CONSTITUTIONAL COURT OF SOUTH AFRICA

Cases CCT 29/22, CCT 57/22 and CCT 58/22

In the matter between:

Case CCT 29/22

NU AFRICA DUTY FREE SHOPS (PTY) LIMITED	Applicant
and	
MINISTER OF FINANCE	First Respondent
COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	Second Respondent
MINISTER OF INTERNATIONAL RELATIONS AND CO-OPERATION	Third Respondent
AMBASSADOR DUTY FREE (PTY) LIMITED	Fourth Respondent
FLEMINGO DUTY FREE SHOPS INTERNATIONAL SA (PTY) LIMITED	Fifth Respondent
INTERNATIONAL TRADE & COMMODITIES 2055 CC t/a ASSORTIM DUTY FREE	Sixth Respondent

Case CCT 57/22

And in the matter between:

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Applicant

and

AMBASSADOR DUTY FREE (PTY) LIMITED First Respondent

FLEMINGO DUTY FREE SHOPS INTERNATIONAL SA (PTY) LIMITED Second Respondent

INTERNATIONAL TRADE & COMMODITIES 2055 CC t/a ASSORTIM DUTYFREE Third Respondent

NU AFRICA DUTY FREE SHOPS (PTY) LIMITED Fourth Respondent

MINISTER OF FINANCE Fifth Respondent

MINISTER OF INTERNATIONAL RELATIONS AND CO-OPERATION Sixth Respondent

Case CCT 58/22

And in the matter between:

MINISTER OF FINANCE Applicant

and

AMBASSADOR DUTY FREE (PTY) LIMITED First Respondent

FLEMINGO DUTY FREE SHOPS INTERNATIONAL SA (PTY) LIMITED Second Respondent

INTERNATIONAL TRADE & COMMODITIES 2055 CC t/a ASSORTIM DUTY FREE Third Respondent

NU AFRICA DUTY F.REE SHOPS (PTY) LIMITED Fourth Respondent

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Fifth Respondent

MINISTER OF INTERNATIONAL RELATIONS AND CO-OPERATION Sixth Respondent

Neutral citation: *Nu Africa Duty Free Shops (Pty) Ltd v Minister of Finance and Others; Commissioner for the South African Revenue Service v Ambassador Duty Free (Pty) Ltd and Others; Minister of Finance v Ambassador Duty Free (Pty) Ltd and Others* [2022] ZACC 31.

Coram: Zondo CJ, Baqwa AJ, Kollapen J, Madlanga J, Mathopo J, Mbatha AJ, Mhlantla J, Rogers J and Tshiqi J

Judgments: Mathopo J (majority): [01] to [149]
Rogers J (minority): [150] to [285]

Heard on: 20 October 2022

Decided on: 03 October 2023

Summary: [Customs and Excise Act 91 of 1964] — [Value Added tax Act 89 of 1991] — [Constitutionality of section 75(15)(a)(i)(bb) of the Customs Act] — [Constitutionality of section 74(3)(a) of the VAT Act]

[Sections delegate plenary legislative power to the Minister] — [Breach of doctrine of separation of powers] — [Rationality] — [Section 77 of the Constitution]

ORDER

On application for confirmation of the order of constitutional invalidity granted by the High Court of South Africa, Gauteng Local Division, Pretoria:

CCT 29/22: Nu Africa (Pty) Limited v Minister of Finance and Others

1. The orders of the High Court, declaring section 75(15)(a)(i)(bb) of the Customs and Excise Act 91 of 1964 (Customs Act) and section 74(3)(a) of the Value-Added Tax Act 89 of 1991 (VAT Act) inconsistent with the Constitution and invalid, are not confirmed.
2. The orders of the High Court setting aside the amendments made by the Minister of Finance to Schedules 4 and 6 of the Customs Act and Schedule 1 of the VAT Act on 23 April 2021 and 14 June 2021, are set aside.
3. There is no order as to costs in the High Court and this Court.

CCT 57/22 and CCT 58/22: Commissioner for the South African Revenue Service and the Minister of Finance v Ambassador Duty Free Retailers (Pty) Limited and Others

1. The Commissioner for the South African Revenue Service and the Minister of Finance are granted leave to appeal.
2. The appeals by the Commissioner for the South African Revenue Service and the Minister of Finance are upheld.
3. The order granted by the High Court reviewing and setting aside the amendments and the Rules is set aside and replaced with the following:

(a) The applications by Ambassador, Flemingo and Assortim are dismissed.

