CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO CCT 13/96

G Rudolph	First Appellant
Glynn Rudolph & Co (Pty) Ltd	Second Appellant
v	
Commissioner for Inland Revenue	First Respondent
JFC Heydenrych NO	Second Respondent
RJ Beukes NO	Third Respondent
JJ Holtzhausen NO	Fourth Respondent
K Steyn NO	Fifth Respondent
P Du Plessis NO	Sixth Respondent
TJ Frates NO	Seventh Respondent
MMJ Van Wyk NO	Eighth Respondent

Heard on: 28 May 1996

Delivered on: 11 June 1996

JUDGMENT

ACKERMANN J:

[1] This matter comes before this Court pursuant to the following order of the Appellate Division of the Supreme Court:

> (1) In this order the words "common law grounds of invalidity" mean the contentions -
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> > (a) that an authorization in terms of sec 74(3) of the Income Tax Act 58 of 1962, once issued and executed, may not be used in perpetuity and that the use in April 1994 of the authorizations originally issued and executed in October 1993 was an unlawful administrative action;

(b) that the power to issue such authorizations was vested in the Commissioner for Inland Revenue, that the delegation of this power to Mr CT Prinsloo under sec 3(1) of the Act was invalid and that, therefore, the authorizations were invalid; and

(c) that the authorizations were invalid on the ground that they were too vaguely and imprecisely worded.

(2) In terms of sec 102(6) of the Constitution of the Republic of South Africa Act 200 of 1993 ("the Constitution"), read with Rule 23(4) of the Rules of the Constitutional Court, the following issues in this case are referred for decision to the Constitutional Court, viz:-

(a) whether sec 74(3) of the Income Tax Act 58 of 1962 is contrary to the provisions of chapter 3 of the Constitution and accordingly invalid;

(b) in view of the provisions of the Constitution, and in particular sec 24 thereof, whether it is competent for this Court (the Appellate Division) to adjudicate upon and determine on appeal the common law grounds of invalidity or whether these matters fall within the exclusive jurisdiction of the Constitutional Court;

(c) if it is competent for the Appellate Division to adjudicate upon and determine on appeal the common law grounds of invalidity, what further directions for the disposal of the appeal should be given; and

(d) if the common law grounds of invalidity fall within the exclusive jurisdiction of the Constitutional Court, whether these grounds, or any of them, are well-founded.

(3) The costs of the hearing before the Appellate Division on 12 March 1996 shall be costs in the cause.

[2] Section 74(3) of the Income Tax Act 58 of 1962 (the "Act") *inter alia* empowers certain persons, authorized thereto by the Commissioner in writing, to enter any premises and there to search for and seize books, records, accounts or documents which may be material in assessing the liability of any person for any tax and to retain such documents as may be required for any assessment or for any criminal or other proceedings under the Act.

[3] During October 1993 officials of the first respondent, acting with written authorizations issued by Mr Prinsloo (referred to in para (1)(b) of the above quoted order), searched the first appellant's home and seized various documents in his possession. On 22 April 1994 various of the respondents, acting under the same authorizations, searched the business premises of second appellant in Johannesburg, where the first appellant had an office. They seized a large number of documents, locked them in a store room on the premises, which they sealed, and one of the respondents retained the key. On 26 April 1994 first appellant was afforded an opportunity of copying the seized documents under supervision of some of the respondents. Late that afternoon third respondent intimated that the seized documents were to be removed from the premises then and there. However, because of the lateness of the hour, the mass of documents for which a receipt had not yet been issued, and the fact that first appellant had not completed copying the documents, the seized documents were once again locked in the store room, third respondent retaining the key. The next day the interim Constitution came into operation.

[4] On 29 April 1994 the appellants launched an urgent application in the Witwatersrand Local

Division of the Supreme Court for interim relief, pending the institution of proceedings impugning the authorizations, alternatively declaring section 74(3) of the Act and the authorizations or their execution to be unconstitutional. A preliminary consent order regarding the filing of affidavits and other interim arrangements, contained the following provision:

> The Applicant's documents shall be transferred to the offices of the Applicant's attorney for safe keeping in a separate strongroom, sealed by Respondent, provided that the First Applicant shall have reasonable access thereto under supervision of a representative of the Respondents and shall be entitled to copy any document or replace any original with a copy.

