CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 35/96

MMAMPOBANE ELIZABETH MOTSEPE Applicant

versus

THE COMMISSIONER FOR INLAND REVENUE Respondent

Heard on: 4 March 1997

Decided on: 27 March 1997

JUDGMENT

ACKERMANN J:

[1] The constitutionality of the provisions of sections 92 and 94 of the Income Tax Act 58 of 1962, as amended, ("the Act") has been referred to us by Roos J sitting in the Transvaal Provincial Division of the Supreme Court (as it then was) pursuant to the provisions of section 102(1) of the Constitution of the Republic of South Africa, 1993 ("the interim Constitution").[1] The referral occurred on 4 March 1996 in the course of

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[1] Section 102(1) reads as follows:

> "If, in any matter before a provincial or local division of the Supreme Court, there is an issue which may be decisive for the case, and which falls within the exclusive jurisdiction of the Constitutional Court in terms of section 98(2) and (3), the provincial or local division concerned shall, if it considers it to be in the interest of justice to do so, refer such matter to the Constitutional Court for its decision: Provided that, if it is necessary for evidence to be heard for the purposes of deciding such issue, the provincial or local division concerned shall hear such evidence and make a finding thereon, before referring the matter to the Constitutional Court."

an urgent application brought by the present respondent (to whom I shall refer as "the Commissioner") against Mr Solomon Maselala Motsepe (to whom I shall refer as "Mr Motsepe") as first respondent and the present applicant (to whom I shall refer as "Mrs Motsepe") as second respondent for the sequestration of the joint estate of Mr and Mrs Motsepe who are married in community of property.

[2] The sections of the Act referred provide the following:

Section 92:

> "It shall not be competent for any person in any proceedings in connection with any statement filed in terms of paragraph (*b*) of subsection (1) of section *ninety-one* to question the correctness of any assessment on which such statement is based, notwithstanding that objection and appeal may have been lodged thereto."

Section 94:

> "The production of any document under the hand of the Commissioner purporting to be a copy of or an extract from any notice of assessment shall be conclusive evidence of the making of such assessment and, except in the case of proceedings on appeal against the assessment, shall be conclusive evidence that the amount and all the particulars of such assessment appearing in such document are correct."

[3] In the sequestration application the liquidated claim of R6 381 318,65 relied on by the Commissioner arose from income tax assessments raised by the Commissioner

against Mr Motsepe for the tax years 1988 to 1995. The assessments for the years 1988 to 1991 were in respect of additional income tax (including penalties) and interest, as returns for these years were previously furnished and assessed. (I shall refer to these further assessments as the "additional assessments"). The assessments for the years 1992 to 1995 were in respect of estimated tax (including penalties) and interest, as returns had not been furnished for these years (to which assessments I shall refer as "the estimated assessments").

[4] Mr Motsepe is a fugitive from justice. On 7 December 1995, while facing a criminal charge of dealing in one million Mandrax tablets, he escaped from custody. His whereabouts are unknown, although deponents for the Commissioner state that they have information that he is in Nigeria. In her answering affidavit Mrs Motsepe avers that she has no knowledge as to whether Mr Motsepe is in Nigeria or not. She does not say whether, since his escape, she has had any communication with Mr Motsepe. Mr Vernon Pike, a practising chartered accountant, conducted an investigation of Mr Motsepe's financial affairs which lasted from approximately September 1995 to February 1996. According to his unchallenged testimony Mr Motsepe has assets to the value of R4 081 878,71 (including eight Mercedes, four Toyota, 3 Volkswagen and one 944 Turbo Porsche motor vehicles) and that over the period 14 March 1992 to 1 July 1994 amounts totalling R612 810,62 were deposited into sixteen different personal bank accounts of Mr Motsepe. Only taking into account Mr Motsepe's tax assessments, Mr Pike deposes that the liabilities of the joint estate exceed its assets by approximately

R2 300 000. I shall deal presently with the extent to which, if any, this last-mentioned averment is challenged by or on behalf of Mrs Motsepe. On 8 February 1996 an extensive report by Mr Pike, inter alia enumerating Mr Motsepe's assets and placing a value on them, was handed to the Commissioner's representatives.

