THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 864/2013

Reportable

In the matter between:

MARK RICHARD SHUTTLEWORTH **First Appellant**

and

SOUTH AFRICAN RESERVE BANK **First Respondent**

MINISTER OF FINANCE **Second Respondent**

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA **Third Respondent**

Neutral Citation: *Shuttleworth v South African Reserve Bank* (864/2013) [2014] ZASCA 157 (1 October 2014).

Coram: Navsa ADP, Ponnan & Majiedt JJA and Fourie & Mocumie AJJA

Heard: 28 August 2014

Delivered: 1 October 2014

Summary: Exchange Control – regulation 10(1)(c) of the Exchange Control Regulations – lawfulness of the imposition of a ten per cent exit levy by the South African Reserve Bank on the value of assets sought to be exported upon emigration – whether court can order repayment of the levy.

ORDER

On appeal from: The North Gauteng High Court, Pretoria (Legodi J sitting as court of first instance).

The following order is made:

1 The appeal and cross-appeal are upheld to the extent reflected in the substituted order that follows.

2 The order in the court below is set aside in its entirety and substituted as follows:

'(i) The decision of the Reserve Bank to impose a ten per cent levy payment into the blocked rand levy account of the Reserve Bank as a condition on the applicant's transfer of his remaining blocked assets out of the Republic is set aside.

(ii) The Reserve Bank is ordered to repay the applicant the amount of R250 474 893, 50 with interest at the prescribed rate from 13 April 2012 to date of payment.

(iii) Each party is to pay its own costs.'

3 In respect of the appeal and cross-appeal the respondents are ordered to pay the appellant's costs attendant upon the employment of three counsel, where so employed, and the respondent in the cross-appeal is ordered to pay the cross-appellants' costs including those attendant upon the employment of two counsel.

JUDGMENT

Navsa ADP and Ponnan JA (Majiedt JA, Fourie & Mocumie AJJA concurring):

[1] The primary question in the present appeal is whether a ten per cent exit levy imposed by the first respondent, the South African Reserve Bank (the Reserve Bank) on the value of the assets sought to be exported by the appellant, Mr Mark Shuttleworth (Shuttleworth), upon his emigration, was lawful.

[2] That question arises for determination against the backdrop of the following facts: Shuttleworth, is a prominent entrepreneur who was born and educated in South Africa. He made his fortune through Thawte Consulting, initially a general internet consultancy that progressed to specialising in security for electronic commerce. It became the first company to produce a full-security encrypted e-commerce web server that was commercially available outside of the United States of America. 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. It was this acquisition of vast wealth by Shuttleworth and subsequent developments that led to his dispute with the Reserve Bank, and ultimately, to the litigation culminating in the present appeal.

[3] Following the sale of Thawte, Shuttleworth formed a venture capital company that he claimed, without challenge, had invested in several South African companies in a variety of sectors such as software, pharmaceutical services and mobile phone services, all with the goal of serving a global marketplace. He started the Shuttleworth Foundation, a non-profit organisation that, he said, supported social innovation in education. In 2001 Shuttleworth emigrated to the Isle of Man, a British Crown dependency and a tax-efficient jurisdiction.

[4] According to Shuttleworth he emigrated in order to free up funds to invest outside South Africa. He claimed that he emigrated due to the system of exchange control in South Africa, which he asserted was severely restrictive and rendered investments outside our borders prohibitive. That claim is, of course, contested by the Reserve Bank, but more about that later. Subsequent to his emigration Shuttleworth donated a total of R180 million to the foundation.

[5] On his emigration, Exchange Control Regulations,[1] promulgated in terms of s 9 of the Currency and Exchanges Act 9 of 1933 (the Act), 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 - an amount not to be sniffed at.

[6] In terms of permission granted by the Reserve Bank, Shuttleworth was entitled to remit out of the country, interest on the blocked loan accounts at the prime lending rate plus two per cent, but the capital could not be transferred without its permission.

[7] 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. This policy was dubbed a 'closed door policy' by Shuttleworth which the Reserve Bank retorted is an inappropriate epithet – this aspect will be dealt with later in this judgment. Shuttleworth complied with the policy and chose the Standard Bank of Southern Africa Limited (SB) 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 subject to the application.

