South African Reserve Bank v Shuttleworth: A Constitutional Lawyer's Nightmare

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Mark Shuttleworth, an entrepreneur and billionaire, had emigrated from South Africa to the Isle of Man. In 2009 he applied to transfer R2.5 billion in blocked assets out of South Africa. The Reserve Bank imposed a 10 per cent exit charge on the capital amount, so that Mr Shuttleworth was obliged to pay R250 million for the privilege of exporting those assets. He asked the Reserve Bank to reconsider its decision, and meanwhile paid the charge under protest. His subsequent challenge to the constitutionality of the exit charge failed in the High Court but succeeded in the Supreme Court of appeal, which ordered repayment of the R250 million. However, in *South African Reserve Bank v Shuttleworth* a majority of the Constitutional Court upheld a further appeal by the Reserve Bank and the Minister of Finance, and dismissed a cross-appeal by the respondent.[1] The result was that Mr Shuttleworth lost his R250 million to the National Revenue Fund.

Apart from the complainant himself, only the rich are likely to have lost sleep over this outcome. The money troubles of billionaires are perhaps more likely to inspire *Schadenfreude* than sympathy, especially when they are of such a mind-boggling order. Besides, most people would probably accept that the South African government is entitled to take measures to discourage the flight of capital from the country. And they would be right. As Legodi J remarked in the court a quo,

> imagine what will happen to this country if the wealthiest men and women … were allowed to take their wealth out of the country with impunity every time the country is in economic grief or when there is a change of government or leaders in government. It could have devastating effects on the country as a whole.[2]

However, as I explain in this note, that is not the principle that was at stake in *Shuttleworth*. The case was not a battle between property rights and governmental regulation, and it was not about the merits of exchange control – something the

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[1] *South African Reserve Bank & Another v Shuttleworth & Another* [2015] ZACC 17, 2015 (5) SA 146 (CC) ('*Shuttleworth*').

[2] *Shuttleworth v South African Reserve Bank & Others* [2013] ZAGPPHC 200, [2013] 3 All SA 625 (GNP)('*Shuttleworth* HC') at para 114.

applicant himself made clear at the outset.[3] As Froneman J pointed out in his dissenting judgment, the case was really about something far more fundamental and far more important: the transformation of South Africa's constitutional order, and obedience to the principles that govern that order.

Now, one would not necessarily expect a lay audience to see the case that way, but the frightening thing about *Shuttleworth* is that the majority of our highest court also seemed unable to see it; for in this matter it tolerated constitutional breaches that it has not hesitated to strike down in other contexts. Indeed, the majority opinion in this case reads almost like the *Doppelgänger* of a Constitutional Court judgment, an unsettling exception to the rules that normally apply in our democracy, and to that extent it evokes the nightmare of Hart's famous description.[4] It seems unlikely that the majority could have had much faith in its own reasoning, particularly when juxtaposed with the irresistible logic of the dissenting opinion; and the context of exchange control does not seem enough on its own to account for such extreme deference.

In the last section of this note I speculate about two other factors that could possibly have influenced the majority judgment. One is that the Court felt constrained by the fear of a flood of similar claims against the National Revenue Fund. The other possibility, a more disquieting one, is that a billionaire emigrant was not the sort of applicant likely to elicit the Court's empathy – and that the majority adjusted its perceptions of constitutionality accordingly.

I The Legislative Framework

The statute governing exchange control in South Africa is a piece of pre-democratic legislation, the Currency and Exchanges Act 9 of 1933. Section 9 of the Act is especially redolent of its era in terms of both content and style. It confers breathtakingly wide discretionary powers on the Governor-General, now to be read as the President. Section 9(1) enables 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(2) allows the President to impose whatever sanctions he sees fit, criminal or civil, in this regard. Section 9(3), a veritable Henry VIII clause, purports to allow the President by regulation to

> suspend in whole or in part this Act or any other Act of Parliament or any other law relating to or affecting or having any bearing upon currency, banking or exchanges, and any such Act or law which is in conflict or inconsistent with any such regulation shall

[3] Ibid at para 27, where the court quotes from the applicant's Notes for Argument: 'It is important to stress at the outset that this case is not an attack on the idea of exchange control. Mr Shuttleworth accepts that exchange control serves a valid public purpose and that a system of exchange control could be validly put in place under our constitutional scheme. His challenge is to the existing system of exchange control which is contrary to the principles of our constitutional scheme.'

[4] HLA Hart 'American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream' (1977) 11 *Georgia Law Review* 969. As Hart pointed out there (at 972), litigants 'consider themselves entitled to have from judges an application of the existing law to their disputes, not to have new law made for them'.

> be deemed to be suspended in so far as it is in conflict or inconsistent with any such regulation.

In addition, s 9(5)(a) provides:

> Any 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 authorised to make regulations.

Section 9(4) is directed at the Minister of Finance. It instructs him to cause a copy of every regulation made under the section to be tabled in both Houses of Parliament within 14 days of its first publication in the *Gazette*. Where the regulation is 'calculated to raise any revenue', the Minister must also table a statement of the revenue that is estimated will be raised in the first 12 months; and a sunset clause adds that unless it has been approved by resolution of both Houses, such a regulation will cease to have force after one month.

Using his powers under s 9(1) of the Act, the President produced a set of Exchange Control Regulations in 1961. 'Treasury' is defined there as meaning the Minister of Finance; and reg 22E allows the Minister to subdelegate any power or function that the regulations confer on the Treasury. However, the most important regulation for present purposes is reg 10(1)(c):

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

When at Mr Shuttleworth's request the Reserve Bank gave him reasons for the imposition of the exit charge on his exported capital, it explained that its action was based upon a decision of the Minister of Finance.[5] The Minister's decision, in turn, had been announced in his budget speech in Parliament on 26 February 2003, at a time when exchange control measures were gradually being relaxed. The Minister's decision was that holders of blocked assets wanting to take more than R750 000 out of the country would have to apply to the Reserve Bank to do so, and that the bank's approval would be subject to an exit charge of 10 per cent. The announcement of this decision in the budget speech was recorded on the same day in Exchange Control Circular No D375.