The application failed.[1]

[5] In due course the matter came before the Appellate Division which, having heard full argument on the "common law grounds of invalidity", made the referral order quoted in para [1] above. In furnishing the Appellate Division's reasons for the referral, Plewman AJA stated the following:

> Counsel for the appellants conceded that the common law grounds of attack upon the validity of the authorizations and any actions taken in terms thereof could, if his arguments were well - founded, constitute a breach of appellants' constitutional rights under sec 24 of the Constitution. He contended however that this Court enjoyed some form of parallel jurisdiction which entitled it to entertain the appeal.
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> I am not satisfied that this Court does indeed have a parallel common law jurisdiction in the circumstances I have outlined. But it seems to me, in any event, that in order to decide whether this Court would have a jurisdiction such as is contended for this Court would be obliged to interpret the Constitution which it is not entitled to do.

[1] The judgment is reported as *Rudolph & Another v Commissioner for Inland Revenue and Others NNO* 1994 (3) SA 771 (W).

Referred issue (a): Whether section 74(3) of the Act is contrary to the provisions of Chapter 3 of the interim Constitution.

[6] Mr *Marcus*, who appeared for the appellants, limited his constitutional attack on section 74(3) of the Act to its alleged inconsistency with section 13 of the interim Constitution and in particular the right of every person "not to be subject to searches of his or her ... home or property [or] the seizure of private possessions [in the Afrikaans text 'die beslaglegging op private besittings']" guaranteed by that section.

[7] He was faced with the difficulty that, after written arguments in this case had been filed, we delivered three judgments which pre-empt the determination of this issue. In *Du Plessis and Others v De Klerk and Another*[2] the Court was concerned with an attempted invocation of the constitutional right of free speech to justify a defamation committed before the interim Constitution came into operation. It held that the Constitution did not operate retroactively in the sense that it enacts that "as at a past date the law shall be taken to have been that which it was not" with the effect of invalidating what was previously valid, or *vice versa*.[3] It did not have the effect that "conduct unlawful before the Constitution came into force is now to be deemed to be lawful by reason of Chapter 3".[4] In *Gardener v Whitaker*,[5] also a defamation case, this conclusion was endorsed without elaboration.[6]

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[2] CCT 8/95, 15 May 1996, as yet unreported.

[3] Id para 13 and quoting from *Shewan Tomes and Co Ltd v Commissioner of Customs and Excise* 1955 (4) SA 305 (A) 311. Although the court was divided on other issues in the case, on this aspect it was unanimous.

[4] Id para 14 per Kentridge AJ.

[5] CCT 26/94, 15 May 1996, as yet unreported.

[6] Id para 13.

[8] In *Key v The Attorney General, Cape of Good Hope Provincial Division and Another*[7] the constitutional validity of *inter alia* the search and seizure provisions of section 6 of the Investigation of Serious Economic Offences Act 117 of 1991 were challenged as being in breach of section 13 of the interim Constitution. Writing for a unanimous court Kriegler J held that the decision in *Du Plessis v De Klerk*[8] was dispositive of the matter. Inasmuch as the search and seizure and other relevant matters all took place prior to the Constitution coming into force -

> [N]one of the events of which the applicant complains can be said to constitute a breach of any of his rights under the Constitution. Such rights had not yet come into existence when the events took place. Nor did - nor could - the subsequent advent of the Constitution, by affording rights and freedoms which had not existed before, render unlawful actions that were lawful at the time at which they were taken.[9] (Emphasis added.)

[9] In the light of these decisions and particularly the passage from Kriegler J's judgment emphasised above, *Mr Marcus* was constrained to contend that the seizure of the documents had not been completed by the time the interim Constitution came into force. This contention is unsustainable. No good reason exists for construing the concept of "seizure" as embodied in section 13 of the interim Constitution any differently from the concept "seize" in section 74(3) of the Act or in similar statutes, nor for concluding that "seizure" in section 13 is perfected in a different manner or at a later stage.

[10] In *Green v Commissioner of Customs and Excise*[10] it was necessary to construe the

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[7] CCT 21/94, 15 May 1996, as yet unreported.

[8] Supra n 2.

[9] Supra n 7 para 6.

[10] 1941 WLD 128.

meaning of the phrase "seize that substance or article" in section 18(2) of Act 34 of 1940, section 18 in general giving the customs and excise authorities certain powers of entry, inspection and seizure. Murray J, relying on *Johnston & Co. v. Hogg and Others*[11] and *Robinson Gold Mining Company v Alliance Insurance Company*,[12] held that "[s]eizure implies a forcible deprivation of possession." [13] In this case the excise officers had purported to seize certain manufacturing plant, not by dismantling and removing it from the premises in question, but by having seals placed on various portions of the plant in such a way that unless the seals were broken and the steel wire and linen tape on which the seals were affixed removed, no portion of the plant could be used.

