order, bill, note, debt, payment or goods, the fine which may be imposed on him shall be a fine not exceeding two hundred and fifty thousand rand, or a sum equal to the value of the security, foreign currency, gold, bank-note, postal order, bill, note, debt, payment or goods, whichever shall be greater."

contraventions of Exchange Control Regulations 2(1), 3(1)(a) and 10(1)(c) read with Regulation 22 had been committed by Mr Armbruster.

3.

3.1 I decided not to refund any of the foreign currency which had been seized from Mr Armbruster in view of the serious nature of the offences.

3.2 In particular I considered the following facts and circumstances as indicative of the seriousness of the offences:

3.2.1. Mr Armbruster, on his own admission, had purchased foreign currency from German tourists and not from an Authorised Dealer.

3.2.2 He did this even though he had previously purchased foreign currency from The Standard Bank of South Africa Limited and must have been aware of the Exchange Control requirements in this regard. However, he stated that he did not do so on this occasion because according to him 'it was time-consuming and expensive'.

3.3 He was also aware of the current provisions of the Exchange Control Regulations applicable to South African residents which would prohibit him from transferring the setting up costs of expanding his business overseas without the necessary authorisation.

3.4 In the circumstances, I found it unacceptable that the applicant did not officially apply for prior authorisation from the Exchange Control Department for the abovementioned."

Legislative and regulatory framework

[10] It is convenient at this stage to outline the legislative and regulatory framework relevant to the seizure and forfeiture of foreign currency under the regulations. Section 9 of the Act makes provision for the President[12] to make regulations regarding any matter that directly or indirectly affects currency, its banking or its exchange.[13]

[12] The Act refers to the Governor-General who was the head of state at the time they were promulgated. Today the Act must be read as referring to the President. The President can delegate the power to regulate to the Minister of Finance.

[13] Section 9(1) of the Act provides: "The Governor-General may make regulations in regard to any matter directly or indirectly relating to or affecting or having any bearing upon currency, banking or exchanges."

For purposes of section 9 the "Treasury" means the Minister of Finance or an officer in the Department of Finance who deals with a matter on the authority of the Minister and in this case the fourth respondent.[14]

[11] The Act empowers the Minister to make regulations that provide for appropriate sanctions, either criminal or civil and for the attachment of money which the Treasury suspects on reasonable grounds to be involved in an offence or suspected offence in contravention of the regulations.[15] Under Regulation 2(1) no person other than an authorised dealer shall buy, borrow, sell or lend any foreign currency[16] to any person who is not an authorised dealer, except with the Treasury's permission and under conditions it imposes. An "authorised dealer", according to the regulations, would be a person authorised by the Treasury to deal in foreign exchange.[17]

[12] According to Regulation 3(1),[18] a person may not take or send foreign currency out of the country unless exempted by the Treasury or a person it authorised. For that

[14] See section 9(2)(f) of the Act.

[15] Section 9(2)(b)(i)(aa) of the Act provides:

> "Any regulation contemplated in paragraph (a) may provide for—
>
> (i) the blocking, attachment and obtaining of interdicts for a period referred to in paragraph (g) by the Treasury and the forfeiture and disposal by the Treasury of any money or goods referred to or defined in the regulations or determined in terms of the regulations or any money or goods into which such money or goods have been transformed by any person, and—
>
> (aa) which are suspected by the Treasury on reasonable grounds to be involved in an offence or suspected offence against any regulation referred to in this section, or in respect of which such offence has been committed or so suspected to have been committed".

[16] Many of the regulations we are concerned with in this judgment refer to commodities other than foreign currency. This judgment will confine itself to foreign currency.

[17] See Regulation 1.

[18] Above n 6.

reason anybody about to leave the country must on request by any customs or excise official, declare and produce currency in his or her possession.[19] Customs officials may therefore search persons and seize currency in their possession, unless satisfied that a person is exempted from the prohibitions under Regulation 3(1) or a certificate issued by the Treasury is produced, showing that the removal of the currency is not in contravention of Regulation 3(2).[20] Currency seized under Regulation 3(3) ". . . shall be forfeited for the benefit of the National Revenue Fund" according to Regulation 3(5).[21]

[13] Failure to comply with the provisions of the regulations constitutes an offence. The person would be liable to a conviction or a fine not exceeding R250 000 or in the case of an offence involving foreign currency, the value of the currency whichever is greater, or to a period of imprisonment not exceeding five years or both.[22]

The High Court

[14] The applicants first brought an application for review of the forfeiture but later changed the original prayer ultimately requiring an order which may be rendered as follows:

> "1. Declaring that the decision by the first, third and/or fourth respondents taken on or about 27 August 2004 in terms of regulation 3(5) of the Exchange Control regulations . . . not to refund the foreign currency seized from the

[19] Regulations 3(3)(a) and (b) in para [38] below.

[20] Regulations 3(3)(b)(i) and (ii) id.

[21] The Regulations are set out in full in para [38] below.

[22] Regulation 22 above n 11.

> first applicant on 18 June 2004 at Johannesburg International Airport is inconsistent with the Constitution of the Republic of South Africa 108 of 1996, unlawful and invalid.
>
> 2. Reviewing and setting aside the decision taken on or about 27 August 2004 . . . not to refund in whole or in part the foreign currency seized on or about 18 June 2004.
>
> 3. Ordering the third respondent to return to the applicants the foreign currency seized on or about 18 June 2004 from the first applicant at the Johannesburg International Airport.
>
> 4. In the alternative, and in addition to the relief sought in paragraph 1, 2 and 3 above, declaring that Regulation 3(5) of the regulations is inconsistent with the Constitution and invalid."