4. There is no order as to costs in the High Court and this Court.

JUDGMENT

MATHOPO J (Zondo CJ, Baqwa AJ, Madlanga J, Mbatha AJ, Mhlantla J, Tshiqi J concurring):

Introduction

[1] These are three consolidated applications. The first application is brought by Nu Africa Duty Free Shops (Pty) Limited (Nu Africa) in terms of section 172(2)(d) of the Constitution read with rule 16 of the Rules of this Court for the confirmation of an order of constitutional invalidity made by the Gauteng Division of the High Court.[1] The other two applications have been brought by the Commissioner of the South African Revenue Service (Commissioner) and the Minister of Finance (Minister) for leave to appeal a judgment and order of the High Court to which I have just referred. The Minister and Commissioner also oppose the confirmation of the High Court's order of constitutional invalidity.

[2] These proceedings follow the judgment and order of the High Court. In terms of which that Court reviewed and set aside the decision of the Minister to amend

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[1] *Ambassador Duty Free (Pty) Ltd v Minister of Finance* [2022] ZAGPPHC 7. (High Court judgment).

Schedules 4 and 6 to the Customs and Excise Act[2] (Customs Act) and the decision by the Commissioner to amend the Rules to the Schedules. The Court also declared section 75(15)(a)(i)(bb) of the Customs Act, section 74(3)(a) of the Value-Added Tax Act[3] (VAT Act) as well as certain amendments to Schedule 4 and 6 of the Customs Act and to Schedule 1 to the VAT Act unconstitutional and invalid at the instance of Nu Africa. Nu Africa was granted leave to intervene in the proceedings in the High Court and challenged the constitutional invalidity of these provisions.

[3] The High Court declared section 75(15)(a)(i)(bb) of the Customs Act and section 74(3)(a) of the VAT Act empowered the Minister to amend the Schedules to those Acts. The basis for the High Court's order of invalidity was that this provision permitted the Minister to exercise plenary legislative powers to amend the original Act.

Parties

[4] Nu Africa, Ambassador Duty Free (Pty) Limited (Ambassador), Flemingo Duty Free Shops International SA (Pty) Limited (Flemingo) and International Trade & Commodities 2055 CC t/a Assortim Duty Free (Assortim) supply duty-free products to foreign Heads of State, diplomatic and consular missions, their representatives and family members. For ease of reference, I shall collectively refer to these entities as the retailers. The retailers are required to operate their respective stores in compliance with the legislative scheme provided for in the Diplomatic Immunities and Privileges Act[4] (Diplomatic Immunities Act), the Vienna Convention on Diplomatic Relations[5](1963 Vienna Convention) and the Vienna Convention on Consular Relations[6] (1961 Vienna Convention) as well as the Customs Act and the VAT Act. All these businesses are conducted under licences issued in terms of section 21 of the Customs Act.

[2] 91 of 1964.

[3] 89 of 1991.

[4] 37 of 2001.

[5] The Vienna Convention on Consular Relations, 24 April 1963 (acceded to by South Africa on 21 August 1989).

[6] The Vienna Convention on Diplomatic Relations, 18 April 1961 (ratified by South Africa on 21 August 1989).

[5] The retailers oppose the applications for leave to appeal on the basis that both applications lack reasonable prospects of success and, therefore, it is not in the interests of justice for leave to appeal to be granted. There was no need for the Minister and the Commissioner to apply for leave to appeal against the High Court's order of constitutional invalidity because in terms of section 172(2)(a) they have an automatic right of appeal and in terms of rule 16 of the Rules of Court, they needed to simply lodge a notice of appeal that complies with the requirements of that rule.

[6] The first respondent in the confirmation proceedings is the Minister, who is responsible for the administration of the Customs Act and VAT Act. It was the Minister who amended the Schedules which were declared unconstitutional by the High Court. The second respondent is the Commissioner. The third respondent is the Minister the political head of the Department of International Relations and Cooperation (DIRCO). DIRCO elected to abide the decision of the High Court and did not participate in this Court.