[5] On 14 February 1996, and after this report had been studied, all the assessments referred to above were issued and delivered to Mrs Motsepe personally at her place of residence. On all the assessments the "due date" for payment is 14 February and the "second date" 15 February, it being stated in the assessments that if payment of the assessed tax was not received by the second date interest would be calculated from the due date. On 16 February the Commissioner caused a certified statement, as contemplated by section 91(1)(b) of the Act,[2] to be filed with the clerk of the Ga Rankuwa Magistrate's Court who caused it to be entered into the judgment book.[3] The sequestration application was launched on 21 February and notice was given that the

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2 Which provides as follows:

> "If any person fails to pay any tax or any interest payable in terms of section 89(2) or 89*quat* when such tax or interest becomes due or is payable by him, the Commissioner may file with the clerk or registrar of any competent court a statement certified by him as correct and setting forth the amount of the tax or interest so due or payable by that person, and such statement shall thereupon have all the effects of, and any proceedings may be taken thereon as if it were, a civil judgment lawfully given in that court in favour of the Commissioner for a liquid debt of the amount specified in the statement."

3 Section 91(2) of the Act provides that -

> "Notwithstanding anything contained in the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), a statement for any amount whatsoever may be filed in terms of subsection (1)(*b*) with the clerk of the court of the magistrate having jurisdiction in respect of the person by whom such amount is payable in accordance with the provisions of this Act."

application would be moved on 23 February. Answering and replying affidavits were filed and on 1 March Mrs Motsepe brought an application for the postponement of the sequestration proceedings and for various provisions of the Value Added Tax Act 89 of 1991, read with various provisions of the Act, to be referred to this court.

[6] On 4 March Roos J referred only sections 92 and 94 of the Act to this Court and postponed the application for sequestration sine die pending the decision on the referral, reserving the costs of the sequestration application and the counter-application. The learned judge came to the conclusion that the constitutionality of these last-mentioned sections was decisive for the application for sequestration, that there was "more than a reasonable prospect" that the sections of the Act in question were unconstitutional and that it was in the interests of justice to refer them to this Court.

[7] In this court it was contended on behalf of Mrs Motsepe that sections 92 and 94 of the Act are inconsistent with the equality provisions in section 8(1) of the interim Constitution, the right to access to a court of law embodied in section 22 and the right to lawful and procedurally fair administrative action in terms of section 24(a) and (b). The complaint against these sections is that they prohibit the taxpayer from challenging the correctness of any assessment in sequestration, or any other proceedings and accordingly leave the taxpayer defenceless. On behalf of the Commissioner it was contended that the referral was not in order as it did not meet the criteria laid down in section 102(1) of the interim Constitution and that we should accordingly not entertain

it. In the alternative it was contended that neither of the provisions referred was inconsistent with the sections of the interim Constitution relied upon.

[8] Before considering the correctness of the referral it may be useful to consider the scheme of the Act and various of its provisions to the extent that they relate to the assessment and collection of income tax and are necessary for purposes of this judgment. Part I of Chapter III of the Act (sections 65 to 76) places an obligation on the taxpayer to furnish a return in the prescribed manner for purposes of assessment. The Commissioner may require a further or more detailed return[4] and may also require the production of documents for examination.[5] The taxpayer or any other person may be examined concerning the taxpayers income.[6] Part II (sections 77 to 80) provides that assessments are to be made by or under the supervision of the Commissioner,[7] that estimated assessments may be made when any person fails to furnish any return or information or the Commissioner is not satisfied with the return or information furnished by any person[8] and that additional assessments may be made.[9] Provision is also made

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4 Section 66(10).

5 Section 74(1) of the Act before its amendment by the Revenue Laws Amendment Act 46 of 1996 which came into operation on 30 September 1996. The new sections 74A, 74B and 74(2) now regulate the way in which the Commissioner is furnished with and obtains information, documents or things.

6 Section 74(2)(a) of the Act before its amendment by the Revenue Laws Amendment Act 46 of 1996. The new section 74C subjects these inquiries to judicial control.