[1] Exchanges Control Regulations, GN R1111, *GG Extraordinary* 123, 1 December 1978.

[8] Shuttleworth contended that he had paid the levy of R165 000 000 in the belief that it was lawfully due. It is necessary to record that apart from the transfer of R1 485 000 000 and the payment of the levy, Shuttleworth made various donations to entities in South Africa, out of what remained in the blocked loan account. As a result of those transactions the value of the assets in his blocked loan account was reduced to R 2 504 748 935 by 26 June 2009.

[9] 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. This time he sought advice in advance of the application as to the lawfulness of the ten per cent exit levy. He was advised that it was unlawful. He consequently framed his application for permission to transfer his remaining assets out of the country in such a manner 'as to protect my right to challenge any imposition of a ten per cent exit levy by the first respondent'.

[10] Shuttleworth, once again, in accordance with the Reserve Bank's policy, instructed SB to submit the application to transfer his remaining assets out of the country. Unbeknown to Shuttleworth, SB did not attach a document supplied by him, which explicitly reserved his rights in respect of the ten per cent exit levy. SB submitted an application framed by *it* and without such reservation of rights. Contrary to his instructions, SB also tendered to pay the Reserve Bank the ten per cent exit levy.

[11] The Reserve Bank approved the application submitted by SB. Upon discovering that SB had tendered the ten per cent levy, Shuttleworth instructed SB to request the Reserve Bank to reconsider its decision to impose the ten per cent exit levy and to pay the levy under protest, pending the reconsideration. Whilst awaiting the decision of the Reserve Bank, Shuttleworth transferred his remaining assets out of South Africa in the manner described by him and set out below:

'28. The payment under protest of the 10% exit fee duly took place on 11 November 2009 and the balance of my blocked assets were transferred out of the Republic as follows:

28.1. On 18 Nov 2009, R650 000 000 was transferred and then a further R1 036 128 303 was transferred.

28.2. On 2 Dec 2009, R300 000 000 was transferred.

28.3. On 21 Dec 2009 the remaining R268 145 738 was transferred.'

[12] The Reserve Bank refused to reconsider its decision, stating only that it was bound by Exchange Control Regulations. Subsequently, it supplied the basis for its decision. The Reserve Bank relied exclusively on Exchange Control Circular No. D375 of 26 February 2003, the relevant part of which reads:

"Emigrant blocked assets are to be unwound. Amounts up to R750 000 (inclusive of amounts already exited) will be eligible for exiting without charge. Holders of blocked assets wishing to exit more than R750 000 (inclusive of amounts already exited) must apply to the Exchange Control Department of the South Africa Reserve Bank to do so. Approval will be subject to an exiting schedule and an exit charge of 10 per cent of the amount""

The Reserve Bank stands by that circular as the basis for the decision. Reserve Bank ruling Section B 5(E)(iii)(e) of the Exchange Control Rulings as reflected in Circular No D380 is equally of importance:

'Any other assets belonging to the emigrants at the time of their departure or accruing to them thereafter will require to be brought under the control of an Authorised Dealer. The Exchange Control Department of the South African Reserve Bank will, on application, consider requests for the unblocking of the emigrant's remaining assets. Any approval will be subject to an exiting schedule, at the discretion of the Exchange Control Department of the South African Reserve Bank, and an exit charge of 10%.'

As can be seen, that ruling also deals with the position of authorised dealers such as SB. The total amount of the levy paid by Shuttleworth under protest was R250 474 893.50.

[13] Shuttleworth emphasised and it was admitted by the Reserve Bank that the ten per cent exit levy was applied on a generalised basis and there was thus no question of any discretion being exercised in that regard. Shuttleworth characterises it as a rigid application of policy. That description was unchallenged. The Reserve Bank did, however, take issue with Shuttleworth's charge that the exit levy operated as a generally applicable revenue raising mechanism. The Reserve Bank is adamant in its denial that the exit levy operated as a tax of sorts. It does admit though, that there is no historical instance in which it did not impose the exit levy.

