THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No 567/07

THE MINISTER OF FINANCE First Appellant

THE PRINTING INDUSTRIES FEDERATION OF SOUTH AFRICA Second Appellant

and

PAPER MANUFACTURERS ASSOCIATION OF SOUTH AFRICA Respondent

Neutral citation: *Minister of Finance v Paper Manufacturers Association* (567/07) [2008] ZASCA 86 (2 September 2008)

Coram: HARMS ADP, STREICHER, MTHIYANE, MAYA JJA, and MHLANTLA AJA
Heard: 18 August 2008
Delivered: 02 September 2008
Corrected:
Summary: Interdict preventing Minister from submitting Bill to

parliament – legality of – jurisdiction – Customs and Excise Act 91 of 1964 s 48

ORDER

On appeal from: High Court, Pretoria (Southwood J sitting as court of first instance)

1. The appeal is upheld with costs, including the costs of two counsel.

2. The order of the court below is set aside and replaced with an order dismissing the application with costs, such costs to include the costs of two counsel.

JUDGMENT

HARMS ADP (STREICHER, MTHIYANE, MAYA JJA and MHLANTLA AJA concurring):

[1] The Minister of Finance gave notice during February 2007 of his intention to submit a Taxation Laws Amendment Bill, 2007 to Parliament. The Bill contained a clause 66(1), which read as follows:

'**Continuation of certain amendments of Schedule 1 to 6 and 10 to [the Customs and Excise] Act 91 of 1964.**

(1) Every amendment or withdrawal of or insertion in Schedules 1 to 6 and 10 to the Customs and Excise Act 1964, made under section 48 . . . or 75(15) of that Act during the calendar year ending on 31 December 2006 shall not lapse by virtue of section 48(6) . . . or 75(16) of that Act.'

[2] In terms of s 48(1)(b), the Minister of Finance may from time to

time by notice in the Gazette amend, i.a., Part 1 of Schedule 1 in so far as it relates to imported goods in order to give effect to any request by the Minister of Trade and Industry. Section 75(15) is similar, allowing the Minister of Finance to amend, i.a., Schedule 4 in the same manner. The reason for this kind of provision is explained by R C Williams in *Lawsa* vol 22(2) para 566:

'In an economy which employs the tariff as a potent instrument to manipulate economic activity there is a need for frequent adjustment of the terms of and the rates applied in the tariff. The Customs and Excise Act accordingly provides that the Minister may from time to time by notice in the Government Gazette amend the general notes to Schedule 1 part 1 or replace the said part 1 and amend part 2 of the Schedule in so far as it relates to imported goods.'

[3] These amendments have a limited lifespan and their future is dependent on parliamentary action. This appears from the provisions of s 48(6) of the Customs and Excise Act, which reads:

'Any amendment, withdrawal or insertion made [by the Minister] under this section in any calendar year shall, unless Parliament otherwise provides, lapse on the last day of the next calendar year, but without detracting from the validity of such amendment, withdrawal or insertion before it has so lapsed.'

This provision applies *mutatis mutandis* in respect of any amendment made under the provisions of s 75(15), hence the reference to s 75(16) in the proposed Bill.

[4] On 21 July 2006, which is within the period covered by the Bill, the Minister of Finance had abolished and/or lowered the rates of duty

and rebates on paper and paperboard products by amending Schedules 1 and 4 by notices GN R 691 and R 692. This means that the relevant changes to the schedules effected by the ministerial notices would have lapsed by the end of 2007 unless Parliament had provided otherwise. With this in mind the Minister sought to introduce the mentioned Bill.

[5] These changes to the Schedules had been sought by the Printing Industries Federation of SA (a respondent in the court below and the second appellant on appeal and whom I shall call 'the Printers') who sought a lower import levy on paper and paperboard. The Paper Manufacturers Association of SA (the applicant in the court below and the respondent on appeal to whom I shall refer as 'the Manufacturers'), whose members manufacture paper and paperboard locally, objected because the abolition or lowering of import levies would have made their prices less competitive.