7 Section 77(1) read with section 3.

8 Section 78(1).

9 Section 79.

for the payment of additional tax in the case of default in rendering a return, an omission from a return or a mistake in a return, whether the assessment is an ordinary assessment, an estimated assessment or an additional assessment.[10] Part IV (sections 89 to 94) makes provision for the payment and recovery of tax. Apart from the provisions of sections 91(1)(b), 92 and 94, to which reference has already been made, it is to be noted that section 89(1) provides that, subject to the provisions of section eighty-nine bis (which are not applicable in the present case) -

> "any tax chargeable shall be paid on such days and at such places as may be notified by the Commissioner or as specified in this Act, and may be paid in one sum or in instalments of equal or varying amounts as may be determined by the Commissioner having regard to the circumstances of the case."

[9] Of particular importance in the present case are the provisions in Part IV (sections 81 to 88) for objections to the Commissioner against assessments, appeals from decisions of the Commissioner on objections and the clear policy emerging therefrom that, notwithstanding a dispute concerning the correctness of any assessment, the taxpayer is obliged to pay the assessed tax forthwith as and when ordinarily provided for in the Act. Taxpayers who are aggrieved by any assessment in which they are interested may object to the Commissioner within 30 days after the date of the

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10 Section 76 read with section 79(3).

assessment.[11] On receipt of the objection the Commissioner may reduce or alter the assessment or may disallow the objection and must inform the taxpayer accordingly.[12] Where no objections are made to any assessment or where objections have been allowed or withdrawn, such assessment or altered or reduced assessment (as the case may be) is, subject to the right of appeal, final and conclusive.[13] The lodging of an objection is a condition precedent to the bringing of such an appeal, which is brought either to a special income tax court ("the Special Court") or, where the amount of tax in dispute does not exceed R20 000 or certain other prescribed conditions are fulfilled, to a specially constituted board ("the Board")[14] and for the referral of a Board decision to the Special Court.[15] Provision is then made for appeals against decisions of the special court to the Supreme Court.[16]

[10] A key provision in the enforcement structure is section 88(1), which provides that-

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11 Section 81(1), (2) and (3).

12 Section 81(4).

13 Section 81(5).

14 Section 83(1), which provides that-

> "Any person entitled to make an objection who is dissatisfied with any decision of the Commissioner as notified to him in terms of section 81(4) may, subject to the provisions of section 83A, appeal therefrom to a special court for hearing income tax appeals, constituted in accordance with the provisions of this section."

read with section 83A.

15 Section 83(13) and (14).

16 Section 86A.

> "The obligation to pay and the right to receive and recover any tax chargeable under this Act shall not, unless the Commissioner so directs, be suspended by any appeal or pending the decision of a court of law under section 86A, but if any assessment is altered on appeal or in conformity with any such decision or a decision by the Commissioner to concede the appeal to the special board or the special court or such court of law, a due adjustment shall be made, amounts paid in excess being refunded with interest at the prescribed rate, such interest being calculated from the date proved to the satisfaction of the Commissioner to be the date on which such excess was received and amounts short-paid being recoverable with interest calculated as provided in section 89."

This provision, taken together with the others referred to, makes it quite clear that the purpose and effect of the Act is to compel taxpayers to effect immediate payment of any tax due in terms of any assessment (unless the Commissioner otherwise directs) and if they object to any assessments to have them rectified by objection and, if necessary, by appeal to the Special Court or Board and by such proceedings to recover with interest any money they may have overpaid.