The 10 per cent exit charge was ultimately done away with in October 2010, in the Minister's mid-term budget speech. Dismayingly, however, the Act and most of the 1961 regulations are still in place, as is a set of orders and rules made by the Minister under those regulations.

II The High Court and Supreme Court of Appeal

In the North Gauteng High Court the complainant sought to impugn almost every aspect of the legislative framework outlined above. [6] He challenged the constitutionality of the exit charge, of s 9 of the Act, of some of the Exchange

[5] *Shuttleworth* HC (note 2 above) at para 8.
[6] *Shuttleworth* HC (note 2 above).

Control Regulations and of one of the Rules.[7] Legodi J was willing to declare unconstitutional s 9(3) of the Act as well as several of the regulations, though he suspended most of these declarations of invalidity. But he rejected the applicant's arguments in support of the main relief sought: the setting aside and repayment of the exit charge itself.

Mr Shuttleworth appealed against the adverse parts of the High Court judgment, while the respondents cross-appealed against the various declarations of invalidity. In the Supreme Court of Appeal (SCA),[8] as in the court below,[9] the respondents relied on reg 10(1)(c) as the source of authority for the exit charge, which they characterised as a blanket condition imposed by the Minister on the export of capital. However, Navsa ADP and Ponnan JA held for a unanimous court that the imposition of the exit charge was unlawful, and they ordered the Reserve Bank to repay the R250 million to Mr Shuttleworth with interest.[10]

As the SCA saw things, it could hardly be disputed that the exit charge was a revenue-raising mechanism for the state. The court found, first, that the charge had not been authorised by the regulation, for while reg 10(1)(c) allowed 'conditions' to be imposed on the export of capital, this could not be construed as including a power to impose a tax or levy on such export.[11] And even if the regulation *could* be construed as authorising the raising of revenue, it was common cause that reg 10(1)(c) had not been made in accordance with s 9(4) of the Act.[12] Furthermore, as a revenue-raising mechanism the exit charge fell within the category of 'national taxes, levies, duties or surcharges' identified in s 77(1)(b) of the Constitution,[13] and was clearly in breach of that provision, for it had not been legislated in accordance with the special procedure stipulated for money Bills.[14]

In the cross-appeal, the SCA reversed the various declarations of invalidity issued by the High Court. It did so on the basis that Legodi J had judged the constitutionality of the relevant provisions in the abstract, without properly considering their effect on the system of exchange control or the economy.[15]

III The Constitutional Court

The Reserve Bank and the Minister of Finance sought and were granted leave to appeal to the Constitutional Court on the main issue, the constitutionality of the exit charge, while the complainant was granted leave to cross-appeal on the issue

[7] Rule 10(1)*(a)* and its 'closed door policy', which makes certain banks intermediaries between an applicant and the Reserve Bank.

[8] *Shuttleworth v South African Reserve Bank & Others* [2014] ZASCA 157, 2015 (1) SA 586 (SCA) ('*Shuttleworth* SCA').

[9] In *Shuttleworth* HC (note 2 above) at para 59, Legodi J noted that 'the respondents do not see the circulars aforesaid as their source of power to impose the levy. They see their source of power in section 9(1) of the Act and Regulation 10(1)*(c)*.'

[10] The court also criticised the reliance on the regulation as an '*ex post facto* attempt to contextualise the levy within an enabling regulatory framework': *Shuttleworth* SCA (note 8 above) at para 32.

[11] Ibid at paras 28 and 31.

[12] Ibid at para 29.

[13] Constitution of the Republic of South Africa, 1996.

[14] *Shuttleworth* SCA (note 8 above) at para 31.

[15] Ibid at paras 36–39.

of the constitutionality of s 9(1) of the Act and reg 10(1)(c). Even though the exit charge no longer applied, the dispute about its constitutionality was clearly not moot: Mark Shuttleworth still wanted his R250 million back and the government was still determined to keep it.[16]

On the other hand, the Court found that the complainant lacked standing to challenge other provisions in his own interest or in the public interest. He had not shown how the regulations affected him, and had not established that he was genuinely acting in the public interest or that there was a need for him to do so. The majority conceded that some of the surviving provisions might well be unconstitutional, and 'nudged' the state parties to review them.[17] But the government seems instead to have taken heart from the court's judgment, for most of the provisions remain in place today – including the flagrant Henry VIII clause, s 9(3) of the Act.

In the main appeal the first question for the Constitutional Court was whose decision it had been to impose the exit charge. Mr Shuttleworth had attacked the charge as a decision of the Reserve Bank (which had repeatedly called it 'our decision')[18] and the appellants hoped his case would collapse if they established that he had pursued the wrong decision-maker. The Court held that the decision had indeed been the Minister's, and that the bank had merely applied or implemented that decision, but pointed out that this finding did not dispose of the entire appeal in any event.[19]

That left two main questions for the Court. One was whether the exit charge was a national 'tax, levy, duty or surcharge' as contemplated in s 77 of the Constitution – a money Bill, in effect, which (as the SCA had found) ought to have complied with the special constitutional requirements laid down for the enactment of such legislation. The other was whether the exit charge was 'calculated to raise any revenue' so as to bring it within s 9(4) of the Act. Moseneke DCJ held for the majority that the charge was neither a money Bill nor calculated to raise revenue. The judgment went on to consider and dismiss various arguments made in the dissenting judgment of Froneman J. In the result, the main appeal was upheld against Mr Shuttleworth.