[14] Following on the Reserve Bank's refusal to reconsider its decision and given the amount of money involved, it was hardly surprising that Shuttleworth approached the North Gauteng High Court for relief, principally against the imposition of the exit levy, which he contended was unconstitutional. He also sought a range of far-reaching orders. Shuttleworth launched an attack on various provisions underpinning the exchange control system in South Africa. He sought the following extensive relief against the Reserve Bank as the first respondent, the Minister of Finance (the Minister) as the second respondent, and the President of the Republic of South Africa (the President) as the third respondent:

'1 Reviewing and setting aside the decisions of the first respondent taken on or about 16 October 2009 and 1 December 2009 to impose a 10% levy payment into the first respondent's Blocked Rand Levy Account as a condition on the applicant's transfer of his remaining blocked assets out of the Republic.

1A Substituting the decisions of the first respondent on or about 16 October 2009 and 1 December 2009 with an unconditional decision to authorise the applicant to transfer 90% of his remaining blocked assets out of the Republic.

1B Directing the first respondent, alternatively the second respondent to repay the applicant the amount R250, 474, 893.50.

1C Directing the first respondent, alternatively the second respondent to pay the applicant interest on the amount of R250, 474, 893.50 at the prescribed rate from date of demand to date of payment.

1D To the extent necessary, condoning the applicant's failure to have served a notice on the respondents in terms of section 3(2)(a) of the Legal Proceedings against Certain Organs of State Act 40 of 2002.

2 Declaring that the words "and an exit charge of 10% of the amount" in

2.1 Exchange Control Circular No D375 of 26 February 2003,

2.2 Exchange Control Circular No D380 of 26 February 2003, and

2.3 Section B [5](E)(iii)(e) of the Exchange Control Rulings;

were at all material times inconsistent with the Constitution and invalid.

3. Declaring that section 9 of the Currency and Exchange Act 9 of 1933 ("the Act") is inconsistent with the Constitution and invalid.

4. In the alternative to prayer 3 above,

4.1 declaring that paragraphs (a), (c) and (f) of subsection (2) of section 9 of the Act are inconsistent with the Constitution and invalid,

4.2 declaring that subsection (3) of section 9 of the Act is inconsistent with the Constitution and invalid, and

4.3 declaring that subsection (5) of section 9 of the Act is inconsistent with the Constitution and invalid.

5. Declaring that the Exchange Control Regulations are inconsistent with the Constitution and invalid.

6. In the alternative to prayer 5 above,

6.1 declaring that paragraphs (a) to (c) of Regulation 3(1) of the Exchange Control Regulations are inconsistent with the Constitution and invalid;

6.2 declaring that Regulation 3(3) of the Exchange Control Regulations is inconsistent with the Constitution and invalid;

6.3 declaring that the words “(3) or” in Regulation 3(5) of the Exchange Control Regulations are inconsistent with the Constitution and invalid;

6.4 declaring that Regulation 10(1)(b) of the Exchange Control Regulations is inconsistent with the Constitution and invalid;

6.5 declaring that Regulation 18 of the Exchange Control Regulations is inconsistent with the Constitution and invalid;

6.6 declaring that Regulation 19(1) of the Exchange Control Regulations is inconsistent with the Constitution and invalid;

6.7 declaring that the words “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” in Regulation 22 of the Exchange Control Regulations and the omission in that regulation of the words “intentionally or negligently” immediately after the words “every person who” are inconsistent with the Constitution and invalid.

7. Declaring that the Orders and Rules under the Exchange Control Regulations are inconsistent with the Constitution and invalid.

8. In the alternative to prayer 7 above, declaring that Order and Rule 10(a) of the Orders and Rules under the Exchange Control Regulations is inconsistent with the Constitution and invalid.

9. Declaring that the policy of the first respondent of refusing to deal directly with members of the public in relation to the exercise of its delegated powers under the Exchange Control Regulations and insisting that members of the public communicate with it

through the intermediation of authorised dealer banks, is inconsistent with the Constitution and invalid.'

[15] Essentially, Shuttleworth's attack on the exit levy was that taxation required a statute passed by Parliament, which in the present case was conspicuously absent. He submitted that the requirement contained in sections 75 and 77 of the Constitution that a money bill as defined (including the appropriation of money or imposition of taxes) must follow a prescribed procedure, was crystal clear. In the present case, as will be discussed later in greater detail, the policy applied by the Reserve Bank has its genesis in a speech made in Parliament in 2003 by the Minister, which was then recast as policy and found its way into the circulars and rulings referred to earlier. Shuttleworth contended that regulation 10(1)(c) upon which the Reserve Bank relied as the source of its power to impose the levy did not, without more, authorise the raising of revenue. Before obtaining the force of law it had, in accordance with section 9(4) of the Act, to be approved by Parliament which, it was common cause, did not occur. These contentions did not find favour with the high court.