Background

[7] Before 1 August 2021 diplomats were entitled to a full rebate on the duty ordinarily payable in respect of goods purchased by them from any of the retailers, provided that such goods were either for the official use of their mission or for personal use. Prior to the amendments, diplomats could purchase an unlimited quantity of alcohol and tobacco products on a duty-free basis.

[8] As far back as 2019 the Minister and the Commissioner identified abuse in the system where certain diplomats were purchasing duty-free tobacco and alcohol in South Africa and selling them in the domestic market. Consequently, the Minister announced a review of the treatment of duty-free shops including the legislative framework governing duty- free shops in a Budget Review dated 20 February 2019. To ascertain whether the duty-free retailers contravened the law, the Commissioner investigated and reviewed previous audit findings of the duty-free shops to ascertain compliance and

whether the fiscus sustained any loss as a result. According to the Minister and the Commissioner, the fiscus was losing substantial revenue in respect of the duties on those products. The Commissioner calculated the losses to the fiscus owing to the illegal trading by diplomats of duty-free products to be around R100 000 000 per month.

[9] The Commissioner held consultations with DIRCO to understand the constraints, challenges, policies and processes involved when diplomats purchase alcohol or tobacco. To assist the Commissioner in this investigation, DIRCO benchmarked other jurisdictions to establish what would constitute reasonable quantities of alcohol and tobacco products which could be procured for personal or official use by Heads of States, diplomats, and other foreign representatives. On 12 February 2020, a presentation was made by the Commissioner to all four duty-free shops across Pretoria. During the presentation, the attendees were made aware of abuses by persons holding diplomatic immunities and privileges. The retailers were forewarned about the prospective changes to the regulatory processes concerning the imposition of a quota in respect of alcohol and tobacco products.

[10] In a letter dated 13 February 2020 addressed to the duty-free shops, the Commissioner sought to provide feedback on the meeting held on 12 February 2020. Draft amendments to Schedule 1 to the VAT Act were published on the SARS website on 17 December 2020 and were open for comment until 15 January 2021. The draft amendments to Schedule 4 of the Customs Act were published on 20 November 2020 on the SARS website for comment. The closing date was 4 December 2020. The period for comments was subsequently extended to 15 January 2021. The proposed amendments introduced substantive components of the quota system and ushered in a dramatic change to the system. The second category of amendments comprised amendments to Schedule 6 of the Customs Act. These were the only consequential amendments to make certain items in Schedule 6 applicable to the amendments in Schedule 4. The third category related to paragraph 8 of Schedule 1 to the VAT Act. It gave effect to substantive principles of the quota system by

removing the reference to reciprocity in Notes to item 406.00 of paragraph 8.[7] In addition, they sought to introduce a reference to the requirements to pay tax on items covered by rebate items 406.02, 406.03, 406.04 and 406.05.[8] The last category of amendments included amendments to the rules made in terms of section 120 of the Customs Act. Section 120 of the Customs Act provides in effect that section 21 licence of the Customs Act is subject to the Rules published in terms of section 120 of the Customs Act.

[11] Comments on the draft amendments were received from one duty-free shop. The Minister subsequently approved the amendments to Schedules 4 and 6 of the Customs Act and Schedule 1 of the VAT Act and signed the draft notices for publication in the *Government Gazette*. Acting in accordance with section 75(15)(a)(i)(bb) of the Customs Act and section 74(3)(a) of the VAT Act, the Minister published in the *Government Gazette* amendments to certain Schedules to the Customs Act and the VAT Act. The amendments were published in notice numbers: R. 360, R. 361, R. 362, R. 363, R. 364, R. 365, R. 366, R. 367, R. 368 and R. 369 of *Government Gazette* No. 44473 dated 23 April 2021, with effect from 1 July 2021.

Relevant provisions

[12] Section 75(15) of the Customs Act provides in relevant part:

> "(a) The Minister may from time to time by notice in the *Gazette*—

[7] Item 406 of paragraph 8 to Schedule No. 1 of the VAT Act, allows for an exemption from VAT on imported goods, provided they are not entered for home consumption. In terms of Schedule 4, Part 1 of the Customs Act, Rebate Item 406 provides that a diplomatic or consular mission, representative and family members are entitled to claim rebates on all goods purchased for (i) the official use by a diplomatic or consular mission; (ii) the official use by a diplomatic or consular representative; or (ii) the personal use of a diplomatic or consular representative who are accredited to a diplomatic or consular mission and members of their family, to the extent as determined and approved by the Director General: DIRCO.