[15] Prinsloo J held that ignorance of the provisions of the regulations was no defence[23] and that the applicants' submission that he did not know he was acting illegally, was false.[24] He concluded that:

> "In all these circumstances, I have come to the conclusion that the first applicant, on his own evidence, and over an extended period, acted in breach of the prescribed Exchange Control Provisions, knowing that his conduct was unlawful. He did so for reasons of expediency, such as the ability to negotiate lower and more favourable exchange rates, and he did so repeatedly and over a long period. When he was caught red handed by Mr Khoza, he tried to slip out of the net by telling a blatant lie."[25]

[23] Above n 2 at para 29. The High Court relied in this regard on *S v De Blom* 1977 (3) SA 513 (A) at 528D where it was held, in relation to Regulations 2(1) and (3)(1)(a), that:

> "Deur die publikasie in die *Staatskoerant* is die publiek dus ten volle ingelig oor die prosedure wat gevolg moet word in verband met toestemming om geld of juwele uit die land te neem en moet die betoog namens die appellante in hierdie verband verwerp word."

[24] *Armbruster* above n 2 at paras 24 and 27.

[25] Id at para 30.

[16] Approaching the application for review as essentially an application under the Promotion of Administrative Justice Act (PAJA),[26] the Court rejected the applicants' contentions.[27] These contentions were that the forfeiture decision was taken in an arbitrary and irrational manner in that the fourth respondent's decision not to return the currency "fell foul of . . . the provisions of the Promotion of Administrative Justice Act of 2000 ('PAJA') for a variety of reasons":[28]

- it was procedurally unfair;
- it was materially influenced by an error of law;
- irrelevant considerations had been taken into account in so far as the applicants' rights had not been properly considered when the proportionality of the forfeiture had been compared to the violation; and
- the fourth respondent had not taken the decision herself.[29]

[17] The Court held that there was no merit in these considerations: the fourth respondent had considered the relevant factors, had not taken irrelevant factors into account, and had taken the decision herself.[30]

[18] Counsel for the applicants submitted that they also place reliance on section 6(2)(d) of PAJA,[31] which provides for judicial review of administrative action if it has

[26] 3 of 2000.

[27] *Armbruster* above n 2 at para 40, Prinsloo J referred in this regard to this Court's decision in *Bato Star Fishing (Pty) Ltd v Minister of Home Affairs and Others* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 25, where it was held that the cause of action for the judicial review of administrative action now ordinarily arises from PAJA, and not from the common law as in the past.

[28] *Armbruster* above n 2 at para 35.

[29] Id at paras 35 and 39.

[30] Id at paras 38-40.

been materially influenced by an error of law. The error of law was said to be the fourth respondent's failure to realise that her decision amounted to the imposition of a penalty.[32] In this regard the Court held that the "confiscation" occurred by operation of the regulations and was effected by an appropriate officer in terms of the regulations and not as a result of the fourth respondent's decision.[33] It held "the decision not to refund the foreign currency is not disproportional to the gravity of the offences committed by the first applicant."[34] It concluded that the applicants had failed to make out a case for the review of the fourth respondent's decision.[35] It followed that the applicants had not made out a case for the return of the currency.

[19] In relation to that prayer, the court held that in terms of section 8(1)(c)(ii)[36] of PAJA, a review court should only in *exceptional circumstances* substitute or vary the administrative action taken by an official as opposed to remitting the matter for reconsideration. It held that no such special circumstances existed.[37]

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[31] Id at para 42. Section 6(2)(d) of PAJA provides: "A court or tribunal has the power to judicially review an administrative action if the action was materially influenced by an error of law."

[32] *Armbruster* above n 2 at para 42.

[33] Id at paras 43-47.

[34] Id at para 42.

[35] Id at para 48.

[36] Section 8(1)(c)(ii) of PAJA provides:

> "The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders setting aside the administrative action and in exceptional cases—
>
> (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or
>
> (bb) directing the administrator or any other party to the proceedings to pay compensation".

[37] *Armbruster* above n 2 at para 49.

[20] The applicants also challenged the constitutionality of Regulation 3(5): first on the basis that it violates their rights not to be deprived of property except in terms of a law of general application, which is not arbitrary, under section 25(1)[38] of the Constitution,[39] and second infringes the right to have a dispute resolved by a fair and impartial tribunal under section 34[40] of the Constitution.[41]

[21] Regarding the constitutionality of Regulation 3(5), the Court found that section 34 of the Constitution had not been violated because any person who felt aggrieved by the attachment of money could bring an application for review before a court of law.[42] In addition, the Court held, a decision by the fourth respondent under Regulation 3(5) constituted administrative action, implying that any person aggrieved by the decision could apply for judicial review under the relevant provisions of PAJA.[43] Also dismissing the application on the basis of section 25(1) of the Constitution, the Court found that the deprivation of property in question was pursuant to the Act as a law of general application and was therefore not arbitrary.[44]

[22] Applicants sought leave to appeal to the Supreme Court of Appeal. The High Court dismissed the application. At the time, the *Van der Merwe* matter dealing with

[38] Section 25(1) of the Constitution 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."

[39] *Armbruster* above n 2 at para 50.

[40] Section 34 of the Constitution 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."

[41] *Armbruster* above n 2 at para 51.

[42] Id at para 56.

[43] Id at para 59. See also section 6 of PAJA.

[44] *Armbruster* above n 2 at para 61.

similar legal questions was before this Court on appeal from the full Court of the Cape High Court.[45] Consequently, the applicants applied for leave to appeal directly to this Court against the High Court decision. The Chief Justice directed that this matter be heard on the same date as that of the *Van der Merwe* matter.

In this Court

[23] The applicants argue that Regulation 3(5) provides officials such as the fourth respondent with a discretion to forfeit property, which they submit is a punishment, without guidelines to show how the discretion is to be exercised. This they contend, violates section 25(1) of the Constitution, which guarantees the right not to be arbitrarily deprived of property; section 165(1) of the Constitution, which vests the judicial authority of the Republic in the courts; and section 34 of the Constitution, which guarantees the right of access to court.

The application for leave to appeal

[24] In determining whether leave to appeal is to be granted, two issues arise: does the application raise a constitutional issue? If it does, is it in the interests of justice to grant leave?[46] In making this determination this Court exercises its discretion.[47]

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[45] Above n 3.