His cross-appeal failed, too, for the Court dismissed his argument that the Minister had been given discretionary power of an excessively broad and unguided nature. The Court thus upheld the constitutional validity of both s 9(1) and reg 10(1)(c).

By contrast, Froneman J would have allowed the cross-appeal, at least in relation to the unconstitutionality of s 9 of the Act, and would have dismissed the main appeal altogether. He found the imposition of the exit charge unconstitutional for a host of reasons that may conveniently be divided into three categories.[20] First,

[16] *Shuttleworth* (note 1 above) at para 26.

[17] Ibid at para 77.

[18] See ibid at para 33.

[19] Ibid at paras 35–39.

[20] While the complainant had not expressly relied on all of these points of law, they were apparent on the papers and fell within the category described in *CUSA v Tao Ying Metal Industries & Others* [2008] ZACC 15, 2009 (2) SA 204 (CC) at para 68: points that a court of law would be entitled or even obliged to raise in order to avoid a result premised on an incorrect application of the law.

he reasoned, the raising of national revenue required an Act of Parliament, and could not validly be effected by means of delegated legislation alone, as had been done in this instance. Secondly, s 9(1) of the Act impermissibly assigned plenary legislative power to the President. Thirdly, even if one assumed that national revenue could validly be raised by subordinate legislation, the power to do so had not been validly subdelegated to the Minister. Underlying all of these objections, he explained, was the theme of eradicating one of the most pervasive and depressing characteristics of South Africa's legal system before 1994: 'executive rule by decree under the guise of delegated legislation'.[21]

It was for this reason that Froneman J regarded the case as having a transformative dimension. Apartheid, we should never forget, was a legal order:[22] it was implemented by means of law and was sustained by the constitutional doctrine of parliamentary sovereignty. A standard practice of the apartheid legislature was to confer extremely broad and unguided legislative powers on members of the executive, who then subdelegated similarly broad powers on administrative officials. The facts in *Shuttleworth* are all too reminiscent of the power granted to the State President under the ironically named Public Safety Act 3 of 1953 to make 'such regulations as appear to him to be necessary or expedient' for dealing with a state of emergency; and Froneman J was right to remind us of South Africa's most terrifying case, *Staatspresident v United Democratic Front*, [23] which arose out of the State President's subdelegation of power to the Commissioner of Police to 'identify' subversive statements. This was the case in which the Appellate Division, then South Africa's highest court, upheld the legality of the action taken, and did so by denying that the power subdelegated was legislative or even discretionary in nature.[24]

The parallels with the setup in *Shuttleworth* were apparent to Froneman J and must also have been apparent to the rest of the Court, which included former anti-apartheid lawyers and even a political prisoner of the apartheid regime: the author of the majority judgment.[25] But one would never guess this from the bland and insouciant tone of that judgment, whose few references to South African history related solely to the surface themes of exchange control and taxation. That is remarkable in itself, for the Constitutional Court seldom misses an opportunity to remind its audience of the deeper historical reasons for our constitutional design. For instance, the judgment in another recent case dealing with taxation, *Gaertner v Minister of Finance*, begins with an account of South Africa's painful history regarding warrantless police searches under apartheid. [26]

[21] *Shuttleworth* (note 1 above) at para 89.

[22] C Forsyth 'The Judiciary Under Apartheid' in C Hoexter & M Olivier (eds) *The Judiciary in South Africa* (2014) 26 at 26.

[23] *Staatspresident & Andere v United Democratic Front & 'n Ander* 1988 (4) SA 830 (A).

[24] For exposition and criticism, see especially N Haysom & C Plasket 'The War Against Law: Judicial Activism and the Appellate Division' (1988) 4 *South African Journal on Human Rights* 303.

[25] For a stirring account of Justice Moseneke's arrest, detention, trial and years of imprisonment on Robben Island, see D Moseneke *My Own Liberator: A Memoir* (2016).

[26] *Gaertner & Others v Minister of Finance & Others* [2013] ZACC 38, 2014 (1) SA 442 (CC)('*Gaertner*') at para 1.

As I shall suggest in the more detailed discussion that follows, the majority judgment in *Shuttleworth* was remarkable in other ways too: unconvincing on the questions it addressed, and unable to give satisfactory answers to the compelling constitutional objections raised by the dissenting judgment.

A The Nature of the Exit Charge

It was incontrovertible that the exit charge had raised revenue for the state by bringing into the National Revenue Fund 10 per cent of the value of all exported capital amounts over R750 000. The evidence was that while it was in force, the exit charge had raised about R2,9 billion in this way. The SCA thus had no difficulty in regarding the charge as a revenue-raising measure and as falling within the category of 'national taxes, levies, duties or surcharges' identified in s 77(1)(b) of the Constitution.

In the Constitutional Court, however, the majority distinguished between revenue raised deliberately, as a tax, and revenue raised incidentally by means of a 'regulatory charge'. While it conceded that 'every tax is in some measure regulatory',[27] the majority placed the exit charge in the second category because its primary or dominant purpose was not to raise revenue, but to protect the domestic economy by discouraging the export of capital from the country. In other words, the exit charge had not been 'directed at' raising revenue to fund the state, and its success in doing so had been a mere side-effect.[28] This conclusion was fortified by factors identified in Canadian jurisprudence and pointing away from taxation: that the charge applied to a small and discrete portion of the population (people exporting capital in excess of R750 000) and the 'close relationship between the regulatory charge and the persons being regulated'.[29]

