THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

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***Shuttleworth v South African Reserve Bank & others* (864/2013) [2014] ZASCA 157**

MEDIA STATEMENT

Today the Supreme Court of Appeal (SCA) upheld an appeal by the appellant, Mr Mark Richard Shuttleworth and a cross appeal by the South African Reserve Bank, the Minister of Finance and the President of the Republic of South Africa. It accordingly set aside the order of the North Gauteng High Court in its entirety.

The issue before the SCA was whether a ten per cent exit levy imposed by the first respondent, the South African Reserve Bank, on the value of assets sought to be exported by the appellant, Mr, Mark Shuttleworth, upon his emigration, was lawful.

The appellant, a prominent entrepreneur, was born and educated in South Africa. He made his fortune through Thawte Consulting, a general internet consultancy that progressed to specialising in security for electronic commerce. Thawte shot to international prominence by assisting businesses throughout the world to engage in secure transactions over the web. In 1999 he sold the company for $575 million. In 2001 Shuttleworth emigrated to the Isle of Man, a British Crown dependency and a tax-efficient jurisdiction. On his emigration, Exchange Control Regulations, promulgated in terms of s 9 of the Currency and Exchanges Act 9 of 1933 had the effect of blocking the expatriation of his assets from South Africa. The aggregate value of his blocked loan accounts was R4 276 757 134.

On 5 March 2008, Shuttleworth applied to the Reserve Bank for permission to transfer R1 500 000 000 of the blocked loan account out of South Africa. In accordance with the policy of the Reserve Bank the application could not be made directly by Shuttleworth but had to be made through an authorised dealer bank. Shuttleworth complied with the policy and chose the Standard Bank of

Southern Africa Limited to make the application, which was granted subject to the payment of an exit levy of R165 000 000. However, due to an error in calculating the ten per cent exit levy, Shuttleworth was later informed that the amount that could be transferred out of the country was R1 485 000 000, which would ensure that the exit payment represented ten per cent of the total amount. Shuttleworth contended that he had paid the levy of R165 000 000 in the belief that it was lawfully due.

In June 2009 Shuttleworth decided to transfer his remaining assets out of South Africa and applied to the Reserve Bank for permission to do so. Upon advice sought regarding the lawfulness of the ten per cent levy, he was advised that it was unlawful and challenged same. Significantly, Shuttleworth however did not challenge the principle of exchange control. He accepted that exchange control was necessary. He contended, however, that many facets of the current exchange regime was unconstitutional. Mr Shuttleworth's blocked assets would not be released until he paid the ten per cent exit levy. He thus paid an amount of R250 474 893.50 under protest to secure the release of his blocked assets.

When the Reserve Bank refused to reconsider its decision, Shuttleworth launched an application in the North Gauteng High Court in which he sought repayment of that sum as well as fairly wide-ranging orders to the effect that various provisions of our exchange control regime was unconstitutional and invalid. The high court refused to order the repayment sought but did strike down certain provisions of the Currency and Exchanges Act and the Exchange Control Regulations. Shuttleworth appeals against the refusal by the high court to order repayment and the Reserve Bank, the Minister and the President cross appeal against the various orders of invalidity.

The SCA held that a founding principle of Parliamentary democracy is that there should be no taxation without representation and that the executive branch of government should not itself be entitled to raise revenue but should rather be dependent on the taxing power of Parliament. The Court stated that the levy raised revenue for the State in that it brought in ten per cent of the value of any capital in excess of R750 000 exported out of the country, into the National Revenue Fund. Whilst in force, it raised approximately R2.9 billion. The SCA found therefore that the levy thus fell within the category of 'taxes, levies or duties' contemplated by sections 75 and 77 of the Constitution.

It held further that the reference in regulation 10(1)(c) to the power of Treasury to impose conditions on the export of capital from the Republic could not be construed as to include the power to impose a tax or levy on such export of capital and hence the imposition of the ten per cent levy was inconsistent with sections 75 and 77 of the Constitution and invalid and ultra vires regulation 10(1)(c).

By paying under protest, according to the SCA, Shuttleworth sought to convey that the payment was not a voluntary one and that he reserved the right to seek to reverse that payment. The Court accordingly set aside the decision of the Reserve Bank to impose the ten per cent levy. The Reserve

Bank was ordered to repay the appellant the amount of R250 474 893,50 with interest at the prescribed rate from 13 April 2012 to date of payment.

The SCA, moreover, held that there was no basis for the various declarations of invalidity by the high court. In those circumstances, the cross appeal succeeded.

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