[11] In this context the following reasoning of Murray J is relevant to the present case:

> If the conditions of the sub-section are satisfied, the excise officer may, in order to deprive the owner of the possession of the article seized, remove it from the premises of the owner, and so prevent the exercise by such owner of any control over or user of the article. But it is not necessary, I think, to proceed to such lengths. The removal of an essential, but easily portable, portion of a machine produces as effective a deprivation of the owner's control and user as the removal of the whole machine. The action of the respondent's officials in securing the plant by the employment of Government seals, wire and tape and thereby preventing use of the plant while the seals are intact equally dispossessed the owner.[14]

The essential feature of seizure is thus the effective deprivation of the owner's control in the

[11] 10 Q.B.D. 432, 434 (cited as *Johnson v. Harcourt* in Green's case).

[12] [1904] AC 359.

[13] Supra n 10, 133.

[14] Supra n 10, 133-134. See also *Giuliano v Minister of Law and Order* 1990 (4) SA 308 (W) where the court, in interpreting the meaning of the term "seize" in section 20 of the Criminal Procedure Act 51 of 1977 held at 311C that it "connotes what in its nature is a unilateral step; a taking of control over an object ...".

circumstances of each particular case.[15] The word "seizure" must be taken in its ordinary and natural meaning; it is not a term of art.[16]

[12] In the present case the appellants were effectively deprived of their possession, control and use of the last of the documents in question on 22 April 1994 when the second set of documents was locked in the store room, one of the respondents retaining the key. Thereafter neither of the appellants regained possession or control of the documents until after 7 May 1996 when the first respondent caused them to be returned to the appellants.

[13] Something was made in argument of the fact that on 26 April 1994 the first appellant was allowed to copy certain of the documents seized and that second respondent gave an undertaking that he could continue making copies on 28 April 1994. These circumstances are irrelevant. Section 74(5) of the Act provides that the person to whose affairs any documents seized under subsection (3) relate, is entitled to examine and make extracts from them during office hours "under such supervision as the Commissioner may determine". By allowing the first appellant to make copies and by undertaking to allow him to continue to do so the first respondent was doing no more than respecting this right of the appellant; it in no way warrants the inference that the appellants had not yet effectively been deprived of their possession and control of their documents.

[14] It was also suggested that the paragraph of the consent order quoted in paragraph [4], provided some indication that execution had not yet been completed. I disagree, for the reasons

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[15] See also *Owners of the Cargo Lately Laden on Board the MV Menalon v MV Menalon* 1995 (3) SA 363 (D) 374G-H, 377A and *Johnston v. Hogg* supra n 11, 435.

[16] *Johnston v. Hogg* supra n 11, 434.

just mentioned. The first respondent's control was quite as effective as before; the documents were to be kept in a separate strongroom sealed by the respondents. The fact that the strongroom was in the offices of the first appellant's attorney is irrelevant. Possession and control of the documents were not thereby restored to the appellants. The access granted to first appellant was subject to the control of the respondents. Its purpose was to enable him to exercise his section 74(5) rights. It did not restore possession or control to him.

[15] The answer on this issue must therefore be that the question whether section 74(3) of the Act is contrary to the provisions of Chapter 3 of the interim Constitution is irrelevant for the determination of the case because the acts of issuing the authorizations and of searching for and seizing the documents in question were all completed before the interim Constitution came into operation and the Constitution accordingly does not apply to the matter before the Appellate Division.

Referred issue (b): In view of the provisions of the Constitution, and in particular section 24 thereof, whether it is competent for the Appellate Division to adjudicate upon and determine on appeal the common law grounds of invalidity or whether these matters fall within the exclusive jurisdiction of the Constitutional Court.

[16] Because the interim Constitution does not apply to the authorization, search or seizure in the present case, the Appellate Division is competent to adjudicate upon and determine on appeal the "common law grounds of invalidity". It is unnecessary to express any view on what the position would have been had the interim Constitution applied.

Referred issue (c): If it is competent for the Appellate Division to adjudicate upon and

determine on appeal the common law grounds of invalidity, what further directions for the disposal of the appeal should be given?

[17] The Appellate Division may competently dispose of the appeal in accordance with its own powers and procedures in the light of this judgment in respect of referred issues (a) and (b) above.

Referred issue (d): If the common law grounds of invalidity fall within the exclusive jurisdiction of the Constitutional Court, whether these grounds, or any of them, are well founded.