In line with this 'regulatory' characterisation, the majority of the Constitutional Court also held that the exit charge had not been calculated to raise revenue, meaning that the regulation authorising the charge did not have to comply with the requirements of s 9(4) of the Act (though it took the view that in any event s 9(4) had been superseded by the constitutional money Bill provisions). The majority declined to interpret 'calculated to' to mean merely 'likely to', and opted for the much stricter meaning of 'intended', 'designed' or 'planned'; and again, it saw the revenue-raising effect as merely incidental to the dominant regulatory aim of discouraging the flight of capital.[30]

Now, this sort of interpretative technique is nothing new, at least not to those of us old enough to remember the tropes of public-law adjudication in South Africa before 1994. But such a counter-intuitive style of adjudication is noteworthy when it is applied by the court pre-eminently charged with keeping public authorities to the constitutional mark and showing the way to a culture of justification – and

[27] *Shuttleworth* (note 1 above) at para 48, quoting from *Sonzinsky v United States* 300 US 506 (1937) at 513.
[28] *Shuttleworth* (note 1 above) at para 57.
[29] Ibid at para 56.
[30] Ibid at para 61.

not a little incongruous when the author of the judgment is a leading proponent of transformative adjudication.[31]

As suggested by the reasoning of the SCA, the Constitutional Court was hardly driven to characterise the exit charge as a 'regulatory charge' and could easily have seen it as a tax, levy, duty or surcharge. For one thing, there were strong pointers to its being a tax in terms of South African case law: the money was paid into a general revenue fund for general purposes, and no service was rendered in return for payment.[32] The Court could have concluded, as it did in *Gaertner*, that this was essentially a fiscal measure with the added purpose of discouraging undesirable conduct.[33] More troubling, though, is the sheer artificiality of construing an effect as 'incidental' when it is actually inevitable. The measure was *bound* to raise revenue, for it was a blanket condition and regarded as such by the Reserve Bank as well as the Minister. The exit charge thus raised revenue every time capital in excess of R750 000 was exported, without exception.

Similarly, common sense suggests that a measure that in fact raised R2,9 billion for the National Revenue Fund must have been calculated to raise revenue – all the more so given the adjective 'any' in s 9(4) (a word ignored by the majority) and in view of the inevitability of the revenue-raising effect. On the test proposed by Mureinik for the equivalent phrase 'designed to', there was an 'objective probability' that revenue would be raised by the measure.[34] In any event, the majority was well aware of the middle ground between 'likely to' and 'intended to'; for in the *Van Heerden* case, when interpreting 'designed to' in the context of affirmative action measures, Moseneke J had held that it meant 'reasonably capable of attaining', or 'reasonably likely to achieve'.[35] In *Shuttleworth*, the best Moseneke DCJ could do was hint at the context-specific nature of such meanings.[36]

In short, the majority fell back on 'technical readings of legislation'[37] strangely divorced from reality as well as from the Court's own previous approaches.

B The Need for Original Legislation

Froneman J, too, distinguished between revenue-raising in the form of taxation and revenue-raising of a non-tax nature. In his judgment the latter would not have to comply with the special procedure laid down in s 77 of the Constitution, but it *would* at least have to be achieved by means of original rather than delegated

[31] See especially D Moseneke 'The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication' (2002) 18 *South African Journal on Human Rights* 309. The most seminal account remains that of K Klare in his 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

[32] *Permanent Estate and Finance Co Ltd v Johannesburg City Council* 1952 (4) SA 249 (W), referred to by Moseneke DCJ in *Shuttleworth* CC (note 1 above) at para 49.

[33] *Gaertner* (note 26 above) at paras 54 and 55.

[34] E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31 at 46ff, discussed by Chaskalson P in *S v Lawrence; S v Segal; S v Solberg* [1997] ZACC 11, 1997 (4) SA 1176 (CC) at para 38 et seq.

[35] *Minister of Finance & Another v Van Heerden* [2004] ZACC 3, 2004 (6) SA 121 (CC)('*Van Heerden*') at para 41.

[36] *Shuttleworth* (note 1 above) at para 60 note 97.

[37] Justice P Langa 'Transformative Constitutionalism' (2006) 17 *Stellenbosch Law Review* 351 at 353.

legislation; in the case of national revenue, an Act of Parliament. (*Fedsure*,[38] which described taxation as a power peculiar to elected legislative bodies, had stated it too narrowly in his view.)[39] Such legislation was signally absent from this case, for nothing in the Act specifically or even generally authorised the exit charge. As Froneman J pointed out, the venerable principle 'no taxation without representation'[40] cannot hinge on technical legal meanings, for citizens are not concerned about whether what is being imposed on them is technically a 'tax' or a 'regulatory charge'. What they object to is being made to pay up without their consent. Whatever label is used for a compulsory payment, the principle remains that citizens 'should have their democratic say, through elected representatives in parliament, in approving the decision to raise revenue'.[41] He added:

> [I]f it is accepted that the charge of 10% was constitutionally valid, that implies that it would also have been valid if it were double, treble or even more than that, all without parliamentary accountability. That cannot be.

This cogent and thoughtful point of departure was dismissed by the majority as 'overbroad' and inconsistent with domestic and comparative authority.[42] Bishop and Brickhill agree that the argument is a little too broadly stated: for instance, would one need original legislative authority for raising revenue by letting out state-owned property?[43] However, these authors agree with Froneman J that a non-voluntary charge on citizens does require original legislation, irrespective of whether that charge is called a tax, and they are surely right on this point. Notably, it was an argument that the majority judgment seemed unable to refute. Instead it evaded the issue, merely reiterating that the exit charge did not fit the definition in s 77 of the Constitution.[44] But Froneman J had not been contending that it did.