[6] The Manufacturers applied to the High Court, Pretoria, for an interim interdict, prohibiting the Minister from introducing the Bill to the extent that it related to these items to Parliament. The High Court obliged. Subsequently it granted leave to appeal to this Court realizing that the interdict, although framed as an interim interdict, was final in effect and, accordingly, appealable. *Metlika Trading Ltd v Commissioner for SA Revenue Service* 2005 (3) SA 1, [2004] 4 All SA 410 (SCA). What was though not taken into account in the main judgment is the rule that if an interdict is final in effect, the applicant has to prove a clear right – a prima facie right is insufficient – and that the balance of convenience does accordingly not arise. We

conclude that the Manufacturers had no right to the relief sought and we uphold the appeal for the reasons that follow.

[7] The International Trade Administration Act 71 of 2002 (the ITA Act) repealed the Board on Tariffs and Trade Act 107 of 1986 and replaced the Board on Tariffs and Trade with the International Trade Administration Commission (ITAC). The differences between the two Acts are not of any relevance to this case. On the contrary, the issues in this case turn on similar provisions in the two Acts. The earlier Act was the subject of the judgment in *Chairman, Board on Tariffs and Trade v Brenco Inc* 2001 (4) SA 511 (SCA). One of the ITA Act's objects is to provide for the control of the import and export of goods on a continuous basis, and for the amendment of customs duties. For this, ITAC must investigate and evaluate applications for the amendment of customs duties and issue recommendations regarding the rates of duty and rebate provisions in the Customs and Excise Act. It is then required to take appropriate steps to give effect to its recommendations (s 22). A report is provided to the minister responsible for trade and industry who, if the recommendations are adopted, requests the Minister of Finance to amend schedules to the Customs and Excise Act (which is the responsibility of this Ministry) by notice in the Government Gazette.

[8] The ITAC report is not only an important link in the administrative and legislative chain; it is indeed a jurisdictional fact for the ministerial actions that follow. It is consequently not surprising that the ITA Act makes special provision for the review of any determination, recommendation or decision of ITAC (s 46). A fatal flaw in the process

at the ITAC stage affects the whole process (*Brenco* at para 10.)

[9] Prior to publication of the intention to submit the Bill to Parliament, the Manufacturers had lodged a review application in the Pretoria High Court, citing not only ITAC but also the two ministers and the Printers. This case is still pending. The Manufacturers sought the interdict, which is the subject of this appeal, on the allegation that the adoption of the Bill would have led to the demise of its review application. The whole thrust of the interdict application, consequently, was to protect the reviewability of ITAC's report on which the two ministers had acted.

[10] The case as formulated in the founding affidavit was that if the Bill were to be adopted the court's review jurisdiction would have been ousted and this would have amounted to an infringement of the Manufacturers' enshrined constitutional right to have a pending dispute decided in a fair public hearing and its right to administrative justice. The High Court accepted this reasoning. The essence of the argument is that if the legislation were to be adopted the administrative process would have been superseded by a legislative one and since legislation cannot be reviewed in terms of the definition of 'administrative action' in s 1 of the Promotion of Administrative Justice Act 3 of 2000, the Manufacturers' right of review would have been lost.

[11] For this conclusion the Manufacturers relied on the judgment of Spoelstra J in *Kennasystems South Africa CC v Chairman, Board on Tariffs and Trade* 1996 (1) SA 69 (T) at 74D-H where the learned

judge dealt with a similar case. He said:

‘The sole effect [of the legislation] is that the amendment [effected by the Minister of Finance to the Schedule] does not lapse. Parliament can achieve this in one of two ways: (i) by passing an Act amending the Schedule and thereby imposing a tax independent of the Minister's measure or (ii) by passing an Act preventing the lapsing of the amendment, as it has done in this case. Although the practical effect may be identical, the submission is that, from an administrative-law perspective, the two methods attract different consequences. Method (i) would probably establish sovereign parliamentary legislation. Method (ii) is not equivalent to sovereign parliamentary legislation because it merely prevents the lapsing of a ministerial measure which would have come to an end but for its extension by Parliament. It remains a ministerial amendment which could be scrutinised by this Court. The distinction between these two methods seems more apparent than real. In both cases Parliament ratifies and adopts the Minister's amendment. Parliament enacts that it shall remain in force. The manner in which Parliament elects to do this, cannot change the nature of what it has done. A Court of law is precluded from excluding from the provisions of an Act of Parliament what the Legislature has expressly included therein.’