[16] The high court (Legodi J) held that a reading of the applicable regulations led compellingly to the conclusion that: (a) the ten per cent levy did not amount to a revenue raising mechanism but was intended to act as a disincentive to the export of capital; (b) that there was legislative underpinning for its imposition, namely, regulation 10(1)(c) and (c) that it was not unconstitutional.

[17] In respect of the 'closed door policy' based on rule 10(a) made by the Minister, purportedly in terms of the Act, the high court held, first that there was legislative underpinning for the rule and second, that it was not unconstitutional. The high court accepted the justification supplied by the Reserve Bank for applications to transfer assets out of the country to be processed through authorised dealers (banks), namely, that it was a practical arrangement because the Reserve Bank's Exchange Control Department did not have the capacity to deal with the large number of applications and that authorised dealers acted within the parameters of exchange control rulings and

orders and only when the rulings did not cater for a particular situation, was it referred directly to the Reserve Bank.

[18] The court below recorded what it considered to be the essence of Shuttleworth's attack on the system of exchange control and the regulations on which it is based as follows:

'[130] In his written heads of argument, the applicant contends that the regulations make no provision for the power to grant permissions and exceptions which is given to the Minister of Treasury and has been delegated to the Reserve Bank, to be exercised in accordance with the requirements of procedural fairness (My own emphasis).

[131] On the contrary, it is said, the regulations simply vest the Treasury or the Minister with an unfettered discretion to grant exemptions from the blanket prohibitions on any transactions involving foreign currency, gold or other assets readily convertible into foreign currency. They do not prescribe any process of notice and comment which must be followed prior to the Reserve Bank determining that an exemption or permission should be granted. This unbridled discretion creates a system on non-participative rule making, so it is contended. This is said to be inconsistent with the right to procedurally fair administrative action and therefore inconsistent with the Constitution. Specifically the Regulations are said to be in conflict with sections 22, 25(1) and (2) of the Constitution. Section 25 was quoted earlier in paragraph 107 of this judgement. Section 22 provides as follows:

"*22. Freedom of trade, occupation and profession*

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."

[132] The Regulations under attack are said to infringe everyone's rights under sections 22 and 25 of the Constitution because they establish a system of exchange control which prohibits any transaction involving currency, gold or other foreign currency. The prohibition itself interferes with every member of the public's ability to deal with his or her property as he or she chooses, and to engage in free trade because, it places a limit on what transactions may be undertaken in relation to that property and in the pursuit of that trade, so it is contended.

[133] For three reasons it is said, although the Regulations make provision for the prohibitions which interfere with the rights under sections 22 and 25 of the Constitution to be mediated or minimized through the grant of exemptions and permissions, the relaxation on the prohibitions does not save them from Constitutional inconsistency. The protection of fundamental rights

cannot be made to be departed from on the exercise of a discretion and, in my view, only in compelling situations can the provisions of section 36 of the Constitution be brought into play.'

[19] The court below dismissed Shuttleworth's application to have s 9 of the Act in its entirety declared unconstitutional. It refused to declare the Orders and Rules[2] under the Exchange Control regulations unconstitutional and invalid. It did declare s 9(3) of the Act to be inconsistent with the Constitution and invalid. Furthermore, it declared regulation 3(1) of the Exchange Control Regulations in its entirety to be inconsistent with the constitution and invalid. In addition, regulations 3(3) and 3(5) were declared inconsistent with the Constitution and invalid. So too, regulations 10(1)(*b*) and 19(1). Legodi J also declared certain words in regulation 22 unconstitutional and invalid. Virtually all of the declarations of invalidity were suspended.