The majority also had no answer when Froneman J pointed out the true nature of the 'raft' of pre- and post-1994 legislation alluded to earlier on in the judgment of Moseneke DCJ: legislation that 'routinely authorises the executive to impose fees, tariffs, levies, charges and surcharges';[45] for Froneman J showed that every one of the statutes referred to specifically authorised the raising of revenue itself, and did not simply leave the decision to a subordinate decision-maker. 'Judging from past practice', he added, the need for original legislation in such circumstances 'appears to have been regarded as obvious'.[46]

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[38] *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* [1998] ZACC 17, 1999 (1) SA 374 (CC) at para 45.

[39] *Shuttleworth* (note 1 above) at para 96.

[40] Though often attributed to a political speech by James Otis in 1761, the phrase seems to have been used for the first time in a sermon by the Rev Jonathan Mayhew in Boston in 1750. Since then it has become a 'founding principle of parliamentary democracy': *Shuttleworth* SCA (note 8 above) at para 29.

[41] *Shuttleworth* (note 1 above) at para 99.

[42] Ibid at para 64.

[43] M Bishop & J Brickhill 'Constitutional Law' 2015 (2) *Juta's Quarterly Review* 1 at 2.

[44] *Shuttleworth* (note 1 above) at para 64.

[45] Ibid at para 46.

[46] Ibid at para 95.

C Delegation of Plenary Legislative Power

As Froneman J remarked, it 'is difficult to conceive of a more comprehensive divesting of legislative power from Parliament to the Executive than what is contained in s 9 of the Exchanges Act'.[47] Precisely because it occurred with such shameless frequency before 1994, such divesting is not allowed now. Section 43 of the Constitution vests the national legislative authority in Parliament, an elected and deliberative body, and the principle that Parliament may not surrender too much of that authority has been affirmed several times by the Constitutional Court. In *Executive Council, Western Cape Legislature*[48] the Court explained the crucial difference between delegating authority to make subordinate legislation and passing on plenary legislative power to another body. The power under scrutiny in that case was a Henry VIII clause similar to s 9(3) of the Exchanges Act, and the Court did not hesitate to strike it down.

But considerably less egregious delegations of legislative power have also been found unconstitutional. An apposite case is *Justice Alliance*, where in terms of the Constitution an Act of Parliament was required for the extension of the term of office of any Constitutional Court judge – including the Chief Justice.[49] Parliament had chosen to give its power to the President by means of s 8(a) of the Judges' Remuneration and Conditions of Employment Act 47 of 2001, and the President had exercised the power by deciding to extend the term of the then Chief Justice. The Constitutional Court found it 'self-evident' that the Act did not itself extend the Chief Justice's tenure, but rather surrendered the power to the President to do so if he wished; and it held that this was simply not good enough.[50]

In *Shuttleworth*, however, the majority denied that the legislative scheme in the case before it transferred plenary legislative power to the President. The scheme, it said, merely allowed him to make regulations. One of his regulations allowed the Minister to impose conditions on the exporting of capital, and the Minister had imposed a condition in the form of the exit charge, so '[t]he trail from the legislation to the regulations and to implementation is there'.[51] But the majority must have been well aware that a 'trail' cannot cure an excessive and thus unconstitutional delegation of power, and its own lack of conviction in its assertion is suggested by an additional point made by Moseneke DCJ: that even if Parliament's delegation of power was 'conspicuously abundant', it was justified by the unique context of exchange control and the importance of protecting South Africa's currency.[52] That point, too, was easily refuted by Froneman J, for s 224 of the Constitution makes the protection of the currency the primary object of the

[47] Ibid at para 111.

[48] *Executive Council, Western Cape Legislature & Others v President of the Republic of South Africa & Others* [1995] ZACC 8, 1995 (4) SA 877 (CC) at para 51.

[49] *Justice Alliance of South Africa v President of the Republic of South Africa & Others* [2011] ZACC 23, 2011 (5) SA 388 (CC)('*Justice Alliance*').

[50] Ibid at paras 52 and 53–69.

[51] *Shuttleworth* (note 1 above) at para 67.

[52] Ibid at para 68 et seq.

Reserve Bank – and s 225 expressly requires the bank's powers and functions to be determined by and exercised under an Act of Parliament.[53]

Froneman J would also have upheld the argument Shuttleworth made in his cross-appeal: that contrary to the principle established in *Dawood v Minister of Home Affairs*,[54] s 9(1) and reg 10(1)(c) gave the Minister too much discretionary power without any guidelines for its exercise, thus increasing the risk of an unconstitutional exercise of power on his part. The majority rejected the *Dawood* argument as the High Court had done, by pointing out that *Dawood* also acknowledged exceptions to the general principle it laid down. It would be impossible, the majority held, to enumerate factors in advance given the complexity of the exchange control system and the need for 'flexibility and speedy governance' in the protection of our currency.[55]

Froneman J disagreed with this piece of exceptionalism, and pointed out that it had not saved the relevant legislation from constitutional invalidity in *Dawood* itself.[56] It is interesting, too, to contrast the majority's reluctance here with the Court's cheerful reliance on the same *Dawood* principle in *Gaertner*,[57] where it contributed to the conclusion that provisions of the Customs and Excise Act 91 of 1964 were overbroad and unconstitutional.

D Subdelegation

Section 238 of the Constitution permits the delegation (really the further delegation or subdelegation) of 'any power or function that is to be exercised or performed in terms of legislation' to 'any other executive organ of state'. But there is a crucial proviso: the subdelegation must be 'consistent with the legislation' in question. So, even assuming it is constitutionally feasible to raise revenue by means of subordinate legislation, express or implied authority must be found for the further delegation of the power to raise it,[58] a fortiori because the power is of a legislative and thus far-reaching kind. Again, the need for such authority is a fundamental principle that has readily been upheld by the Constitutional Court in other contexts.[59]

The problem identified by Froneman J in *Shuttleworth* was that there was really nothing to allow the President to subdelegate his power to the Minister.[60] Regulation 10(1)(c) was not capable of conferring the necessary authority: there

[53] Ibid at para 111 and note 139.