[12] This extract should be read in context. It was written on the assumption of the existence of “sovereign parliamentary legislation”. (The same applies to the cases that followed this judgment such as *Lead Laundry Equipment (Pty) Ltd v Minister of Finance* [1996] 3 All SA 516 (N).) I agree with the submission referred to by Spoelstra J that by passing an Act preventing the lapsing of a ministerial amendment, the ‘sovereignty’ of parliament does not arise ‘because it

merely prevents the lapsing of a ministerial measure which would have come to an end but for its extension by Parliament.' I do, however, disagree that the distinction is more apparent than real. (The first postulate referred to by him did not arise because the Bill was not intended to impose a tax independently of the ministerial measure.)

[13] All depends on an interpretation of the Bill. The Manufacturers' argument is premised on the alleged retrospectivity of the consequent Act: it would have legalised the Minister's notice *ex tunc*, i.e., from the date of its promulgation. I disagree. There was no need for legislation to cover the period before end 2007. The validity or invalidity of the notice until then was independent of any legislation as appears from the concluding words of s 48(6), namely that Parliament's failure to prevent the lapse of the notice does not detract from the validity of such amendment, withdrawal or insertion before it has so lapsed. The object of the Bill was to extend the changes to the Schedules beyond 1 January 2008 and preventing their automatic lapsing by virtue of s 48(6). In other words, the intention of the Bill was to legislate for the future, beginning on 1 January 2008.

[14] As mentioned, the report is a jurisdictional fact for the validity of the Minister's notice and, consequently, the subsequent legislation. In other words, the legislative chain requires a 'valid' ITAC report. Therefore, an 'invalid report' invalidates subsequent legislation *pro tanto*. The situation is comparable to the failure of Parliament to comply with a precondition for legislation, which could affect the validity of the resultant legislation. *King v Attorneys Fidelity Fund Board of Control* 2006 (1) SA 474, [2006] 1 All SA 458 (SCA); *Doctors for Life*

International v Speaker of the National Assembly 2006 (6) SA 416 (CC). On this premise, too, the supposition that the adoption of the Bill would have brought an end to the review application was misconceived.

[15] In *Regina v Secretary of State for Health, ex parte US Tobacco International Inc* [1992] 1 QB 353 the lower court had set aside regulations made under a statute. They had been laid before Parliament and had come into force because Parliament did not by resolution set them aside. The Court of Appeal, upholding the judge's decision, said:

'Although the Regulations were subject to annulment by negative resolution of the House of Commons but were not so annulled, Parliament would be concerned only with the objects of the Regulations and would be unaware of any procedural impropriety. It is therefore to the courts, by way of judicial review, that recourse must be had to seek a remedy.'

(Quoted in *Secretary of State for the Foreign & Commonwealth Affairs v Bancoult* [2007] EWCA Civ 498.) In the present case Parliament would have been unaware of the alleged procedural defect attached to the Bill and by parity of reasoning the adoption of the Bill would not have cured the defect.

[16] Underlying the Manufacturers' argument is the proposition that all legislation with retrospective effect is unconstitutional although counsel did not put it in those terms. Instead he argued that this particular Bill would have given rise to legislation that was unconstitutional. First, it was said, the Minister's decision to submit the

Bill to Parliament with knowledge of a pending review application was irrational. There is no merit in the submission. An allegation of irrationality was never made on the papers. In addition, at the time the Minister took his decision he only knew of an allegation (albeit under oath) that the ITAC report was reviewable. There is nothing to show that he knew that it was in fact bad, something that has not yet been decided. Furthermore, if a minister acts in this regard irrationally, that does not make the legislation unconstitutional. If anything, it is the content of legislation that determines whether or not it is irrational; nothing else.