[8] Rebate Item 406.02 requires a diplomat to present a DIRCO document that pre-authorises the sale. In other words, and as explained in the founding affidavit, the diplomat must obtain permission from DIRCO before entering the duty-free store to make the purchase. Rebate Item 406.03 applies to goods imported (by) or obtained at a licensed special shop for diplomats for other approved foreign representatives (excluding those of rebate item 406.05). Rebate Item 406.04 relates to "Goods imported by an international institution or organisations in terms of an agreement entered into with the Republic of South Africa" as provided for in note 3 to this item. Rebate item 406.05 relates to "Goods for consular missions, consular representatives accredited to consular missions and foreign representatives (excluding those in rebate items 406.02 and 406.03)".

(i) amend Schedule 3, 4, 5 or 6—

(aa) in order to give effect to any request by the Minister of Trade and Industry; or

(bb) whenever he deems it expedient in the public interest to do so;

. . .

(aA) The Minister may, whenever he deems it expedient in the public interest to do so—

(i) by like notice amend any such Schedule with retrospective effect from such date as he may specify in that notice; or

(ii) by like notice declare any amendment made under paragraph (a) to apply with retrospective effect from such date as he may specify in that notice."

[13] Section 75(16) provides that "the provisions of section 48(6) shall *mutatis mutandis* apply in respect of any amendment made under the provisions of subsection (15)." Section 48(6) provides:

> "Any amendment, withdrawal or insertion made 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."

[14] Section 74(3) of the VAT Act provides as follows:

> "(a) Whenever the Minister amends any Schedule under any provision of the Customs and Excise Act, 1964 (Act No. 91 of 1964), by notice in the *Gazette* and it is necessary to amend in consequence thereof Schedule 1 of this Act, the Minister, may by like notice amend the said Schedule 1.
>
> (b) The provisions of section 48(6) of the Customs and Excise Act, 1964, shall apply *mutatis mutandis* in respect of any amendment by the Minister under this subsection."

[15] Article 34 of the 1961 Vienna Convention provides:

"A diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:

(a) Indirect taxes of a kind which are normally incorporated in the price of goods or services;

(b) Dues and taxes on private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

(c) Estate, succession or inheritance duties levied by the receiving State, subject to the provisions of paragraph 4 of article 39;

(d) Dues and taxes on private income having its source in the receiving State and capital taxes on investments made in commercial undertakings in the receiving State;

(e) Charges levied for specific services rendered;

(f) Registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of article 23."

[16] Article 36 of the 1961 Vienna Convention provides:

"(1). The receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services, on:

(a) Articles for the official use of the mission;

(b) Articles for the personal use of a diplomatic agent or members of his family forming part of his household, including articles intended for his establishment."

[17] Article 50 of the 1963 Vienna Convention states:

"(1) The receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services, on:

(a) articles for the official use of the consular post;

(b) articles for the personal use of a consular officer or members of his family forming part of his household, including articles intended for

his establishment. The articles intended for consumption shall not exceed the quantities necessary for direct utilisation by the persons concerned.

(2) Consular employees shall enjoy the privileges and exemptions specified in paragraph 1 of this Article in respect of articles imported at the time of first installation."

Litigation history

High Court

[18] Ambassador launched an urgent application for an order reviewing and setting aside the Minister's amendments to the Schedules and the Commissioner's amendments to the Rules on the basis that the process leading to the introduction of the quota system was arbitrary, irrational and procedurally unfair. Ambassador further contended that the amendments to the Schedules were unlawful and invalid because they were inconsistent with the provisions of the Vienna Conventions. Flemingo and Assortim followed suit by filing urgent applications seeking similar relief. They contended that the Minister, as the decision-maker, presented no evidence to establish that he had any involvement in the determination of the quota system. Flemingo and Assortim argued that the process was administered by the Commissioner and DIRCO. They further submitted that the amendments offended the rule of law and unlawfully delegated authority to DIRCO to adjust the limits of the quantities imposed.