[54] *Dawood & Another v Minister of Home Affairs & Others; Shalabi & Another v Minister of Home Affairs & Others; Thomas & Another v Minister of Home Affairs & Others* [2000] ZACC 8, 2000 (3) SA 936 (CC) ('*Dawood*').

[55] *Shuttleworth* (note 1 above) at para 81.

[56] Ibid at paras 113–114.

[57] Note 26 above at para 7.

[58] See, eg, *Democratic Alliance & Another v Masondo NO & Another* [2002] ZACC 28, 2003 (2) SA 413 (CC) at paras 21–22.

[59] See, eg, *Minister of Health & Another NO v New Clicks South Africa (Pty) Ltd & Others (Treatment Action Campaign & Another as Amici Curiae)* [2005] ZACC 14, 2006 (2) SA 311 (CC) at para 281; *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council & Another* [2006] ZACC 9, 2007 (1) SA 343 (CC) at para 81 et seq in the judgment of Langa CJ.

[60] *Shuttleworth* (note 1 above) at paras 115–120.

had to be something in the Act itself to authorise subdelegation of the power. And the only contender in the Act, s 9(5)(a), did not do the trick either, as it merely enabled the President to empower another person or body to make orders and rules – a species of legislation necessarily subordinate to the already subordinate legislative powers granted to the President by s 9(1).[61] Yet another difficulty was that the Minister had not, in any event, exercised his power by means of a properly promulgated legislative instrument.[62]

Not surprisingly, the majority had no answer to these subdelegation arguments beyond what it had already said about delegation more generally; and again, it must have been plain to all that these fundamental deficiencies could not have been cured by the existence of a 'trail'.[63]

IV Possible Explanations

In an eloquent and inspiring lecture on transformative adjudication, Moseneke concluded that 'the judiciary is commanded to observe with unfailing fidelity the transformative mission of the Constitution'.[64] It seems to me that the majority of the Constitutional Court knowingly disobeyed that order in *Shuttleworth* – a case that was, or ought to have been, about upholding the rule of law and the right to lawful administrative action, and not about exchange control and its 'exceptional design in protecting the national currency'.[65] (Nor was the case a 'dispute about taxation', as asserted in the opening line of the majority judgment.[66] Indeed, that description seems somewhat perverse in view of the majority's dogged insistence that the exit charge was *not* a tax but a regulatory charge.)

While Froneman J correctly judged that 'there should never be reason for legislation by executive decree to be acceptable in one instance but not in another',[67] the majority in *Shuttleworth* was evidently determined to treat the area of exchange control as an exception to basic principles of constitutionalism that the Court has applied unhesitatingly in other contexts. The majority effectively held that legislation by executive decree *is* acceptable in this uniquely complex and dynamic context, where the potentially catastrophic impact of capital exports justifies a 'special amplitude of regulatory power'.[68] However, the reasoning the Court used in support of its conclusion was far from convincing. Even if one accepts the need for flexibility and quick decision-making on the part of the Reserve Bank and the Minister, those things are not incompatible with fidelity to the Constitution, and the suggestion that they are is dangerous because it opens the door to exceptionalism in a range of other policy-laden contexts. There are many other instances in which government agencies might need to respond quickly, threats to national security being an obvious example. But in

[61] Ibid at para 118.
[62] Ibid at paras 121–122.
[63] Ibid at para 67.
[64] Moseneke (note 31 above) at 319.
[65] *Shuttleworth* (note 1 above) at para 81.
[66] Ibid at para 1.
[67] Ibid at para 90.
[68] Ibid at para 70, and see also paras 68–69, 71 and 81.

any event, as Bishop and Brickhill have pointed out, requiring a proper legislative foundation for the exit charge would not in the slightest have prevented the authorities from taking speedy action to protect the currency.[69] I would suggest that formulating guidelines for the exercise of broad discretionary power would not necessarily prevent flexibility and speed either: it might even help to promote them. The wisdom of having such referents in place was something the Court seemed to accept in an earlier case concerning exchange control, *Armbruster v Minister of Finance*.[70] There it added that public officials must be governed by the Constitution '*always and in every sphere*',[71] a proposition that has indeed been stated or implied countless times by the Court.

Are there any other factors, then, that could help to explain the Court's willingness to compromise this basic principle in *Shuttleworth*? Could the Court's judgment have been clouded by the fear of a flood of similar claims against the National Revenue Fund? Or, less worthily and more worryingly, could it have been influenced by reluctance to find for a billionaire who had chosen to leave the country?

The first concern was expressly considered but quickly dismissed by the SCA. Navsa ADP and Ponnan JA, having held the facts to be appropriate for the condictio indebiti, thought that

> [h]aving regard to the time that has elapsed between the commencement of the dispute between Shuttleworth and the Reserve Bank and the abolition of the 10% levy more than three years ago, there is no danger of a flood of similar claims.[72]

However, the Constitutional Court evidently thought differently, presumably because it did not limit itself to that particular remedy and the associated prescription period of three years. After all, the 1996 Constitution opens up other restitutionary possibilities underpinned by the broad remedial discretion in s 172(1)(b); and the Prescription Act 68 of 1969 contemplates a range of longer periods, most notably a period of 30 years in respect of taxation.[73] These prospects were not specifically canvassed in the majority judgment, but the danger of a flood of similar claims was acknowledged in a general manner quite early on. When dealing with the issue of leave to appeal, Moseneke DCJ noted that the outcome of the case had possible consequences for other potential claimants, and that claims against the state might run into billions – perhaps even R2,9 billion, the total amount raised by the exit charge since its inception in 2003.[74] Some might say that R2,9 billion is not too much to pay for the rule of law, others that the

[69] Bishop & Brickhill (note 43 above) at 3.