[11] In the course of argument it was contended on Mrs Motsepe's behalf that no assessed tax becomes payable until expiry of the period of 30 days afforded for lodging an objection where an objection has not been made or, in the case of an objection duly made, until the Commissioner has notified the taxpayer of his or her decision. The point of this submission was that the due date for payment of all the relevant assessments in the present case was 14 February 1996 and that the period for lodging any objection had not yet expired when the section 91(1)(b) statement was filed by the Commissioner; nor

had it expired when the sequestration proceedings were instituted on 21 February. In my view this is not a matter which was or could have been referred to us because the mere construction of the Act does not fall within our exclusive jurisdiction, a condition precedent for referral in terms of section 102(1) of the interim Constitution. If the construction was considered relevant it should have been raised before Roos J and decided by the learned judge. It is not a matter to be decided by us in the first instance.[17] It should be mentioned in passing that as at the date of signature of the Commissioner's replying affidavit in the sequestration proceedings neither Mrs Motsepe or Mr Motsepe had taken any steps to object to the assessments nor is there anything to indicate or suggest that any such steps were taken in the year subsequent to the referral.

[12] In determining the correctness of the referral it is necessary to consider what was really in issue in the sequestration proceedings. Apart from a bald denial that the liabilities of the joint estate exceeded its assets, Mrs Motsepe does not contest any of the allegations in the founding or supporting affidavits regarding the correctness of the assessments or the financial position of the joint estate. She does not dispute that the assets referred to by Mr Pike are their assets nor the value he places on them. In particular she does not aver that there are any further assets over and above those

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[17] There are conflicting views on the contention advanced. D Meyerowitz *Meyerowitz on Income Tax* 1996-1997 ed (The Taxpayer, Cape Town 1996-1997) at para 34.26 and E Spiro "Effect of Lodging an Objection on Payment of Tax" (September 1964) 13 *The Taxpayer* at 167 support it whereas A de Koker *Silke on South African Income Tax* Vol III (Butterworths Publishers (Pty) Ltd, Durban 1996) at para 18.28 takes the contrary view, namely that the lodging of an objection does not suspend the payment of assessed tax.

mentioned by him. She also does not dispute Mr Pike's evidence, already referred to, concerning the amounts which were paid into Mr Motsepe's personal bank accounts over the period 14 March 1992 to 1 July 1994. Mr Pike mentions no liabilities other than the Commissioner's assessments. Yet in her affidavit Mrs Motsepe mentions that they do have other creditors, without indicating what the amount of these debts are. She in fact does no more than refer to the affidavit of their bookkeeper, a certain Merika Johannes Madungandaba, who has been their bookkeeper or accountant from 1989 to the present time.

[13] Mr Madungandaba does not, however, take the matter any further as far as the assets or liabilities of Mr and Mrs Motsepe are concerned. He does not deal at all with Mr Pike's affidavit. As far as the tax returns in question are concerned he says that he only drafted those in respect of the tax years 1989, 1990 and 1991 and does not refer at all to the returns for subsequent tax years or the estimated assessments. Yet, quite inexplicably for someone who has only acted as accountant for Mr and Mrs Motsepe since 1989 and first drafted a return for the 1989 tax year, he states in his affidavit that -

> "[t]he amounts of R60 000,00 in 1988, R28 922,00 in 1989, R34 379,00 in 1990 and R55 277,00 in 1991 were according to all the information at my disposal their correct income."

The sums mentioned are those referred to in the additional assessments for the years in question as "[Income Assessed] Previously". The above statement, to the extent that

it relates to the sum of R60 000,00 in 1988 is clearly unacceptable because Mr Madungandaba did not act as accountant for the Motsepes in 1988, nor did he draft the tax return for that year. In any event, for his bald statement in respect of any of these years to have any value at all it must be assumed that Mr Motsepe made a full disclosure to him of all his income. But this cannot be done because there was no evidence that such a full disclosure was made.

[14] Mr Madungandaba further states that he is presently not in possession of copies of the returns for 1989 to 1991, documentation in proof thereof or the assessments, because the South African Police Services confiscated the files of Mr and Mrs Motsepe during the second half of 1995. Had there been any genuine desire to take issue with the Commissioner on the correctness of the returns submitted for these years the provisions of section 80 of the Act[18] could have been invoked to gain access to the documents in the Commissioner's possession and if necessary a postponement sought of the sequestration application in order to do so. There is nothing to suggest that this was done.