[20] In the present appeal Shuttleworth defended the orders granted in his favour and appealed against the findings adverse to him. The Minister and the President lodged an appeal to the Constitutional Court against the orders of invalidity referred to in para 19. The Constitutional Court has stayed those proceedings pending a determination of the present appeal and cross-appeal. Before us the Minister, the President and the Reserve Bank defended the orders made in the latter's favour and made common cause in the cross-appeal against the various declarations of invalidity.

[21] Significantly, Shuttleworth does not challenge the principle of exchange control. He accepts that exchange control is necessary. He contended, however, that many facets of the current exchange regime is unconstitutional.

[22] According to the Minister, a system of exchange control allowances for the export of funds when persons emigrate has been in place in South Africa for a number of decades. Emigrants' funds in excess of the emigration allowance were thus placed in what were described as 'emigrants blocked accounts' in order to preserve foreign reserves. During 2002, given the improved strength and resilience of the South African

[2] Orders and Rules under the Exchange Control Regulations, GN R1112, *GG Extraordinary* 123, 1 December 1961.

economy and as part of a process of gradual exchange control liberalisation, it was decided that those 'blocked assets will now be unwound'. Thus in the Minister's Budget Review of 2003, he announced that emigrants wishing to export amounts up to R750 000 could do so without charge and those wishing to export more than R750 000 would have to apply to the Exchange Control Department to do so, subject to the submission of an exiting schedule and payment of an exit charge equal to ten per cent of the amount sought to be exported. The ten per cent charge, so it was suggested, was intended to constitute a disincentive to the exit of large amounts of capital - thus assisting to maintain the financial stability of the South African economy. The new policy thus determined a limit to the quantum of funds which may be exported by emigrants from South Africa, and any amounts sought to be exported in excess of such limit would only be allowed subject to the payment of a ten per cent exit levy and the provision of an exiting schedule. On 27 October 2010 and during the course of his mid-term budget speech to Parliament, the Minister announced the repeal of the ten per cent levy.

[23] In opposing Shuttleworth's application, the Director-General of the National Treasury stated on behalf of the Minister:

'46. The core Exchange Control Regulations were published under Government Gazette 123 of 1 December 1961, the last amendment thereto being effected on 14 January 2011. Restrictions on the export of capital, which form the nub of the applicant's case, are to be found in Regulation 10(1).

47. The exit charge that the applicant complains of is imposed in terms of Regulation 3(1) read with Regulation 10(1)(c).

48. Regulation 3(1)(a) read with Regulation 10(1)(c) *inter alia* prohibits any person from taking currency or capital out of the Republic without the prior permission of the Treasury or a person authorised by the Treasury. Should such permission have attendant conditions of export, these must be complied with by all parties, including the authorised dealer who may be facilitating the transaction.

The determination of 10%

49. The 10% charge is a condition that was decided upon by Treasury in accordance with Regulation 10(1)(c). It is imposed as a flat rate in the interests of consistency, certainty,

constancy and evenness in its application. In practice it is implemented by the first respondent and its designated officials.

The above provisions of the Act and regulations thus form the basis of the legal framework within which the 10% charge was located whilst it was still in force.

. . .

Rulings and circulars

54. The first respondent issues rulings and circulars. These are administrative measures designed to facilitate the application of the legislation (including subordinate legislation) on exchange control. The rulings and circulars published by the first respondent guide the authorised dealers in the day to day transactions that they undertake on behalf of their clients. They are intended to address the individual factual issues that arise with respect to the clients of the authorised dealers.

55. The rulings are different from the orders and rules contemplated in section 9(5)(a) of the Act. Unlike the Regulations and orders and rules, the rulings and circulars have no force of law.

56. I hasten to explain that though the authorised dealers are appointed by the Minister, they are the agents of the clients whom they serve, and on whose behalf they apply to engage in various exchange control related transactions.

57. The majority of requests concerning exchange control are transacted by the authorised dealers on behalf of their clients without any reference to the Exchange Control Department. It is only when a particular application falls outside the ambit of the rulings that it must be referred to the Exchange Control Department by the authorised dealer.

58. In this instance, for example, the application of the applicant to export capital from the country was one of those that required the approval of the Exchange Control Department because the quantum to be exported was in excess of the allowed limit.

. . .

75.3 I am not able to comment on the discussions or instructions given to the applicant's authorised dealer or the detail of the communication between the first respondent and the authorised dealer, save to state that Exchange Control Circular No. D375 of 26 February 2003 administratively communicated the policy decision of the government.