[46] *S v Boesak* 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at paras 10-15. See also *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) at paras 16 and 24-25; *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC); 2006 (11) BCLR 1255 (CC) at para 26; *Alexkor Ltd and Another v The Richtersveld Community and Others* 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) at paras 21-26; *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at para 25; *Phoebus Apollo Aviation CC v Minister of Safety and Security* 2003 (2) SA 34 (CC); 2003 (1) BCLR 14 (CC) at para 9.

[47] See for example *President of the Ordinary Court Martial Lieutenant-Colonel Mardon NO and Others v The Freedom of Expression Institute and Others* 1999 (11) BCLR 1219 (CC) at paras 14-16.

[25] The applicants contend that Regulation 3(5) is unconstitutional in that it violates sections 34, 25(1), and 165(1) of the Constitution. Indeed the judgment of the High Court, refusing to set aside the decision of the fourth respondent not to return the foreign currency, was not mentioned at all until after the respondents drew attention to this in their written argument before this Court. The applicants then tried to resuscitate this ground in a supplementary note. A single sentence is devoted to the issue. It reads:

> "In any event, even if this Court does not uphold the applicants' arguments concerning the constitutionality of regulation 3(5), it is submitted that the decision of the fourth respondent not to return or refund the foreign currency seized falls to be reviewed for the reasons set out in the founding papers as read with the answering affidavit."

Nothing is advanced in support of any contention that the High Court judgment was wrong in this respect.

[26] I consider first the application for review of the decision of the fourth respondent. The application for leave to appeal does not mention this at all, and as I have pointed out, nor does the applicants' argument. The single sentence in the supplementary argument does not take the matter any further. There is no application for leave to appeal in relation to this aspect before us and therefore no warrant for any further consideration of this matter.

[27] The application for leave to appeal in relation to the constitutionality of Regulation 3(5) is another matter altogether. Regulation 3(5) could result in the administrative forfeiture of very large sums of money and could, as appears later in this judgment, cause undue hardship and injustice. Whether the Constitution permits the forfeiture provided for in the regulations, as well as issues concerning the nature and effect of the discretion afforded to the official who decides on the return of the currency, raise constitutional questions of some importance.

[28] The question whether forfeiture under Regulation 3(5) occurs automatically and immediately the foreign currency is seized or whether it results from a decision by the official concerned not to return the foreign currency is also an issue that raises important constitutional implications. This is because forfeiture of foreign currency amounts to deprivation of property and the process by which forfeiture occurs could have a bearing on the issue of whether the deprivation is arbitrary. Moreover there are conflicting decisions in the High Courts concerning this issue.[48] It is accordingly in the interests of justice to hear the appeal. Leave to appeal must therefore be granted.

Interpretation of Regulation 3(5)

[29] The constitutional validity of Regulation 3(5) is attacked on various grounds including the questions which relate to the exercise of the discretion by the Treasury not to return the foreign currency. To decide these issues without first determining

[48] *Van der Merwe and Another v Nel and Others* 2006 (2) SACR 487 (C); [2006] 4 All SA 96 (C) at paras 20-23; *Action Engineering and Fencing (Pty) Ltd v Moyses NO and Others* 2004 (5) SA 399 (T); [2003] 3 All SA 263 (T) at para 15.

what the regulations mean would be difficult. There are two relevant aspects concerned with the meaning of the Regulation, which must receive attention. The first is concerned with when and how forfeiture occurs while the second is about the nature of the discretion conferred upon the Treasury by the Regulation. I look at each separately.

(a) Forfeiture: when and how?

[30] Prior to the decision of the High Court in this case, the Pretoria High Court had considered the interpretation of a regulation equivalent to Regulation 3(5) in *Action Engineering*. In addition, a full Court of the Cape High Court considered the same issue in *Van der Merwe*.[49]

[31] In *Action Engineering*[50] the High Court considered Regulations 3(6)[51] and 3(8).[52] Except that they provide for seizure and forfeiture of South African rands

[49] *Van der Merwe* above n 48 at para 15.

[50] *Action Engineering* above n 48.

[51] Regulation 3(6) provides:

> "Every person who is about to enter the Republic and every person in any port or other place recognised as a place of arrival in the Republic, who is requested to do so by the appropriate officer shall—
>
> (a) declare whether or not he has with him any South African bank-notes; and
>
> (b) produce any such bank-notes which he has with him;
>
> and the appropriate officer and any person acting under his directions may search such person and examine or search any article which such person has with him, for the purpose of ascertaining whether he has with him any South African bank-notes and may seize any such bank-notes produced or found upon such examination or search unless either—
>
> (i) the appropriate officer is satisfied that such person is, in respect of any South African bank-notes which he has with him, exempt from the prohibition imposed by subregulation 1 (b)*bis* ; or
>
> (ii) such person produces to the appropriate officer a certificate granted by the Treasury which shows that the importation by such person of any South

brought into the country, their provisions are identical to those of Regulations 3(3) and 3(5) respectively. The Court disposed of the forfeiture issue in a single sentence:

> "[I]t appears to be provided in peremptory language that the money must be forfeited for the benefit of the National Revenue Fund, whereupon, the Treasury . . . in its discretion, may direct that the money seized, or any portion thereof may be refunded".[53]

[32] This brevity is not surprising because the High Court was in that case not concerned with the question of precisely when and how forfeiture would occur in terms of the regulations. The question in *Action Engineering* was really whether the criminal courts had rightly made a forfeiture order in respect of a large amount of South African rands that had admittedly been seized in terms of the equivalent of Regulation 3(3). *Action Engineering* in fact held that the criminal court forfeiture was incompetent because the money seized in terms of the equivalent regulation to Regulation 3(3) had been forfeited by the regulation equivalent to Regulation 3(5). The process of forfeiture did not call for investigation.[54]

> African bank-notes which he has with him does not involve a contravention of that subregulation.
>
> No female shall be searched in pursuance of this subregulation except by a female."