[15] There is likewise no explanation for the fact that no objection to any of the additional or estimated assessments was made by or on behalf of Mrs Motsepe in terms

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[18] Which provides that-

> "The record of assessments shall not be open to public inspection, but every taxpayer shall be entitled to copies certified by or on behalf of the Commissioner of such recorded particulars as relate to him."

of section 81 of the Act. If 30 days were insufficient to formulate a proper objection Mrs Motsepe could have sought an extension of time from the Commissioner in terms of section 81(1) of the Act and if such request was refused or an inadequate extension granted, the decision of the Commissioner could have been objected to and, if necessary, taken on appeal to the Special Court.[19]

[16] If necessary, and in the light of the fact that the urgent sequestration application was brought only a week after the assessments had been delivered, Mrs Motsepe could have sought a postponement of those proceedings in order to pursue the remedies under the Act. If indeed there was any substantial basis for challenging the correctness of the assessments one would have expected the ground to have been prepared in the answering affidavits for a postponement of those proceedings in order for her to pursue, as a matter of urgency, her remedies under the Act unrestricted by the impediments imposed by sections 92 and 94 of the Act. It is not contended on the papers and was not suggested in argument before us that Mrs Motsepe refrained from challenging the correctness of the assessments because of the provisions of sections 92 and 94, in the belief that it would have been futile to have done so - even in order to obtain a postponement of the sequestration proceedings.

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[19] See section 81(2) which enacts the following-

> "No objection shall be entertained by the Commissioner which is not delivered at his office or posted to him in sufficient time to reach him on or before the last day appointed for lodging objections, unless the Commissioner is satisfied that reasonable grounds exist for delay in lodging the objection: Provided that any decision of the Commissioner in the exercise of his discretion under this subsection shall be subject to objection and appeal."

[17] When regard is had to the bald, incomplete and unsatisfactory challenge to the correctness of the assessments and the further features referred to above, one is bound to conclude that no genuine dispute of fact was raised on the papers in this regard and that the Commissioner had accordingly established the indebtedness of the joint estate to him in the amount of the assessments. This was frankly and properly conceded by Mr Louw, who appeared on behalf of Mrs Motsepe, when he stated that there was no defence on the merits of the sequestration application which, apart from the constitutional issues raised, was bound to succeed. It does not necessarily follow, however, that the sections of the Act in question were correctly referred.

[18] In doing the above analysis of the sequestration affidavits I have not disregarded the provisions of sections 92 and 94, or any other provision of the Act. If the provisions are not inconsistent with the Constitution they are as binding on this court as any other. The purpose of the analysis is merely to enquire into the propriety of the referral and for that purpose to determine what the position in the sequestration would be if the provisions in question were struck down. This is dealt with in what follows.

[19] A prerequisite for a valid referral in terms of section 102(1) of the interim Constitution, is that the issue referred must be one which "may be decisive for the case". This requirement will be met once the ruling sought from the Constitutional Court -

"may have a crucial bearing on the eventual outcome of the case as a whole, or on any significant aspect of the way in which its remaining parts ought to be handled".[20]

[20] The conclusion reached in paragraph 17 above, that on the papers the Commissioner had affirmatively established his claim and accordingly that the liabilities of the joint estate exceeded its assets even when all the facts deposed to by Mrs Motsepe and her deponents are taken into account, is fatal for the referral. It means that even if the sections of the Act in question were assumed to be invalid and the barriers which they presented ignored, Mrs Motsepe would be in no better position to resist the Commissioner's claim or his evidence of the insolvency of the estate. Under these circumstances the issue referred, namely the unconstitutionality of sections 92 and 94, far from being decisive for the sequestration application, would in fact be irrelevant.

[21] The referral may very well be defective for another reason. This court has laid down the general principle that "where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed", and has applied this principle specifically to section 102(1) referrals and obiter to applications for direct access.[21] On an objective assessment of the present case it was

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[20] *Luitingh v Minister of Defence* 1996 (2) SA 909 (CC); 1996 (4) BCLR 581 (CC) at para 9 per Didcott J writing for a unanimous court. See also *Brink v Kitshoff NO* 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 10 and *Tsotetsi v Mutual and Federal Insurance Company Ltd* 1996 (11) BCLR 1439 (CC) at para 5.