[19] The primary contention of the retailers was that, first, the Minister's decision to make the amendments to the Schedules and the Commissioner' decision to make the amendments to the Rules, constituted administrative action which was susceptible to review in terms of the Promotion of Administrative Justice Act (PAJA).[9] Second, they contended that the impugned amendments, as well as the decision to make the amendments, fell to be reviewed and set aside in terms of the principle of legality. The

[9] 3 of 2000.

retailers relied on *Cable City*[10] and *Esau*[11] where the Supreme Court of Appeal held in both cases that the making of regulations constituted administrative action and thus reviewable under PAJA.

[20] The Minister contended that the amendments were rational and were intended to curb the abuse of the privileges by rogue diplomats purchasing exorbitant quantities of duty-free alcohol and tobacco products, only to resell them for personal gain. He argued that the amendments were rationally connected to this legitimate purpose. Part of the Minister's argument was that in the United Kingdom the quota for cigarettes per year amounted to "375 000" and that of spirits or liquors amounted to "2 861". The Minister further took issue with the submissions that the amendments were procedurally unfair. He contended that on 12 February 2020 a meeting had been held with the representatives of the duty-free retailers. He said that at that meeting, proper notice was given of the intention to amend the relevant Schedules to the Customs Act and the VAT Act, and the retailers had an opportunity to make representations in respect of the proposed amendments.

[21] It was further contended by the retailers that the amendments to the Schedules were inconsistent with the Vienna Conventions. The argument was that both the 1961 and 1963 Vienna Conventions had been incorporated into domestic law and that Article 36 of the 1961 Vienna Convention and Article 50 of the 1963 Vienna Convention granted exemption from all customs duties and taxes on goods purchased by diplomats for their personal or official use. In other words, it was argued that the Vienna Conventions did not provide for any limitation to the quantities of goods purchased by diplomats for their personal or official use.

[10] *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* [2009] ZASCA 87; 2010 (3) SA 589 (SCA); [2010] 1 All SA 1 (SCA) at para 10.

[11] *Esau v Minister of Cooperative Governance and Traditional Affairs* [2021] ZASCA 9; [2021] 2 All SA 357 (SCA); 2021 (3) SA 593 (SCA) at para 84.

[22] Nu Africa applied for and was granted leave to intervene in both the applications brought by the other retailers and joined the litigation. Nu Africa contended that section 75(15) of the Customs Act and section 74(3) of the VAT Act, relied on by the Minister, were unconstitutional and invalid and that the decisions to make the impugned amendments were, therefore, also unconstitutional and invalid. Nu Africa argued that this Court's judgments in *Executive Council*[12] and *Smit*,[13]penned by Tshiqi J conclusively decided that it was constitutionally impermissible for Parliament to delegate plenary law-making powers to the Executive, including the power to amend Schedules to a statute. It was argued that the impugned provisions of the Customs Act and VAT Act plainly delegated such plenary powers to the Minister. Nu Africa argued that, in introducing the quota regime governing duty-free sales of alcohol and tobacco to diplomats, the Minister exercised plenary law-making power, thus violating the separation of powers principle. Nu Africa thus contended that the impugned provisions of the Customs Act and VAT Act offended the principle enunciated in *Executive Council*. It further argued that *Smit* later reaffirmed the principles in *Executive Council* that it is constitutionally impermissible for Parliament to delegate plenary law-making powers to the Executive.

[23] The Minister adopted a different position. He contended that section 75(15)(a)(i)(bb) of the Customs Act permitted him to amend Schedules 3, 4, 5 and 6 whenever he deemed it expedient in the public interest. The Minister submitted that section 48(6) of the Customs Act provides for parliamentary oversight or supervision and does not give the Minister carte blanche to amend the legislation. Finally, the Minister argued that *Smit* is distinguishable and inapplicable because the question in that matter was whether Parliament could permit the Minister to amend the Schedules to an Act without any involvement of Parliament which is not the position in the present matter. The Minister further contended that Parliament had not delegated

[12] *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* [1995] ZACC 8; 1995 (4) SA 877;1995 (10) BCLR 1289.

[13] *Smit v Minister of Justice and Correctional Services* [2020] ZACC 29; 2021 (1) SACR 482 (CC);2021 (3) BCLR 219 (CC).

its plenary legislative power to amend the Schedules to the Minister but had empowered the Minister to take certain action that remains valid until such time as Parliament approves or expunges it, acting in terms of section 48(6) of the Customs Act.