[52] Regulation 3(8) provides, in relevant parts:

> "All South African bank-notes seized under subregulation (6) . . . shall be forfeited for the benefit of the National Revenue Fund: Provided that the Treasury may, in its discretion, direct that any notes so seized be refunded or returned, in whole or in part, to the person from whom they were taken, or who was entitled to have the custody or possession of them at the time when they were seized."

[53] *Action Engineering* above n 48.

[54] Id at para 19.

[33] The Cape High Court in *Van der Merwe*[55] followed the line adopted in *Action Engineering*,[56] and concluded that the foreign currency that had been seized was forfeited to the state immediately. A full Court of the Cape High Court, disagreed with the reasoning of the High Court in *Action Engineering* and held that although Regulation 3(8) provided, as does Regulation 3(5), that foreign currency which has been seized "shall" be forfeited to the National Revenue Fund, the forfeiture is subject to the Treasury's discretion to return or refund the currency "so seized".[57]

[34] The full Court held that the forfeiture of the currency does not take place until the Treasury has decided whether to forfeit the currency. It reasoned that if, as the respondents argue and *Action Engineering*[58] held, the forfeiture was automatic, the legislature would have used the words "so forfeited" and not "so seized". The Treasury must then exercise its discretion as to whether or not any or all of the currency seized should be returned. Where the Treasury decides not to return the money, it will then be deemed forfeited. The full Court concluded "it could [n]ever have been intended that an act of seizure could constitute a permanent deprivation without any intervention from a body other than the party seizing the items."[59]

[35] The applicants support the approach of the full Court but they go a little further. They argue that the regulations, properly interpreted, provide the Treasury with

[55] *Van der Merwe v Nel and Others* Case No 5902/04, 12 January 2005 unreported, at para 35.

[56] *Action Engineering* above n 48.

[57] *Van der Merwe* above n 48 at para 20.

[58] *Action Engineering* above n 48.

[59] *Van der Merwe* above n 48 at para 23.

discretion to forfeit the currency. They contend further that the Treasury, in deciding not to return the currency, in effect makes the decision to forfeit it.

[36] The first and second respondents assert that the currency seized under Regulation 3(3) is forfeited to the Treasury automatically as a consequence of the operation of Regulation 3(5). They argue that the forfeiture is not a consequence of any decision by the Treasury. The Treasury decision is aimed at the possible amelioration of the consequences of the forfeiture that has already taken place. The respondents, it appears, support *Action Engineering* and the Cape High Court in *Van der Merwe*.

[37] The third and fourth respondents, however, approach the matter somewhat differently. They contend that forfeiture is not complete until the Treasury has exercised its discretion under Regulation 3(5) and determined whether or not to return the seized foreign currency. But they contend, if the Treasury does not direct the return of the currency the forfeiture is completed as a matter of law. This argument too tends towards supporting the judgment of the full Court.

[38] It will be convenient for Regulations 3(3) and 3(5) to be set out in full in order to facilitate an evaluation of the position of the parties. Regulation 3(3) provides:

> "Every person who is about to leave the Republic and every person in any port or other place recognised as a place of departure from the Republic, who is requested to do so by the appropriate officer shall—
>
> (a) declare whether or not he has with him any . . . foreign currency; and

> (b) produce any . . . foreign currency which he has with him;
>
> and the appropriate officer and any person acting under his directions may search such person and examine or search any article which such person has with him, for the purpose of ascertaining whether he has with him any . . . foreign currency, and may seize any . . . foreign currency produced or found upon such examination or search unless either—
>
> (i) the appropriate officer is satisfied that such person is, in respect of any . . . foreign currency which he has with him, exempt from the prohibition imposed by subregulation (1); or
>
> (ii) such person produces to the appropriate officer a certificate granted by the Treasury which shows that the exportation by such person of any . . . foreign currency which he has with him does not involve a contravention of that subregulation.
>
> No female shall be searched in pursuance of this subregulation except by a female."

Regulation 3(5) provides:

> "All . . . foreign currency seized under subregulation (3) or (4) shall be forfeited for the benefit of the National Revenue Fund: Provided that the Treasury may, in its discretion, direct that any . . . foreign currency so seized, be refunded or returned, in whole or in part, to the person from whom they were taken, or who was entitled to have the custody or possession of them at the time when they were seized."

[39] In my view, the foreign currency is not forfeited for the benefit of the National Revenue Fund immediately upon seizure. Nor is it correct that the Treasury decision whether to return the currency occurs after forfeiture and at a time when the foreign currency is already being held for the benefit of the Fund. On a proper interpretation, forfeiture only occurs after the Treasury decision not to return the currency has been made. This conclusion is based on four reasons.

[40] First, the regulations draw a distinction between seizure and forfeiture. Regulation 3(3) provides for seizure while Regulation 3(5) is concerned with forfeiture. This implies that forfeiture is seen as something different from seizure. Any analysis that equates forfeiture and seizure would in my view be incorrect. Seizure is what happens when the currency is taken under Regulation 3(3). Regulation 3(5) provides that forfeiture of the seized items will follow. Forfeiture does not occur at the same time as the seizure but after the seizure has taken place. Regulation 3(5) expressly provides for "currency seized" to be "forfeited".

[41] In addition, Regulation 3(5) further carves out a proviso to forfeiture. The proviso is to the effect that forfeiture will not occur in the circumstances covered by it: where the Treasury in its discretion directs return of the seized currency. As the full Court correctly pointed out, Regulation 3(5) expressly provides for the return of seized currency, not forfeited currency. This again implies that forfeiture will not occur until the Treasury has determined whether or not to return the currency in terms of the proviso.

[42] Third, it must also be kept in mind that the decision to refund money seized is at odds with the idea that forfeiture had occurred immediately upon seizure. Forfeiture as a concept indicates finality. There cannot be incomplete forfeiture: an item is either forfeited or not. The suggestion of the third and fourth respondents that forfeiture is only completed when the decision whether to return what had been seized

has been made, is accordingly contrary to the notion that forfeiture occurred immediately upon seizure.