75.4 impose a condition of this nature.

75.5 I reiterate that the exit charge was imposed in accordance with the law. Regulation 10(1)(c) is the source of the authority . . . .

. . .

81.5 The circulars and rulings are administrative measures publicised in execution of the policy directives of government.

. . .

81.11 I deny that crucial legislative determinations are made in the rulings and circulars or that critical law making functions are performed by the designated officials of the first respondent by means of rulings and circulars.

81.12 The source of the power to regulate exchange control transactions is the Act read with the Regulations, not the rulings and circulars.

81.13 Rules and orders constitute law, unlike rulings and circulars which do not.'

[24] According to the Reserve Bank:

'78.2.1 The application received from the Applicant was dealt with according to the then prevailing policy established by the Minister of Finance, which policy was set out in Exchange Control Circular D 380.

78.2.2 the Department exercised no discretion in relation to this application, but applied the then-prevailing policy laid down by the Minister of Finance, as it does in all such cases. . . .'

[25] Section 9(1) of the Act empowers the President to make 'regulations in regard to any matter directly or indirectly relating to or affecting or having any bearing upon currency, banking or exchanges'. Section 9(5)*(a)* of the Act provides that: '[a]ny regulations made under this section may provide for the empowering of such persons as may be specified therein to make orders and rules for any of the purposes for which the [President] is by this section authorized to make regulations'. In terms of the regulations, the control over South Africa's foreign currency is vested in the Treasury. The Treasury is defined in regulation 1 as the Minister of Finance or an officer of the Department of Finance who, by virtue of the division of work in that Department, deals with the matter on the authority of the Minister.

[26] The respondents now rely exclusively on regulation 10(1)(c) as the ostensible enabling power for the imposition of the exit levy. In broad terms regulation 10(1)(c) prohibits the export of capital or any right to capital from the Republic. It provides that:

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

Considering the history of Exchange Control and prior concerns about the outflow of capital on a scale that would be detrimental to South Africa's economy, this regulation clearly served a legitimate purpose. Even now the external balance of payments must be a continuing concern for Treasury. However, notwithstanding that the regulation was intent on ensuring that the outflow was regulated and that conditions could be attached in relation to the outflow of funds, it does not follow that the regulation was intended to or could be utilised as a revenue-raising mechanism. On the contrary, as will become evident, for the collection of revenue, taxes or levies, prescribed procedures have to be followed.

[27] Acting in terms of regulation 10(1)(c), so we are told, the Minister granted permission generally for the export of capital from the Republic. The grant of that general permission though was subject to a condition, namely payment of a ten per cent levy. The effect therefore was the grant of a general permission subject to a blanket condition. The consequence, as Treasury understood the situation, was that its discretion was rigidly fettered because it was obliged to apply the policy of the Minister instead of assessing the peculiar facts of the application before it. The Reserve Bank's officials were therefore responsible only for mechanically applying the policy decision of the Minister.

[28] The ten per cent levy on the export of capital was a levy of general application that, whilst in force, was imposed on every export of capital in excess of R750 000. It can thus hardly be in dispute that the levy was a revenue-raising mechanism for the State. The levy could therefore only have been intra vires regulation 10(1)(c) if that provision legitimately authorised the raising of revenue for the State. Section 9(4) of the Act, however, prescribes how a regulation calculated to raise revenue has to be promulgated. Section 9(4) states:

'The Minister of Finance shall cause a copy of every regulation made under this section to be laid upon the Table of both Houses of Parliament within fourteen days after the first publication thereof in the *Gazette*, if Parliament is in ordinary session during the whole of that period, and if Parliament is not in ordinary session during the whole of that period then within fourteen days after the beginning of the next ordinary session of Parliament; and if any of such regulation is calculated to raise any revenue, he shall cause to be attached to the copy so laid upon the Table a statement of the revenue which he estimates will be raised thereby during the period of twelve months after the coming into operation thereof. Every such regulation calculated to raise any revenue shall cease to have the force of law from a date one month after it has been laid on the Table unless before that date it has been approved by resolution of both Houses of Parliament.'