[70] *Armbruster & Another v Minister of Finance & Others* [2007] ZACC 17, 2007 (6) SA 550 (CC) at para 80 in the unanimous judgment of Mokgoro J.

[71] Ibid at para 81 (emphasis added).

[72] *Shuttleworth* SCA (note 8 above) at para 35.

[73] Section 11(a)(iii) of the Prescription Act, but see *Eskom v Bonjanala Platinum District Municipality* [2004] ZASCA 118, [2005] 3 All SA 108 (SCA) (provision held to operate only in favour of the state and not the taxpayer). Interestingly, this case also provides an example of a constitutionally based claim to a right of restitution as an alternative to the condictio indebiti, though the claim was not discussed.

[74] *Shuttleworth* (note 1 above) at paras 26 and 27.

rule of law ought not to be sacrificed at any price. Still, the possible flood must have been an arresting thought, for South Africa is a country of limited financial resources and there are many urgent calls on the public purse.

On the other hand, s 172(1)(b) also offered possible solutions to the problem: the Court could have prevented a flood of claims by limiting the retrospective effect of its declaration of invalidity of the exit charge, or by suspending it. While Bishop and Brickhill do not discuss the problem of other potential claimants, they do suggest that suspension would have been a way to avoid giving Shuttleworth a 'windfall' if the Court had been so minded.[75] That seems to me an odd way of describing money that belonged to Mark Shuttleworth and had been taken from him by the state in a manner that was, at best, constitutionally suspect – but that aside, Bishop and Brickhill make an important point. As Jafta J said in *Mvumvu v Minister for Transport*, when pondering a just and equitable remedy the courts are obliged to take into account not only the interests of those whose rights have been violated but also the interests of good government.[76] In that case the evidence showed that an order with unlimited retrospective effect would increase the liability of the Road Accident Fund by about R3 billion. The Court accepted that this would likely have a crippling effect on the fund, and tailored its order accordingly: it suspended its declaration of invalidity for a period to give Parliament a chance to fix the defect and, in the event of Parliament's failing to do so, limited the retrospective effect of the declaration to a certain category of claims.[77]

In short, *Mvumvu* gives particular scope for ameliorating orders of invalidity where they would otherwise have 'serious budgetary implications',[78] and there seems no reason why the Court in *Shuttleworth* should not have relied on it. There was no need to find against the complainant in order to prevent a flood of similar claims.

That leaves the billionaire factor. Is it possible that, notwithstanding the importance of the constitutional principles at stake, the Court's view of the case was significantly influenced by the identity and circumstances of the complainant himself? The doors of the Constitutional Court are, we have been assured, 'open to all',[79] and from its earliest days the Court has stressed that everyone is protected by the constitutional order. As was said in *Makwanyane*, in relation to the sentencing of cold-blooded killers, '[i]t is only if there is a willingness to protect the worst and weakest amongst us, that all of us can be secure that our own rights will be

[75] Bishop & Brickhill (note 43 above) at 3. The idea of a 'windfall' alludes to *Fose v Minister of Safety and Security* [1997] ZACC 6, 1997 (3) SA 786 (CC), where the term appears several times in the majority judgment of Ackermann J; see also *Van Heerden* (note 35 above) at para 39.

[76] *Mvumvu & Others v Minister for Transport & Another* [2011] ZACC 1, 2011 (2) SA 473 (CC)('*Mvumvu*') at para 49.

[77] Ibid at paras 50–57.

[78] Ibid at para 52, and see further M du Plessis, G Penfold & J Brickhill *Constitutional Litigation* (2013) 118–120.

[79] Sachs J in *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, & Others* [2007] ZACC 13, 2007 (6) SA 4 (CC) at para 109, remarking on the irony that the first invocation of the rights to environmental justice came 'not from concerned ecologists' but from 'an organised section of an industry frequently lambasted … for spawning pollution'.

protected'.[80] However, an open door does not guarantee a successful outcome, and in other contexts there is evidence of the Court's preference for the right kind of applicant or victim.

Some of the clearest evidence of such a preference has emerged from challenges based on the rights to equality. Now, that is admittedly an area in which the circumstances of the individual applicant have special legal relevance under the test set out in *Harksen*.[81] In particular, when a court has to decide whether discrimination has an unfair impact, the *Harksen* test requires it to consider factors including the position of the complainant in society and whether the group of which he or she is a member has been the victim of past discrimination. However, Pieterse argues convincingly that in equality cases the Court has sometimes focused excessively on the circumstances or characteristics of the individual applicant before it when judging the constitutionality of law or conduct, and that the Court has definite ideas about who is worthy of protection under s 9(3) of the Constitution.[82] Indeed, his survey of the equality cases suggests that

> an applicant's chances of success are significantly enhanced where she displays all or some of the features of 'appropriate victimhood' … ie where she is the 'typical' victim of discrimination, is economically vulnerable, is untainted by criminality or perceptions of immorality and finds herself in a predicament beyond her individual control.[83]

To mention some of the better-known examples offered by Pieterse,[84] the equality claims of white men, members of the 'oppressor class', failed in cases including *Hugo*,[85] *Walke*r[86] and *Van Heerden*;[87] and the economic privilege of the various claimants may well help to explain the outcome in cases such as *Harksen*, *Walker*, *Van Heerden* and *Robinson*.[88] The unsuccessful claimants in *Hugo* and *Jordan*[89] were regarded as having effectively caused their own plight by engaging in criminal and/or immoral conduct, while the applicant in *Robinson* evidently did the same by opting not to marry.[90]

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[80] *S v Makwanyane & Another* [1995] ZACC 3, 1995 (3) SA 391 (CC) at para 88. Two judgments described the crimes as cold-blooded: Kentridge AJ at para 203 and O'Regan J at para 319.