[43] Finally, forfeiture immediately upon seizure is constitutionally objectionable. While it is understandable that foreign currency found to be in the possession of someone at the airport must be seized immediately, there can be no reason to justify forfeiture immediate upon seizure. Immediate forfeiture would mean that the property is forfeited without giving the person concerned an opportunity to be heard. The legislature could not have contemplated this. In my view, Regulations 3(3) and 3(5) set in train a process. It begins with the seizure of foreign currency followed by a decision by the Treasury whether or not to return what had been seized and ends with forfeiture immediately that decision has been taken.

[44] In their contentions, the third and fourth respondents relied on *Minister van Onderwys en Kultuur en Andere v Louw*[60] and *Phenithi v Minister of Education and Others*.[61] The Supreme Court of Appeal in both cases interpreted certain legislative provisions to the effect that an employee who is absent from work for 30 consecutive days without the consent of the head of department is deemed to have been discharged on account of misconduct unless the employer directs otherwise. In neither of these cases, it was held, was there any decision dependent upon a discretion. The third and fourth respondents contend that the regulations in this case are of the same kind. I disagree. Forfeiture of foreign currency is fundamentally different from the concept

[60] 1995 (4) SA 383 (A).

[61] 2006 (11) BCLR 1314 (SCA); 2006 (27) ILJ 477 (SCA).

of being deemed to have been discharged from employment. There is also a fundamental difference between the employer directing otherwise on the one hand and the Treasury making a decision whether or not to return all or part of the currency on the other.

[45] When foreign currency is seized in terms of Regulation 3(3), the Treasury cannot neglect to make a decision whether what has been seized ought to be returned. The regulations cannot mean that the absence of a conscious decision on the part of the Treasury would lead to forfeiture by default as it were. The person from whom the foreign currency was taken is entitled to a decision. Forfeiture does not occur until and unless that decision has been made. Further, it is common cause that the decision to return or not to return is an administrative one with the result that the person concerned must be given a fair opportunity to be heard before the decision is taken.

[46] I prefer the approach of the full Court and conclude that forfeiture does not occur immediately upon seizure. I therefore hold that forfeiture only occurs when a decision of the Treasury is made in relation to the return of the foreign currency seized only after a fair hearing has been afforded the person concerned.

(b) The nature of the discretion

[47] Applicants also attack Regulation 3(5) on the basis that the discretion it confers could lead to arbitrary deprivation of property because it is extremely wide and unfettered by any guideline. Whether guidelines are necessary or appropriate in the

circumstances can be decided if we first understand the purpose and nature of the discretion that is conferred.

[48] The nature and purpose of the discretion cannot be gauged without an appreciation of the purpose of the forfeiture provision itself and the context in which it is exercised. Once forfeited, the currency is not returned. The purpose of forfeiture must be distinguished from the purpose of seizure of the foreign currency. Once foreign currency is seized, it can no longer be taken out of the country. The purpose of forfeiture is in my view threefold. First, the forfeiture of foreign currency has a deterrent purpose in that it gives a strong message to the person concerned and the public at large that currency sought to be unlawfully exported will be forfeited. It has the effect of preventing that person or others from attempting to export foreign currency. The second purpose is to ensure that the foreign currency is available to the police as evidence in any criminal charge that might ensue. The third and final objective is to avoid unlawful possession of the foreign currency being granted to anyone else not entitled to it.

[49] As sensible as the forfeiture provision might appear to be, its potential, if applied without exception, to wreak injustice and cause undue hardship, is nevertheless real. The purpose of the discretion is to avoid these unjust and unduly harsh consequences. The Treasury official after looking at all the facts simply asks herself: bearing in mind the seriousness of the foreign currency contravention, will the decision not to return the currency in this case result in serious injustice or undue

harshness? This approach is mandated by the values of our Constitution which, in a broad sense recognises and requires respect for the human dignity and equality of all.

[50] Once the person who faces forfeiture has made representations for the return of some or all of the foreign currency, the decision-maker is called upon to consider whether in all the circumstances forfeiture will cause injustice or hardship. Ignorance, lack of education, genuine mistake or lack of appreciation of the consequences, or where there is some strong moral or other justification for the conduct might be important factors that need to be considered. There is no closed list. The key factor is whether an ordinary person in the shoes of the official, aware of the purposes of the measure, would say that the forfeiture of all or some of the seized currency would in the circumstances be unduly harsh or unjust.

Regulation 3(5) and the courts

[51] The applicants contend that Regulation 3(5) is inconsistent with the role that the Constitution envisages for the courts. In particular they contend that it violates the rights of access to courts protected in section 34 of the Constitution, as well as section 165 of the Constitution which reserves certain functions to the judiciary. This is so, they say because the forfeiture is punitive by design and constitutes punishment at least in part. Accordingly, they contend that section 34 requires access to courts before forfeiture happens while section 165 requires that forfeiture be authorised by a court if it is to be valid. Three separate questions therefore arise. The first is whether the Regulation authorises criminal punishment either wholly or in part. If this is so,

two further questions need to be answered. The one is whether the forfeiture provisions violate section 34 of the Constitution, and the other whether the Treasury has taken over a judicial function mandated by section 165. I deal firstly with the question of whether the forfeiture constitutes punishment.

(a) Is the forfeiture criminal punishment?

[52] The first and second respondents contend that the basis for the forfeiture is that the person who is in possession of the currency possesses it unlawfully in contravention of the regulations. The person would therefore not be deprived of something which he or she was entitled to possess. The person is not being subject to a fine or penalty, something which might follow from prosecution at a later stage. In recognition of the fact that the forfeiture might have an unduly punitive effect, the Treasury is given a power to mitigate that effect by directing that the currency be returned in whole or in part to the person who had lawfully possessed it. The third and fourth respondents also contend that the fourth respondent, when considering whether part or all of the foreign currency should be refunded, must have regard to the punitive consequences of the forfeiture.

[53] Our law provides for two types of forfeiture, civil and criminal. In this case, we are dealing with civil forfeiture. This Court[62] has recently had the opportunity to consider civil forfeiture of property in relation to Chapter 6 of the Prevention of

[62] *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2002 (4) SA 843 (CC); 2002 (9) BCLR 970 (CC) at para 15.