[29] It is undisputed that regulation 10(1)(c) had not followed the procedure for taxation prescribed by s 9(4) of the Act. Thus, even if the regulation can be construed as authorising the raising of revenue, the problem is that it has not been approved in terms of s 9(4) of the Act. Section 9(4), it would seem, is animated by the 'no taxation without representation principle'. 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, which is democratically accountable to the country's tax-paying citizenry.

[30] Our Constitution is careful to ensure that the power of taxation is tightly controlled. Section 77(1) of the Constitution defines a 'money bill' as follows:

'77. Money Bills –

(1) A Bill is a money Bill if it-

(a) Appropriates money;

(b) Imposes national taxes, levies, duties or surcharges.'

Section 77(2) provides:

'77. (2) A money bill may not deal with any other matter except –

(a) a subordinate matter incidental to the appropriation of money

(b) the imposition, abolition or reduction of national taxes, levies, duties or surcharges.'

Section 73(2) states that only the Minister of Finance may introduce a money bill in the House of Assembly. According to sections 55(1)(*b*) and 68(1)(*b*) of the Constitution, the ordinary power of the National Assembly and the National Council of Provinces to initiate and prepare legislation does not extend to the initiation or preparation of money bills. And, s 73(3) prevents the introduction of money bills in the National Council of Provinces. All of these constitutional provisions thus render it unconstitutional for taxes or levies to be raised by delegated legislation which is not specifically authorised in a money bill enacted in accordance with the money bill provisions of the Constitution.

[31] The levy raised revenue for the State. It brought 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 levy thus fell within the category of 'taxes, levies or duties' contemplated by sections 75 and 77 of the Constitution. The reference in regulation 10(1)(c) to the power of Treasury to impose conditions on the export of capital from the Republic cannot be construed to include the power to impose a tax or levy on such export of capital. It must follow that 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).

[32] It appears to be clear from the history of the matter, including the correspondence exchanged between the Reserve Bank and Shuttleworth that the former relied principally and enduringly on the speech delivered by the Minister in Parliament for the imposition of the ten per cent levy. The more recent reliance on regulation 10(1)(c) is, in our view, contrived and an *ex post facto* attempt to contextualise the levy within an enabling regulatory framework.

[33] It is now necessary to consider whether the ten per cent levy unlawfully imposed by the Reserve Bank has to be repaid to Shuttleworth. It is common cause that the levy was paid by Shuttleworth under protest to the Corporation of Public Accounts as the representative of Treasury. He therefore pursues the repayment claim against the

Minister. Almost a century ago in *Union Government (Minister of Finance) v Gowar* 1915 AD 426 at 433-4, Innes CJ observed:

'It would be in the highest degree inequitable that the Treasury should be permitted to retain what it had no right to claim; and the question is whether the law will allow it to take up such a position. . . . It seems to me that money wrongly exacted by the possessor of goods from the true owner as a condition precedent to their delivery, and paid by the latter not as a gift, but in order to obtain possession of his own property and with a reservation of his rights would be recoverable by a *condictio*. . . . Where goods have been wrongly detained and where the owner has been driven to pay money in order to obtain possession, and where he has done so not voluntarily, as by way of gift or compromise, but with an expressed reservation of his legal rights, payments so made can be recovered back, as having been exacted under duress of goods. The *onus* of showing that the payment had been made involuntarily and that there had been no abandonment of rights would, of course, be upon the person seeking to recover.'

Wessels AJA in a concurring judgment stated (at 453):

'I think we may well take the further step and hold that a payment is involuntary and, therefore, recoverable, even though it was not made *metus causa* in the Roman law sense, but was made under pressure at the demand of one in authority who had it in his power to withhold the property or to suspend the rights of the person making the payment.'

[34] In *Commissioner for Inland Revenue v First National Industrial Bank Ltd* 1990 (3) SA 641 (A) at 647 para C-D, Nienaber AJA, after referring with approval to the aforesaid dicta from *Gowar*, stated:

'. . . the *condictio indebiti* is not, of course, confined to the recovery of an *indebitum solutum* which was involuntary because it was paid by mistake; it is now also available when the payment (or indeed any performance), although deliberate, perhaps even advised, was nevertheless involuntary because it was effected under pressure and protest.'