[17] A related submission was based on s 77(3) of the Constitution. It provides that all money Bills must be considered by Parliament in accordance with the procedure laid down in s 75, which deals with the parliamentary procedure applicable to the adoption of ordinary bills that do not affect provinces. It adds that 'an Act of Parliament must provide for a procedure to amend money Bills before Parliament'. Because no such Act has been adopted the argument is that the adoption of any money Bill would be unconstitutional. The failure of Parliament to adopt legislation envisaged in the Constitution is notorious especially in relation to legislation to which no time frame was added. That, it appears to me, cannot mean that if legislation is not adopted within a reasonable time, and there is an existing procedure, everything done under the existing procedure is unconstitutional. See the transitional provisions of the Constitution in Schedule 6, particularly s 21 and s 23. However, intriguing though the question may be, the Manufacturers were not entitled to rely on this failure of Parliament before either the High Court or this Court

because the failure of Parliament to fulfil a constitutional obligation falls within the exclusive jurisdiction of the Constitutional Court (Constitution s 167(4)(e)).

[18] This raises another question, which was not considered by the High Court or dealt with in the written submissions, namely the jurisdiction of the High Court to prevent the responsible Minister from submitting a Bill to Parliament. In *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) the Constitutional Court said in paras 68 and 69 (footnotes omitted):

> 'Courts in other jurisdictions, notably in the Commonwealth jurisdictions, have confronted this question. Courts have traditionally resisted intrusions into the internal procedures of other branches of government. They have done this out of comity and, in particular, out of respect for the principle of separation of powers. But at the same time they have claimed the right as well as the duty to intervene in order to prevent the violation of the Constitution. To reconcile their judicial role to uphold the Constitution, on the one hand, and the need to respect the other branches of government, on the other hand, courts have developed a "settled practice" or general rule of jurisdiction that governs judicial intervention in the legislative process.
>
> The basic position appears to be that, as a general matter, where the flaw in the law-making process will result in the resulting law being invalid, courts take the view that the appropriate time to intervene is after the completion of the legislative process. The appropriate remedy is to have the resulting law declared invalid. However, there are exceptions to this judicially developed rule or "settled practice". *Where immediate intervention is called for in order to prevent the violation of the Constitution and the rule of law, courts will intervene and grant immediate relief. But intervention will occur in exceptional cases, such as where an aggrieved person cannot be afforded substantial relief once the process is completed because the underlying conduct would have achieved its object.*' [Emphasis added.]

[19] The Constitutional Court chose to leave the question open whether the 'test' set out in the emphasised sentences applies. In effect, the test represents the

Constitutional Court's summation of the test formulated by the Privy Council in *Bahamas District of the Methodist Church in the Caribbean and the Americas v The Hon Vernon J Symonette MP (Bahamas)* [2000] UKPC 31. The Privy Council, it should be noted, did not seek to formulate a rule of universal application but sought to interpret the constitution of The Bahamas. The 'rule' must also be read in the context of the allegations in that case. The applicant church, which was a body corporate, sought to prevent the introduction of a Bill on the ground that the adoption of the Bill would have dissolved the church and that, accordingly, after adoption of the Bill the church's right to attack the constitutionality of the subsequent Act would have become nugatory because the church would not have been able to litigate because it no longer existed. In that context the possibility was mooted of someone who cannot be afforded substantial relief once the process is completed because the underlying unconstitutional conduct would have achieved its object. But even applying that test, there is nothing exceptional about this case and, as set out earlier, it is not a case where the Manufacturers cannot be afforded substantial relief once the Bill is enacted.