[21] *S v Mhlungu and Others* 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) at para 59, as approved by a unanimous Court in *S v Vermaas; S v Du Plessis* 1995 (3) SA 292 (CC); 1995 (7) BCLR 851 (CC) at para 13. The application of the principle to direct access in *S v Vermaas; S v Du Plessis*, although obiter,

unnecessary to decide the constitutional issue because Mrs Motsepe could, by following the objection and appeal procedures provided for in the Act, have avoided the barriers imposed by sections 92 and 94 of the Act and the sequestration application could have been decided in the light of the outcome of such procedures.

[22] This she could have done by objecting to the assessments in terms of section 81 of the Act prior to the filing of her answering affidavit in the sequestration proceedings (which was only filed on or after 26 February). In her affidavit she could then have made out a prima facie case that the assessments were incorrect to such an extent that if her contentions were correct the joint estate would not be insolvent. Armed with such evidence she could have sought a postponement of the sequestration proceedings pending the outcome of her objection and, if necessary in the event of the Commissioner's ruling in terms of section 81(4) being unfavourable, pending the outcome of the appeals provided for in sections 82 and 83A. In this way Mrs Motsepe's objections to the assessments could have been fully ventilated and decided upon without any of the constraints imposed by section 92 or 94. The sequestration application could thereafter have proceeded on the basis of such decision. In this way neither section 92 nor 94 would ultimately have been obstructive in the sequestration proceedings.[22]

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was the unanimous view of the court. See also *Brink v Kitshoff NO* supra n 20 at paras 9, 14 and the authorities referred to therein.

22 In *Union Government v Milne* 1948 (3) SA 1153 (T), Neser J was fully alive to the difficulties facing a respondent under these circumstances by virtue of comparable provisions of the Income Tax Act 31 of 1941, when at 1160 he commented as follows:

"While the Court cannot question the correctness of the assessments, it

[23] The fact that Mrs Motsepe refrained from doing so does not justify the referral. A litigant cannot, by refusing to pursue a non-constitutional remedy, compel a referral; allowing such a device to succeed would not be in the interest of justice, such interest constituting one of the criteria for referral stipulated by section 102(1) of the interim Constitution. It must not be thought that I am dictating to the court below that, under the circumstances sketched above, a postponement must be granted. No more is suggested than that, in the absence of an application for a postponement, Mrs Motsepe has not pursued her non-constitutional remedies and for that reason the matter is not ripe for referral. Inasmuch, however, as the referral has been found to be defective because the unconstitutionality of sections 92 and 94 is not decisive for the sequestration application, it is unnecessary to decide finally on this second ground.

[24] A considerable part of Mr Louw's argument on behalf of Mrs Motsepe was devoted to an attack on section 91(1)(b) of the Act; in fact it constituted the main thrust thereof. The section was not included in the application for referral, nor did Roos J refer it. In Mr Louw's written argument it was submitted that "it may be in the public interest that direct access for the consideration of Section 91(1)(b) be granted . . .". In fairness

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> cannot entirely lose sight of the fact that respondent's appeal [to the special court for hearing income tax appeals] might possibly succeed. In view of the disastrous consequences to respondent, should it eventually transpire that he was not insolvent, the Court should, in my opinion, require clear proof that respondent is insolvent before granting a final order of sequestration of his estate."

it should be pointed out that Mr Louw did not represent either Mr or Mrs Motsepe in any of the proceedings before Roos J.

[25] There was no formal application for direct access as required by Constitutional Court rule 17(2), (3) and (4) nor was such an application made from the bar. Even on the most lenient procedural approach nothing was submitted which could have brought the matter within the provisions of rule 17(1), which allows direct access in terms of section 100(2) of the interim Constitution -

> "... in exceptional circumstances only, which will ordinarily exist only where the matter is of such urgency, or otherwise of such public importance, that the delay necessitated by the use of the ordinary procedures would prejudice the public interest or prejudice the ends of justice and good government."