[81] *Harksen v Lane NO & Others* [1997] ZACC 12, 1998 (1) SA 300 (CC)('*Harksen*').

[82] M Pieterse 'Finding for the Applicant? Individual Equality Plaintiffs and Group-Based Disadvantage' (2008) 24 *South African Journal on Human Rights* 397, and see also C Albertyn 'Gendered Transformation in South African Jurisprudence: Poor Women and the Constitutional Court' (2011) 22 *Stellenbosch Law Review* 591, 602.

[83] Pieterse (note 82 above) at 405. One of Pieterse's conclusions is that the courts should guard against 'formalistic approaches to equality adjudication that blind them to either the particularity or the generality of difference, or that are premised on problematic understandings of disadvantage, constitutional morality and appropriate victimhood' (at 424).

[84] Ibid at 401–405.

[85] *President of the Republic of South Africa & Another v Hugo* [1997] ZACC 4, 1997 (4) SA 1 (CC)('*Hugo*').

[86] *City Council of Pretoria v Walker* [1998] ZACC 1, 1998 (2) SA 363 (CC)('*Walker*').

[87] *Van Heerden* (note 35 above).

[88] *Volks NO v Robinson & Others* [2005] ZACC 2, 2005 (5) BCLR 446 (CC)('*Robinson*').

[89] *S v Jordan (Sex Workers Education and Advocacy Task Force & Others as Amici Curiae)* [2002] ZACC 22, 2002 (6) SA 642 (CC)('*Jordan*').

[90] *Robinson* (note 88 above). Albertyn (note 82 above) suggests at 602 that the Court's discomfort with women who fall outside 'the traditional norms of wife and mother' is a better explanation of the result in both *Jordan* and *Robinson* than the relative privilege of the claimants in those two cases.

Shuttleworth was not, of course, a challenge based on equality, except to the extent that the case resonated with equality before the law – and that, one might suppose, is intrinsically a less hazy or contentious area than unfair discrimination or affirmative action, and commensurately less likely to be affected by judicial preferences of this kind. Indeed, I would argue that there was nothing remotely hazy or contentious about the issues in *Shuttleworth*: as we have seen, the case was about some of the most fundamental and incontrovertible principles of our constitutional order. Still, it is difficult to imagine a more privileged and less vulnerable applicant than Mark Shuttleworth. It would also have been particularly easy for the Court to blame the victim[91] in this instance: to see him as the author of his own predicament and, worse, as tainted by self-interest, given that his sole reason for emigrating was to break free of South Africa's restrictive exchange control system.[92] Could it be that an enormously wealthy, self-interested white male who had caused his own predicament was the least likely kind of applicant to elicit the Court's empathy?

It would be shocking if this were even part of the explanation for the outcome in *Shuttleworth*, for in general the courts' judgments about constitutionality are not supposed to be influenced by such considerations. Indeed, in *Ferreira v Levin* we were told that the inquiry into constitutionality is 'necessarily' an objective one that cannot and does not depend on the individual circumstances of one of the parties to a dispute.[93] But that was long ago, and since then *Afriforum* has stripped us of some of our fonder illusions – for the majority approach in that case goes so far as to suggest that there may be complainants unworthy of constitutional protections, or 'constitutional outcasts'.[94] There Froneman J again dissented, and this time Cameron J joined him in warning the rest of the Court that '[i]t is not consonant with the values of the Constitution to deny constitutional protection to people because of the content of their beliefs, views and aspirations'.[95]

Likewise, it cannot be consonant with the values of the Constitution to deny constitutional protection to people on account of their privilege, even if that privilege is immense. Yet a willingness to adjust the standards of constitutionality depending on the worthiness of the victim concerned would be chillingly consonant with what Woolman has identified as the Court's growing penchant for outcomes-based decision-making[96] and the 'individuation' of cases:[97] a strategy that gives the Court 'licence to decide each case as it pleases, unmoored from its own precedent', and to 'sit as a court of equity'.[98] It would accord with

[91] See Pieterse (note 82 above) at 417, where he refers to some of Albertyn's earlier observations on this theme.

[92] See *Shuttleworth* (note 1 above) at para 1.

[93] *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* [1995] ZACC 13; 1996 (1) SA 984 (CC) at para 26.

[94] *Tshwane City v Afriforum & Another* [2016] ZACC 19, 2016 (6) SA 279 (CC)('*Afriforum*') at para 134 in the dissenting judgment of Froneman and Cameron JJ.

[95] Ibid at para 159.

[96] S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762 at 762.

[97] S Woolman 'On Rights, Rules, Relationships and Refusals: A Reply to Van Marle's "Jurisprudence of Generosity"'(2007) 18 *Stellenbosch Law Review* 508 at 521.

[98] Woolman 'Amazing, Vanishing' (note 96 above) at 763.

Scott's description of 'result-driven jurisprudence: apparently socially progressive, claimant-centred decisions' that are not necessarily supported by the actual rules.[99] It would resonate with the insistence on 'real justice' and 'substantive justice' that drove the majority approach in *Afriforum*.[100] And so far I have not been able to think of a more plausible explanation for the extraordinary majority judgment in *Shuttleworth* – though, for the sake of untroubled sleep, I hope I am wrong.

[99] H Scott 'The Death of Doctrine? Private Law Scholarship in South Africa Today' in J Basedow. H Fleischer & R Zimmermann (eds) *Legislators, Judges, and Professors* (2016) 223 at 245.

[100] *Afriforum* (note 94 above) at paras 18 and 41 in the majority judgment of Mogoeng CJ.