[24] The High Court rejected the argument of the retailers that the Minister's amendments to the Schedules constituted administrative action for purposes of PAJA. Relying on *Pioneer Foods*,[14] it held that PAJA was inapplicable to a decision of the Minister to amend a Schedule to the Customs Act or VAT Act. In *Pioneer Foods*, the Court held that, when the Minister decides what custom duties to set, he or she exercises an Executive function and that, when he or she amended the Schedules to give effect to that decision, he or she exercised a legislative function under the supervision of Parliament.[15]

[25] The High Court reasoned that the definition of "administrative action" in section 1 of PAJA did not include the Executive powers or functions of the national Executive or the legislative functions of Parliament. It held that "a clear distinction should be drawn between a decision of the Minister to amend a Schedule to the Customs Act, or to the VAT Act, on the one hand, and a decision that amounts to the making of regulations".[16] The Court further held that the decision to amend the Schedules did not constitute administrative action within the meaning of PAJA but may be dealt with in terms of the principle of legality.

[26] Regarding the rationality argument, the High Court held that the Minister had put up no evidence to show how the quantities of alcohol and tobacco in the amendments were determined. The figures quoted for spirits or liquors did not indicate whether they referred to a unit expressed in litres or bottles. The Court further held that the mere fact that another country has imposed certain quotas did not make the Minister's decision rational. The Court concluded that the failure to disclose

[14] *Pioneer Foods (Pty) Ltd v Minister of Finance* [2018] ZAWCHC 110; [2018] 4 All SA 428 (WCC).

[15] Id at para 31.

[16] High Court Judgment above n 1 at para 87.

information underlying the specified quotas showed that the quotas were not based on any evidence or relevant facts. The reference by the Commissioner to quotas imposed in other countries was of no assistance. The High Court further held that the decisions were the result of a random selection of quantities without demonstrating how they were determined. It concluded that the amendments should be set aside for being arbitrary and irrational.

[27] With regard to the contentions relating to the Article 36 of the 1961 Vienna Convention and Article 50 of the 1963 Vienna Convention, the Court held that, as a starting point, the contents of the Articles should be considered having regard to the context provided by reading all of them as a whole, taking into account the language used, the apparent purpose to which they are directed and then choosing a sensible meaning as opposed to one that leads to insensible or unbusinesslike results. Care should be taken not to read the words "exemption from all customs duties, taxes and related charges" in isolation. On this point, the Court concluded that, taking into account the wording of these Articles and the context in which they appear, on a proper interpretation, the purpose of both the aforesaid qualifications reflected in the phrase "in accordance with such laws and regulations as it may adopt" (Articles 36 and 50(1)(b) referred to above) appeared to be an acknowledgement that different countries may have different laws and regulations regarding the permissible duty-free sale of liquor and tobacco to diplomats.

[28] The High Court upheld Nu Africa's contention that section 75(15)(a)(i)(bb) of the Customs Act and section 74(3)(a) of the VAT Act delegated plenary legislative powers to the Minister. The core of the High Court's reasoning on this aspect of its judgment is captured as follows:

> "Therefore, in my view, the Act did not empower the Minister to create the Schedules. These Schedules were made part of the Act by Parliament. Section 75(15) empowers the Minister to amend the Schedules. By doing so, he is in my view exercising plenary legislative power to amend an original Act. Section 74(3) of the VAT Act appears to be linked to section 75(15) of the Customs Act. It also grants the Minister a similar

> power to amend Schedule 1 to the VAT Act. By doing so, he is, in my view again exercising plenary legislative power to amend the original Act. Even if one takes into consideration section 48(6) of the Customs Act, I agree with the submissions made by counsel for Nu Africa that, during the initial period of validity, the Minister is exercising full plenary law-making powers which are enjoyed by Parliament – whether or not Parliament later intervenes to legislate for the future or not. For these reasons and taking into account the decision of *Smit* . . . I am of the view that section 75(15) of the Customs Act and section 74(3) of the VAT Act (including the amended Schedules to both Acts) should be declared unconstitutional and invalid."[17]

In this Court

Nu Africa's submissions in the confirmation proceedings

[29] Nu Africa contends that Parliament may not authorise a Member of the Executive to amend Schedules to an Act of Parliament. Nu Africa relies on this Court's judgment in *Smit* where it was held:

> "The Legislature may not assign plenary legislative power to another body, including the power to amend the statute. Subordinate legislation is one not enacted by Parliament.
>
> . . .
>
> Section 63 confers on the Minister plenary legislative power to amend the Schedules [to the Drugs and Drug Trafficking Act 140 of 1992]. As the Schedules are essentially part and parcel of the Act, it in effect delegates original power to amend the Act itself. This is a complete delegation of original legislative power to the Executive and there is no clear and binding framework for the exercise of the powers. This is constitutionally impermissible. Section 63 also undermines the doctrine of separation of powers, which this Court has repeatedly affirmed as an important constitutional principle."[18]

[17] Id at para 126.

[18] Above n 12 at paras 35-6.

[30] Nu Africa submits that both the Minister's and the Commissioner' arguments that the impugned provisions of the Customs Act and VAT Act only permit the Minister to exercise subordinate and not plenary legislative powers is incorrect.

[31] Relying on this Court's decisions in *Executive Council*, *Smit* and *Ayres*[19], Nu Africa submits that the Minister was exercising plenary legislative power. For this reason, it argues that *Smit* and *Ayres* clearly overruled *Kennasystems*,[20] a judgment handed down on the eve of the new constitutional dispensation which held that the Minister does not exercise original legislative power when amending Schedules.

[32] Nu Africa further takes issue with the Commissioner's argument that the "nature" or "substance" of the Minister's conduct when amending the Schedules to the Act should be considered, and not the "form". It argues that it cannot be so because the impugned provisions of the Customs Act and VAT Act have in substance delegated plenary legislative powers to the Minister. Nu Africa submits that, when the Customs Act was originally promulgated, all the Schedules (i.e. Schedule 1 to Schedule 8) were promulgated along with the Act. The Act did not empower the Minister to create the Schedules – those Schedules were created through the exercise of plenary legislative power by Parliament. Nu Africa contends that, by introducing the new quota regime into the Customs Act by amending the Schedules, the Minister has plainly exercised plenary legislative power (the exact opposite of exercising subordinate legislative powers).

[33] Nu Africa also argues that the impugned provisions violate the processes by which statutes must be passed by Parliament. The argument is that section 77 of the Constitution provides that a Bill which "(b) ". . .imposes national taxes, levies, duties or surcharges" or "(c) abolishes or reduces, or grants exemptions from, any national taxes, levies, duties or surcharges . . ." is a money Bill. The section provides:

[19] *Ayres v Minister of Justice and Correctional Services* [2022] ZACC 12; 2022 (2) SACR 123 (CC); 2022 (5) BCLR 523 (CC).

[20] *Kennasystems South Africa CC v Chairman, Board on Tariffs and Trade* 1996 (1) SA 69 (T).

> "(1) A Bill is a money Bill if it—
>
> (a) appropriates money;
>
> (b) imposes national taxes, levies, duties or surcharges;
>
> (c) abolishes or reduces, or grants exemptions from, any national taxes, levies, duties or surcharges; or
>
> (d) authorises direct charges against the National Revenue Fund, except a Bill envisaged in section 214 authorising direct charges.
>
> (2) A money Bill may not deal with any other matter except—
>
> (a) a subordinate matter incidental to the appropriation of money;
>
> (b) the imposition, abolition or reduction of national taxes, levies, duties or surcharges;
>
> (c) the granting of exemption from national taxes, levies, duties or surcharges; or
>
> (d) the authorisation of direct charges against the National Revenue Fund.
>
> (3) All money Bills must be considered in accordance with the procedure established by section 75. An Act of Parliament must provide for a procedure to amend money Bills before Parliament."

[34] Nu Africa contends that VAT being a tax on the value of the supply of goods and services and customs and excise duties being patently revenue, the dominant purpose of the VAT Act and Customs Act and amendments to such Acts is accordingly to raise revenue. The contention continues that, when the Minister promulgated the amended Schedules to the Acts, in substance he was imposing national taxes, levies, duties or surcharges, or abolishing or reducing, or granting exemptions from any national taxes, levies, duties or surcharges. Nu Africa, therefore, argues that the impugned provisions of the Customs Act and VAT Act violate section 77 of the Constitution, by permitting a Minister to introduce into law what is in substance a money Bill, outside of the legislative framework required by the Constitution.