[18] In the light of the aforegoing conclusions, the common law grounds of invalidity do not, in the present case, fall within the exclusive jurisdiction of the Constitutional Court. Because the Constitution does not apply to the present case before the Appellate Division, the Constitutional Court in fact has no jurisdiction at all in respect of the common law grounds of invalidity.

Costs

[19] In paragraph 89 of the respondents' written argument in this Court the following concession is made:

> In the light of the aforegoing it is submitted that common law grounds for invalidity of administrative action fall within the jurisdiction of the Supreme Court, including the Appellate Division, and that the Constitutional Court has no jurisdiction in such matters. Should it be held that this Court has such jurisdiction, it is conceded that one or more of the common law challenges should succeed.

Mr *Marcus* contended that, in the event of this Court finding that the interim Constitution did not apply to the present dispute, this concession disposed of the common law issues. Had the respondents made this concession at an earlier stage, it would have obviated the appellants having to place any reliance on the constitutional invalidity of section 74(3) of the Act. On this basis Mr *Marcus* contended that the respondents should be ordered to bear the costs of the proceedings

before this Court.

[20] There is at least one fundamental difficulty with this argument. The concession cannot be construed as one of fact only which, as such, could definitively dispose of the appeal before the Appellate Division. It was the appellants who raised, albeit in the alternative, in their initiating notice of motion, the unconstitutionality of section 74(3) of the Act. This alternative contention was never abandoned, not in the Appellate Division nor initially in this Court. It cannot be assumed that, even if this contention had not been raised by the appellants, the Appellate Division would not have made the order it did.

[21] The appellants' reliance on the Constitution, even on the basis of an alternative cause of action, was ill-founded in law. None of the parties considered the possibility, at least not until delivery of the judgments referred to above, that the interim Constitution might not apply to their dispute. We are only concerned with the costs relating to the proceedings before this Court. In the judgment on costs in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others (No 2)*[17] we considered that the flexible and adaptable principles developed by the Supreme Court in relation to the award of costs offered a useful point of departure for dealing with costs in regard to constitutional litigation, although recognising the possibility that these principles might have to be adapted, if needs be substantially, but on a case by case basis.[18] Such reliance must have played a role in the Appellate Division's decision to refer the issues in question to this Court. That court was clearly concerned with the implications of the textually wide terms of section 24 of the Constitution in relation to its own jurisdiction.

[17] 1996 (2) SA 621 (CC); 1996 (4) BCLR 441 (CC).

[18] Id para 3.

[22] All the parties erred in assuming that the Constitution applied to their dispute. At the same time the possibility cannot be excluded that the Appellate Division would have made its referral whatever the parties' contentions before it as to the applicability of the Constitution were, and that this might have occurred regardless of the appellants' alternative contention that section 74(3) of the Act is unconstitutional. Under these circumstances there seem to be insufficient grounds for saddling only one of the sets of parties with the costs in this Court.

The Order

[23] The order of the court is as follows:

1. The four questions referred by the Appellate Division of the Supreme Court are answered as follows -

    (a) Whether section 74(3) of the Income Tax Act 58 of 1962 is contrary to the provisions of Chapter 3 of the Constitution is irrelevant for the determination of the case because the acts of issuing the authorizations and of searching for and seizing the documents in question were all completed before the interim Constitution came into operation. The Constitution accordingly does not apply to the matter before the Appellate Division.

    (b) Yes. It is competent for the Appellate Division to adjudicate upon and determine on appeal the common law grounds of invalidity as formulated in paragraph 1 of its order of referral.

    (c) The Appellate Division may competently dispose of the appeal in

accordance with its own powers and procedures in the light of this judgment and order.

(d) The common law grounds of invalidity referred to in (b) do not fall within the exclusive jurisdiction of the Constitutional Court. Because the Constitution does not apply to the present case before the Appellate Division, the Constitutional Court in fact has no jurisdiction at all in respect of the common law grounds of invalidity.

2. No order is made regarding the costs of the proceedings in this Court.

LWH ACKERMANN

Chaskalson P, Mahomed DP, Didcott J, Kriegler J, Langa J, Madala J, Mokgoro J, O'Regan J and Sachs J concur in the judgment of Ackermann J.

For the applicant:	GJ Marcus
Instructed by:	Laäs Doman and Partners
For the respondents:	PJ van R Henning SC SJ du Plessis SC DG Leibowitz
Instructed by:	The State Attorney, Pretoria