Organised Crime Act[63] (POCA) and has held that although civil forfeiture under these provisions has a penal element, its main objective is to remove the incentive for crime and not to punish criminals.[64]

[54] Forfeiture without conviction under the regulations is not analogous to forfeiture under Chapter 6 of POCA. The forfeiture of property under POCA occurs only when a court has determined in civil proceedings, on a balance of probabilities that the property constitutes an instrumentality of the offence or proceeds of the crime. As this Court has noted, POCA provides a unique scheme for forfeiting property in order to meet its specific objectives.[65] In this respect it is not comparable to the forfeiture of currency under Regulation 3(5). The issue here is not one of proportionality but of possible mitigation. Thus, under POCA where the seized property is the instrumentality of the crime, such as the building in which the crime is committed, questions of the proportionality of the confiscation arise.

[55] I have already said that the objectives of forfeiture under Regulation 3(5) are to deter commission of the crime, to prevent unlawful possession of the currency and to have evidence for a criminal trial.[66] However, any mechanism aimed at deterrence will probably have some punitive effect. Therefore, although the forfeiture of currency under Regulation 3(5) is designed to deter, it at least to some extent, effectively penalises those who contravene the regulations. Although it has this

[63] 121 of 1998.

[64] *Mohamed* above n 62.

[65] Id at paras 14-17.

[66] See para [48] above.

punitive effect, it is by no means a criminal sanction. I am therefore satisfied that it is not criminal punishment.[67] I conclude that the forfeiture does not amount to criminal punishment and that the forfeiture is essentially civil with a punitive element. With that in mind we can decide whether sections 34 or 165 of the Constitution have been violated.

(b) Regulation 3(5) and section 34 of the Constitution

[56] The applicants argue that by permitting the Treasury official to forfeit property and thereby inflict some punishment without judicial oversight, Regulation 3(5) infringes section 34 of the Constitution. The applicants add that because forfeiture of property under the regulation amounts to punishment, judicial intervention is necessary before the forfeiture occurs. They argue that it is not sufficient for a court of law to review the fourth respondent's decision after the forfeiture has occurred.

[57] The applicants relied heavily on this Court's decisions in *Chief Lesapo v North West Agricultural Bank and Another*[68] and *Zondi v MEC for Traditional and Local Government Affairs and Others*.[69] In *Chief Lesapo* the fact the bank could cause the sale in execution of its debtors property without resort to a court of law resulted in it becoming a judge in its own cause, the Court held.[70] This amounted to self-help. Expanding on the principle, this Court in *Zondi* held:

[67] See also *Nel v Le Roux NO and Others* 1996 (3) SA 562 (CC); 1996 (4) BCLR 592 (CC); 1996 (1) SACR 572 (CC) at para 11.

[68] 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC).

[69] 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC).

[70] Above n 68 at para 20.

> "Section 34, therefore, requires not only that individuals should not be permitted to resort to self-help, but it also requires that potentially divisive social conflicts must be resolved by courts, or other independent and impartial tribunals. Section 34 recognises that it is important to do so to ensure that orderly and fair solutions to such conflicts are found, to promote social cohesion and to avoid the exacerbation of division and unfairness. Determining whether it is necessary for such conflicts to be brought before courts will require a consideration of the potential for social conflict in relation to the particular matters concerned, the equality of arms of the parties that are likely to be involved in such conflict, and the practicalities of requiring such matters to be resolved by courts, amongst other things."[71]

[58] An important purpose of section 34, it was held in *Chief Lesapo* is to guarantee the protection of the judicial process for persons who have disputes that can be resolved by law.[72] Execution as a means of enforcing a judgment or order of court is an incident of the judicial process. If the debt itself is disputed, the seizure of property in execution of the debt must be equally in dispute. In that case, allowing the creditor to seize and sell the property of the debtor in execution deprives the debtor of the court's supervision.[73] It was held, however, that the protection of section 34 extends to the attachment and sale of a debtor's property even in the case where there is no dispute as to the underlying obligation, and that that protection extends to circumstances in which property may be seized and sold in execution including the control that is exercised over sales in execution.[74] In *Zondi* Ngcobo J held that the protection of section 34 is necessary in that instance "to ensure that the sale is

[71] Above n 69 at para 63.

[72] Above n 68 at para 13.

[73] Id at para 14.

[74] Id at para 15.

conducted in a manner that enables the debtor to recover the value of the property sold."[75]

[59] There are however significant differences between the case at hand and the two cases referred to above. In both those cases, the Court found that the respective respondents were empowered to resort to self-help in the sense that they could execute and sell property without a court order and without any judicial supervision in respect of debts. In addition, *Zondi* had important social conflict implications which this case does not have. When this distinction was put to counsel he attempted to persuade the Court that forfeiture under Regulation 3(5) could also result in harsh consequences for individuals who have very little. I am willing to assume in the applicants' favour that Regulation 3(5) could in certain circumstances have severe consequences for persons who are of limited financial means. That however, does not take the applicants' argument any further. The distinction with *Zondi* to which the applicants' attention was drawn was not the impecuniosity of Mrs Zondi but rather that the impugned statutory provisions had operated in a particular social and historical context.[76] Needless to say, analogous considerations do not apply in the case of Regulation 3(5).

[60] Besides, unlike *Chief Lesapo* and *Zondi*, this case does not deal with the sale of property in execution without provision being made for control or review by the courts. In the first place, the context is completely different. Seizure and sale of land for non-payment of debt, or of cattle that have strayed, are far more drastic, and call

[75] Above n 69 at para 72.

[76] Id at paras 38-42.

for much greater immediate judicial control, than forfeiture of currency about to be sneaked unlawfully out of the country. The property has already been seized to achieve public purposes relating to protection of foreign exchange reserves.