[20] I would with some diffidence like to revisit the foreign cases referred to by the Constitutional Court in this regard. The Canadian cases are of no assistance to the Manufacturers because they were brought under Canadian legislation permitting, for instance, the Lieutenant Governor in Council to refer 'any matter' to the court: *Reference Re Canada Assistance Plan (BC)* [1991] 2 SCR 525, (1991) 83 DLR (4th) 297. The Canadian provinces have similar legislation, which explains the judgment in *In re Amendment of the Constitution of Canada* (1981) 125 DLR (3d) 1 (SCC). The High Court of Australia's judgment in *Cormack v. Cope* (1974) 131 CLR 432 concerned an alleged constitutional irregularity in the law-making process and likewise is no authority for the proposition relied on by the Manufacturers. *Rediffusion (Hong Kong) Ltd v. Attorney-General of Hong Kong* [1970] AC 1136 (PC) dealt with the position of a colony, which had no elected legislative council and had limited legislative authority. These distinguishing features, and many others, were stressed by the Privy Council (at 1153F-1154D). The question it had to judge was whether a court could *a priori* decide whether a particular Bill fell within the legislative competence of the colony, and it held in the affirmative. That does not justify the broad rule and is also hardly comparable to the present case.

[21] I would venture to suggest that the answer is to be sought in the Constitution itself and not on an interpretation or application of foreign constitutions or judgments. The Constitutional Court, as highest court in constitutional matters, has a circumscribed jurisdiction. Importantly, only it may pronounce on the constitutionality of a Bill. Even then its powers are limited: it may do so (in the case of parliamentary bills) but only in the circumstances anticipated in s 79 of the Constitution (s 167(4)(b)). Section 79 envisages the case where the President has reservations about the constitutionality of a Bill twice considered by Parliament and refers the question to that Court for a decision. Conscious of the limitations of the *expressio unius est exclusio alterius* rule, I would nevertheless consider it strange if the Constitutional Court were to have a greater jurisdiction and otherwise be able to prevent the introduction of Bills.

[22] That leaves the question whether a high court may issue an interdict in these circumstances. Once again, I believe that the answer must be sought in the Constitution, more particularly s 172, which deals with the powers of other courts in constitutional matters. Sub-section (2) states that this Court, a high court or a court of similar status may make an order concerning the constitutional validity of 'an Act of Parliament, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.' It furthermore states that if an order of constitutional invalidity issues, the court may grant a temporary interdict, pending a decision of the Constitutional Court on the validity 'of that Act'. This language is quite specific. It does not include a decision on the constitutional invalidity of a Bill. The reason appears to me to be obvious. If a high court could decide on the constitutionality of a bill, and issue an interdict, which is final in effect (compare *National Gambling Board of SA v Premier of KwaZulu-Natal* 2002 (1) SA 715 (CC) at para 50), preventing its submission to Parliament, it short-circuits the constitutional process and emasculates the requirement that the Constitutional Court has to confirm any order of invalidity before it takes effect.

[23] The appeal has accordingly to succeed and the following order is made:

1. The appeal is upheld with costs, including the costs of two counsel.
2. The order of the court below is set aside and replaced with an order dismissing the application with costs, such costs to include the costs of two counsel

L T C HARMS

ACTING DEPUTY PRESIDENT

APPEARANCES:

FOR APPELLANT 1) C E PUCKRIN SC
M B MATLEJOANE

2) A P JOUBERT SC
C J McASLIN

FOR RESPONDENT: E W DUNN SC
V BRONSTEIN

ATTORNEYS:

FOR APPELLANT 1) THE STATE ATTORNEY
PRETORIA
THE STATE ATTORNEY
BLOEMFONTEIN

2) JAN S DE VILLIERS ATTORNEYS
c/o COUZYN HERTZOG & HORAK
PRETORIA
NAUDES ATTORNEYS
BLOEMFONTEIN

FOR RESPONDENT: H MILLER ACKERMANN & BRONSTEIN
c/o JACOBSEN & LEVY
PRETORIA
ISRAEL & SACKSTEIN
BLOEMFONTEIN