Here 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. This is thus clearly a case that falls within the ambit of Innes CJ's recognition in *Gowar* that such payments can be recovered under the *condictio indebiti.* By paying under protest, Shuttleworth sought to convey that the payment was not a voluntary one and that he reserved the right to seek to reverse that payment. By an amendment to his notice of motion on 13 April 2012 he claimed interest

on that amount at the prescribed rate from the date of demand to date of payment. Interest at the prescribed rate will thus run on the sum of R250 474 893.50 from 13 April 2012.

[35] In our view, therefore there is no bar to an order that the ten per cent levy be repaid to Shuttleworth with interest. Having regard to the time that has elapsed between the commencement of the dispute between Shuttleworth and the Reserve Bank and the abolition of the ten per cent levy more than three years ago, there is no danger of a flood of similar claims.

[36] In respect of the remainder of the relief sought, it was contended on Shuttleworth's behalf that he had been acting in the public interest and was genuinely concerned about the manner in which exchange control was being managed by the Reserve Bank and as a result the extensive orders sought were warranted. This submission, with good reason, was not advanced with any vigour. First, it appears to us that Shuttleworth's primary purpose was not purely altruistic but to secure repayment of the ten per cent levy paid by him. Second, the ten per cent levy has in any event been done away with. Third, that situation obtained at the time of the high court's order and it appears somewhat contradictory for the high court to have denied Shuttleworth his primary relief but then to have proceeded to strike down various legislative provisions underpinning our exchange control regime. Thus, the high court's orders issued: (a) in the abstract and without due regard to people other than Shuttleworth and permutations beyond the facts of the present case; and (b) without proper consideration for its effect on the exchange control regime and on the economy as a whole. This court has repeatedly warned against deciding cases which will have no practical effect and for courts to guard against speculative and academic enquiries in circumstances in which there is no factual foundation for findings that might have an effect on future disputes that are yet to crystallise. (See *Radio Pretoria v Chairman Independent Communications Authority of South Africa* 2005 (1) SA 47 (SCA) and the authorities there cited). In those circumstances one can appreciate the concerns of the Minister

and Treasury about the range and breadth of the orders issued by the high court that motivated the cross-appeal.

[37] In respect of the relief sought in para 9 of the notice of motion, which impacts on what Shuttleworth termed the 'closed-door policy', the same considerations as set out in the preceding paragraph apply. Moreover, there is force in the justification proffered by the Reserve Bank, namely, that it has limited resources and would not be able to deal with the flood of applications for the export of capital that occur on a regular basis. There may be questions that arise in particular instances, where, for example, the authority of a bank is challenged by a client or where, as in the present case, it does not faithfully execute a client's mandate. Questions might also arise in the future as to whose interests the dealer banks represent and whether or not they might, in certain circumstances, be conflicted. Once again, those are not areas that, for present purposes, we need to address.

[38] In the light of the conclusions reached it follows that the appeal in relation to the imposition of the ten per cent exit levy must succeed. So too must the cross-appeal in relation to all of the declarations of invalidity. Costs in each instance should follow the result. It is necessary to record that Shuttleworth did not in his notice of motion seek costs. The substituted order proposed in the notice of appeal is to similar effect. The high court ordered each party to pay its own costs. Thus, save for the order relating to costs, the remainder of the high court's order falls to be set aside.

[39] The following order is made:

1. The appeal and cross-appeal are upheld to the extent reflected in the substituted order that follows.
2. The order in the court below is set aside in its entirety and substituted as follows:

'(i) The decision of the Reserve Bank to impose a ten per cent levy payment into the blocked rand levy account of the Reserve Bank as a condition on the applicant's transfer of his remaining blocked assets out of the Republic is set aside.

(ii) The Reserve Bank is ordered to repay the applicant the amount of R250 474 893,50 with interest at the prescribed rate from 13 April 2012 to date of payment.

(iii) Each party is to pay its own costs.'

3. In respect of the appeal and cross-appeal the respondents are ordered to pay the appellant's costs attendant upon the employment of three counsel, where so employed, and the respondent in the cross-appeal is ordered to pay the cross-appellants' costs including those attendant upon the employment of two counsel.

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MS NAVSA

ACTING DEPUTY PRESIDENT

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V PONNAN

JUDGE OF APPEAL

APPEARANCES:

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