[61] Furthermore, under the Regulation we are faced with an administrative decision of the Treasury official that is subject to review by a court of law on grounds of procedural fairness and substantive reasonableness. In *Metcash Trading Ltd v Commissioner, South African Revenue Service, and Another*[77] this Court considered the constitutionality of, inter alia, section 36(1) of the Value-Added Tax Act[78] which provided that upon assessment by the Commissioner for the South African Revenue Service, a taxpayer was obliged to pay the assessed tax regardless of a pending appeal, in common parlance, pay now, grieve later. The Court held that unlike in *Chief Lesapo*, section 36(1) did not permit self-help because a decision of the Commissioner constituted administrative action and could therefore be appealed against to a special court.[79] The Special Court's decisions could then be appealed against either to a full bench of the High Court, or if leave was granted by the presiding judge, to the Supreme Court of Appeal. There was therefore no violation of section 34 of the Constitution, the Court held.[80] It follows that Regulation 3(5) does not infringe section 34 of the Constitution.

[77] 2001 (1) SA 1109 (CC); 2001 (1) BCLR 1 (CC).

[78] 89 of 1991.

[79] The Special Income Tax Court is established by section 83 of the Income Tax Act 58 of 1962 to hear appeals from decisions of the Commissioner. As Kriegler J noted in paragraph 32 of his judgment, the Commissioner is not a judicial body and decisions by the Commissioner are therefore not judicial decisions, but rather administrative in nature.

[80] *Metcash* above n 77 at paras 47-48.

(c) Regulation 3(5) and section 165 of the Constitution

[62] The applicants submit that the forfeiture of currency under Regulation 3(5) amounts to the imposition of a penalty, a function which, under section 165 of the Constitution, can properly be exercised only by the courts. I have already held that the forfeiture does not amount to criminal punishment. It is nevertheless necessary to consider whether the fact that there is a punitive element in the forfeiture requires the decision to be made by a court.

[63] Section 165 of the Constitution provides:

> "(1) The judicial authority of the Republic is vested in the courts.
> (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
> (3) No person or organ of state may interfere with the functioning of the courts.
> (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
> (5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies."

[64] The section vests judicial authority in the courts. Judicial power or any power akin to it can therefore not be left to non-judicial officers to exercise. In *De Lange v Smuts NO and Others*[81] this Court found that the power to commit an unco-operative witness to prison lay "within the very heartland of the judicial power and therefore cannot be exercised by non-judicial officers."

[81] 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 61.

[65] Relying on *De Lange*, the decision of the Supreme Court of Ireland in *Reginald Deaton v The Attorney General and The Revenue Commissioners*[82] and the decision of the House of Lords in *R (on the application of Anderson) v Secretary of State for the Home Department*,[83] the applicants contend that to allow an official in the employ of the executive to forfeit currency is to permit the Treasury official to exercise a power which is judicial in nature. It is therefore inconsistent with the principle of separation of powers.

[66] I do not agree. *Deaton* and *Anderson* are distinguishable from the case at hand, in that they dealt with the selection of punishment for the commission of an offence.[84] Although the forfeiture of currency has some punitive effect, and the culpability of the affected person has to be taken into account when the discretion to forfeit is exercised, the Treasury official does not impose any criminal punishment at all. What the Treasury official does is to exercise an administrative function in terms of Regulation 3(5): she decides whether or not the whole or part of the currency must be returned. An aggrieved person may take the decision on judicial review. One must bear in mind

[82] [1963] IR 170 (SC).

[83] [2002] 4 All ER 1089 (HL).

[84] *Anderson* id at paras 5 and 7-8 dealt with inter alia section 61(1) of the Criminal Justice Act 1967, which provided the Home Secretary with the power to order the release of convicted murderers who had been sentenced to mandatory life sentences. When imposing such a sentence the trial court would fix a "tariff term", which was the minimum portion of the life sentence that the convicted murderer had to serve before being eligible for parole. The length of the "tariff term" was determined on the basis of the specific facts of each particular case. The tariff term was set on the advice of the trial court and the Chief Justice; however the Home Secretary, in setting the tariff, was not bound by these recommendations and had the ultimate discretion. The Court found that allowing the Home Secretary to determine the length of an accused's sentence amounted to a violation of article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms which provides that an accused has the right to a fair trial by an independent and impartial tribunal established by law.

that in our system the right to lawful, reasonable and procedurally fair administrative action is a constitutionally entrenched right[85] which is given effect to in legislation.[86]

[67] Nor can an analogy indeed be drawn between the power questioned in *De Lange* and that impugned here. *De Lange* considered the power to imprison in order to coerce co-operation, giving rise to the loss of physical freedom. Here, the power consists in deciding whether the whole or part of foreign currency lawfully seized should be returned to the affected person. Whereas the process in *De Lange* was fundamentally judicial, the forfeiture of currency illegally held in contravention of the regulations is essentially administrative in nature.

[68] I conclude therefore that section 165 of the Constitution is not violated.

Does Regulation 3(5) amount to arbitrary deprivation of property?

[69] Finally, the applicants contend that the forfeiture provided for in Regulation 3(5) amounts to arbitrary deprivation of property and violates section 25(1) of the Constitution. More particularly, according to the applicants, the violation arises from the fact that the exercise of the Regulation 3(5) discretion whether or not to return the currency is wide and not subject to any guidelines.

[70] It is convenient at this stage to reiterate the provisions of section 25(1) of the Constitution which provides:

[85] Section 33 of the Constitution.

[86] PAJA.

> "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

Regulation 3(5) is a law of general application and its forfeiture provision deprives people caught with unauthorised foreign currency of that currency. The question is whether that deprivation is arbitrary. What constitutes arbitrary deprivation of property was authoritatively determined by this Court in the case of *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*[87] as follows:

> "Having regard to what has gone before, it is concluded that a deprivation of property is 'arbitrary' as meant by section 25 when the 'law' referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair. Sufficient reason is to be established as follows:
>
> (a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question and ends sought to be achieved, namely the purpose of the law in question.
>
> (b) A complexity of relationships has to be considered.
>
> (c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.
>
> (d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.

[87] 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 100.

(e) Generally speaking, where the property in question is ownership of land or a corporeal movable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right something less extensive. This judgment is not concerned at all with incorporeal property.