Even where a procedurally proper application has been brought this Court has adopted a strict approach to the granting of direct access.[23] It is unnecessary for present purposes to analyse the requirement in detail because an application for direct access would have failed at the first hurdle. There would have been no delay if the ordinary procedure had been used and Roos J had been requested to refer this section together with the others. To the extent that the court has been invited, in the laconic and chimerical way indicated above, to exercise its powers under rule 17, it should decline to do so.

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23 *Transvaal Agricultural Union v Minister of Land Affairs and Another* 1996 (12) BCLR 1573 (CC) at paras 16-23 and in particular para 18.

[26] In any event direct access should be refused on even more substantive grounds. Even if section 91(1)(b) were to have been declared unconstitutional and the effect of the certified statement filed by the Commissioner with the clerk of the Ga Rankuwa Magistrates' Court nullified, this would have had no bearing on the sequestration application. The Commissioner would still have had his claim based on the assessments and would have been entitled, by virtue of the provisions of section 91(1)(c) of the Act, to sequestrate the joint estate.[24]

[27] In the course of his argument Mr Louw referred to other sections in the Act, for example section 89(1),[25] in support of his submission that, when taken in conjunction with the provisions of section 91(1)(b) and the sections actually referred, the tax enforcement procedures established by the Act were procedurally and administratively unfair and unconstitutional. He submitted that they empowered the Commissioner, inter alia, to issue and serve an assessment on one day, to make it payable the next, to take judgment in effect and without notice to the taxpayer on the third and to launch sequestration proceedings against the taxpayer on the fourth, while the taxpayer is throughout this period denied the right to challenge the merits of the Commissioner's assessment before the ordinary courts. These submissions, against the background of

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[24] Section 91(1)(c) stipulates -

> "The Commissioner may institute proceedings for the sequestration of the estate of any taxpayer and shall for the purposes of such proceedings be deemed to be the creditor in respect of any tax due by such taxpayer or any interest payable by him in terms of section 89(2) or 89*quat*."

[25] Quoted at the end of paragraph 8 supra.

the scheme of the Act, illustrate the complexity of the interrelationship between and the interdependence of the Act's various provisions and the intricacy of the issue.

[28] The submissions depended, however, on challenges to the validity of provisions of the Act, or of actions taken by the Commissioner pursuant to such provisions, which were not placed in issue in the proceedings before Roos J, and were not referred by him to this court. They raised difficult issues, some of which were canvassed in the course of argument and which involved the effect (if any) that the administrative justice provisions of section 24 of the interim Constitution (section 33 of the Constitution of the Republic of South Africa 1996) might have on the construction and application of section 89 (1) of the Act. They also called for a consideration of one of the major policy features of the Act, namely that which requires payment of an assessment to be effected irrespective of any appeal that might be made against it. This could have led to comparison of statutory tax regimes in other countries, such as the United States of

America,[26] Canada,[27] India,[28] Germany[29] and the Netherlands.[30] Moreover, if the issue had been raised properly, the Commissioner might possibly have wished to lead evidence in relation to the constitutionality of this policy, or the provisions of the Act that were placed in issue. As these issues have not been properly raised in the present case, prudence dictates an abstention from expressing any views thereon at all.

[29] In *Nel v Le Roux NO and Others*[31] this Court re-emphasised the great care which needs to be exercised in referring matters under the interim Constitution and alluded to difficulties which might arise if only provision X of an Act is referred when the real attack is against the constitutionality of provision Y which is incorporated by reference in provision X. Although this caution was in the context of a referral under section 102 of the interim Constitution, a procedure which has not been retained in the Constitution of the Republic of South Africa 1996, it would apply equally to any constitutional attack

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26 See the United States Internal Revenue Code (1996), in particular Chapters 64C, 64D, 70A and 76B and cases such as *Bob Jones University v Simon, Secretary of the Treasury* 416 US 725 (1973); *South Carolina v Regan, Secretary of the Treasury* 465 US 367 (1983) and *McKesson Corporation v Division of Alcoholic Beverages and Tobacco, Department of Business Regulation of Florid* 496 US 18 (1989).