(f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.

(g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution.

(h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with 'arbitrary' in relation to the deprivation of property under section 25."

[71] In the present case the relationship between the deprivation of property and the purpose of the deprivation must first be evaluated. The Regulation permits the deprivation of foreign currency that was unlawfully possessed for the purpose of unlawful removal from the Republic of South Africa. The purpose of the law giving rise to the deprivation is to prevent violations of currency exchange control regulations, and the unlawful removal of foreign currency from South Africa. It aims to deter not only the person affected but also others. The connection between the

purpose of the deprivation, the property and the person deprived could hardly be closer. In all probability, the person who is in unlawful possession of the currency is the owner or carries the property at the owner's behest. Even though it is true that the owner could possibly be deprived of all the currency in his or her possession at an airport, there is in this case sufficient reason for the deprivation. Ordinarily, arbitrariness would be out of the question.

[72] There could, however, be exceptional circumstances that open the Regulation to the charge of being so unremitting as to lend itself to the production of arbitrarily harsh consequences. This is where Regulation 3(5) comes in. It seeks to mitigate undue hardship or injustice by placing into the hands of the Treasury official an effective tool: the discretion to return the whole or part of the money following representations by the affected persons.

[73] The discretion is contained in the proviso to Regulation 3(5). As respondents contended, and as I have held,[88] the currency would be returnable in circumstances where it is necessary to ameliorate undue hardship or injustice that might be perpetrated on the person affected. Furthermore, as I have pointed out, the exercise of the discretion is subject to judicial review.

[74] The question now is whether the absence of guidelines in the Regulation nevertheless opens the way to subjective decision-making by the official concerned at

[88] See paras [49]-[50] above.

the decision-making stage, resulting in possible arbitrary deprivation of property. The possibility of subsequent review might be poor solace for a person whose money is forfeited.

[75] The nature of the discretion provided to the official in the proviso of Regulation 3(5) is undoubtedly wide. It confers upon the official the power to determine on application by the affected person whether to have the whole or part of the currency returned or forfeited.[89] As O'Regan J observed in *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*,[90] the nature of the administrative functions of officials is such that it does not allow them time for considered reflection on the scope of constitutional rights or in what circumstances those rights may be justifiably limited.

[76] Respondents submit that the discretion afforded to fourth respondent is not uncircumscribed. On their interpretation of the Act and the regulations, the discretion under Regulation 3(5) is sufficiently limited by section 9 of the Act and its objectives, policies, the stated government purpose, PAJA[91] and the Constitution.

[89] Regulation 3(5) para [38] above.

[90] 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 46.

[91] Respondents do not specify the relevant provisions of PAJA. They probably intended to rely on section 6 of PAJA which provides for the institution of proceedings in a court or a tribunal for the judicial review of an administrative action and the grounds upon which the action may be taken.

[77] The respondents also contend that the discretion under consideration falls under the exceptions set out in *Dawood*.[92] In that case, a broad discretion was found to be permitted, when (a) the factors that are relevant to the decision are so numerous and varied that it is inappropriate or impossible for the legislature to identify them in advance; (b) the factors which are relevant are indisputably clear; and (c) the decision-maker is possessed of expertise relevant to the decision to be made.[93]

[78] In my view the broad discretion afforded under the proviso is of the kind envisaged in (a) contemplated in *Dawood* above. The factors that must be taken into account in the process of avoiding undue hardship or injustice are so varied and numerous as not easily to be identified in advance, as are the circumstances in which people would unlawfully try to take money out of the country. Furthermore, the constitutionally protected interests at stake are of a different order. *Dawood* involved the right to family life and dignity of persons conducting themselves in a lawful manner. In the present matter the discretion relates to the return of money lawfully seized after being unlawfully possessed. In these circumstances subsequent judicial review would not represent an unjustified limitation on the right not to be deprived arbitrarily of property.

[79] I must emphasise that there are two aspects in which a court would have the power to review the exercise of a discretion. The first is a procedural one in which it

[92] Above n 90 at para 53.

[93] Id. See also *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 33.

will be necessary to ensure that the affected person has been given an appropriate opportunity to make representations. The decision to forfeit cannot stand if no such opportunity has been given. Secondly the court would be able to determine whether the decision-maker came to a reasonable conclusion in relation to the issues of undue hardship or injustice.

[80] I should add that although I do not think that the absence of the guidelines is fatal to the Regulation itself, I do believe it would be prudent for the appropriate authority to formulate guidelines as best they can to give as much assistance to the official as possible. This would ensure that the proviso under Regulation 3(5) is consistently exercised in a way which reduces error.

[81] Finally, although nothing untoward in the conduct of the official in this case has been established, it is necessary to underline the fact that officials are constitutionally bound, in the daily operation of their role and functions, to observe the rule of law and promote the spirit, purport and objects of the Bill of Rights. The public administration must always and in every sphere be governed by the democratic values and principles enshrined in the Constitution, and services must be provided impartially, fairly, equitably, and without bias.[94]

Costs

[94] Section 195 of the Constitution.

[82] All the arguments advanced on behalf of the applicants have failed. Nevertheless the applicant has raised a number of questions of constitutional importance in a relatively undeveloped area of the law. It would not be appropriate that he be ordered to pay the respondents' costs.

Order

[83] The following order is made:

1. The application for leave to appeal is granted.
2. The appeal is dismissed.
3. There is no order as to costs.

Langa CJ, Moseneke DCJ, Kondile AJ, Madala J, Nkabinde J, O'Regan J, Sachs J, Van der Westhuizen J, Van Heerden AJ, Yacoob J concur in the judgment of Mokgoro J.

For the Applicants:	Advocate A Katz and Advocate M du Plessis instructed by Meyer Inc.
For the First and Second Respondents:	Advocate NGD Maritz SC and Advocate JL Gildenhuys instructed by the State Attorney, Pretoria.
For the Third and Fourth Respondents:	Advocate NGD Maritz SC, Advocate JL Gildenhuys and Advocate GM Budlender instructed by Newtons Inc.