27 See the Canadian Income Tax Act R.S.C. 1985 (as amended) and in particular sections 223 and 225 thereof.

28 See the Indian Income Tax Act 1961, in particular sections 220 to 225 thereof and the Second Schedule Rules.

29 See the German Tax Procedure Act ("Abgabenordnung") of 1977 and in particular sections 88, 90, 91, 125-27, 220, 249, 251, 254, 256, 259, 262, 361 and Kühn/Hofmann *Abgabenordnung* 17 ed (1995) Schäffer-Poeschel Verlag, Stuttgart, particularly at 218 *ad* section 91(3).

30 See the Netherlands Invorderingswet of 1990, Schuurman en Jordens *Nederlandse Staatswetten Editsie* 5 ed (1991) and in particular sections 9-17.

31 1996 (3) SA 562 (CC); 1996 (4) BCLR 592 (CC) at paras 25, 26.

which is too narrow or which fails to identify the true offending provision. In the present case this court cannot consider the constitutional propriety of any of the Act's other provisions to which reference was made in argument. It can only do so if and when they are properly before this court.

[30] Mrs Motsepe did not seek an order for costs. The Commissioner, however, requested the Court to grant an order for costs, including the costs attendant upon the employment of three counsel, in the event of the referral being rejected or the sections in question not being held to be unconstitutional. In my view one should be cautious in awarding costs against litigants who seek to enforce their constitutional right against the state, particularly where the constitutionality of a statutory provision is attacked, lest such orders have an unduly inhibiting or "chilling" effect on other potential litigants in this category. This cautious approach cannot, however, be allowed to develop into an inflexible rule so that litigants are induced into believing that they are free to challenge the constitutionality of statutory provisions in this court, no matter how spurious the grounds for doing so may be or how remote the possibility that this court will grant them access. This can neither be in the interests of the administration of justice nor fair to those who are forced to oppose such attacks.

[31] In the present case no explanation was advanced as to why Mrs Motsepe did not pursue her remedies in terms of the Act, if necessary by seeking a postponement of the sequestration proceedings in order to do so. In the absence of any such explanation and

when regard is had to the lack of candour in Mrs Motsepe's answering affidavit the conclusion can really not be avoided that her endeavour to engage this Court was little more than an attempt to gain time. It must not be thought that this conclusion in any way implies that the provisions of the Act might not be open to challenge; it relates solely to Mrs Motsepe's attempts to engage this Court in the light of the merits of the sequestration and the other remedies open to her which do not involve the constitutionality of any of the provisions of the Act. In my view her conduct was of such a nature that it warrants an award of costs against her.

[32] If the joint estate is insolvent to the extent of R2 300 000 there may indeed be scant prospect of the Commissioner benefitting from a costs order. This would of course depend on the extent to which further assets of the joint estate are discovered in the process of sequestration. The record does not indicate that this is beyond the bounds of possibility. In any event, benefit to the successful litigant cannot be the sole consideration in awarding costs. In the present case the award would serve the interests of justice by disabusing the minds of potential litigants of the notion that they can approach this Court without any risk of having an adverse costs order being made against them, no matter how groundless the merits of such approach. This is an appropriate case to award costs, having regard to Mrs Motsepe's conduct. Such an order will not inhibit bona fide and reasonable litigants. The issue of the referral and the very narrow grounds on which it was granted did not raise matters of great complexity. Although the constitutional challenges were no doubt of great importance to the

Commissioner, the circumstances as a whole did not reasonably warrant the employment of three counsel. Two would have sufficed.

[33] The following order is accordingly made:

1. The referral is rejected with costs, such costs to include the costs attendant upon the employment of two counsel on the Commissioner's behalf;

2. The matter is referred back to the Transvaal Provincial Division of the High Court to be dealt with in the light of this judgment .

ACKERMANN J
JUDGE OF THE CONSTITUTIONAL COURT OF SOUTH AFRICA

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

For the applicant:	AA Louw instructed by ML Madungandaba
For the respondent:	JL van der Merwe SC and P Ginsburg SC and JJ le Roux instructed by the State Attorney