[35] Following the delivery of the High Court's judgments, on 19 January 2022 Parliament passed the Taxation Laws Amendment Act[21] (Amendment Act) which

[21] 20 of 2021.

amended certain provisions of the Customs Act and VAT Act. Section 48 of the Amendment Act[22] came into force on 19 January 2022. In response to the Commissioner' argument that this provision "places Parliament's stamp of approval" on the impugned Schedules "and allow[s] them to remain in place and continue irrespective of the declaration of invalidity of section 75(15)(a)(i)(bb) of the Customs Act and section 74(3)(b) of the VAT Act", Nu Africa submits that this is incorrect. It argues that Parliament's specific intervention in the present case does not save the unconstitutionality of the amended Schedules. Nu Africa contends that Parliament merely stated that the amendments would not lapse – Parliament did not effect such amendments to the Schedules itself.

[36] As to remedy, Nu Africa submits that the declarations of invalidity of the impugned provisions of the Customs Act and VAT Act should operate with prospective effect as from 1 August 2021. That is the date on which the amended Schedules came into effect. Nu Africa no longer persists in its submission that all the declarations of invalidity should not be suspended. Instead, Nu Africa contends that the various declarations of invalidity may need to be treated differently. It submits that a just and equitable order in the circumstances would be for the declarations of invalidity of the amended Schedules, recorded in paragraphs 5.3 and 5.4 of the High Court's order, should have immediate effect from the date of their confirmation by this Court. Paragraphs 5.3 and 5.4 of the High Court's order declared the following provisions unconstitutional and invalid:

> "5.3 The amended Schedules to the Customs Act published by the Minister of Finance in terms of section 75 of the Customs Act in No. R.360 to R.368 in *Government Gazette* No. 44473 of 23 April 2021, further amended by No.

[22] Section 48 provides:

> "Every amendment or withdrawal of or insertion in Schedules No. 1 to 6, 8 and 10 to the Customs and Excise Act, 1964, made under section 48, 49, 56, 56A, 57, 60 or 75(15) of that Act during the period 1 October 2020 up to and including 31 October 2021, shall not lapse by virtue of section 48(6), 49(5A), 56(3), 56A(3), 57(3), 60(4) or 75(16) of that Act and in Schedule No. 1 to the Value-Added Tax Act, 1991, made under section 74(3)(a) of that Act during the period 1 October 2020 up to and including 31 October 2021, shall not lapse by virtue of section 74(3)(b) of that Act."

R.523, R.524 and R.526 in *Government Gazette* No. 44705 of 14 June 2021; and

5.4 The amended Schedule to the VAT Act published by the Minister of Finance in terms of section 74(3) of the VAT Act, in No. R.369 in *Government Gazette* No. 44473 of 23 April 2021, further amended by No. R.525 in *Government Gazette* No. 44705 of 14 June 2021."

[37] Lastly, Nu Africa submits that, should it fail, the *Biowatch*[23] principles should be applied in relation to costs and that, accordingly, it should not be liable for costs.

Minister of Finance's submissions in the confirmation proceedings

[38] The Minister filed submissions in both the confirmation and leave to appeal proceedings. In the confirmation proceedings, the Minister submits that Nu Africa's constitutional attack ought to have failed and that the application should, therefore, be dismissed. He submits that in terms of section 48(6) of the Customs Act, when the Minister amends Schedules to the Act, the amendment "shall, unless Parliament otherwise provides, lapse on the last day of the next year, but without detracting from the validity of such amendment, withdrawal or insertion before it has so lapsed". The Minister argues that, because this section applies to section 75(15)(a)(i)(bb) of the Customs Act and section 74(3)(a) of the VAT Act, any amendments made by the Minister to Schedules to the Customs Act and VAT Act were subject to parliamentary oversight in terms of section 48(6).

[39] According to the Minister, section 48(6) makes the present case distinguishable from *Smit* where this Court held that, when the Minister in that case decided to amend Schedules to the Drugs Act,[24] he or she was in fact amending the Act itself. This is so because the Drugs Act contained no provision that was the equivalent of section 48(6) of the Customs Act. As a result, when the Minister amended the Schedules in question, there was no oversight from Parliament. This, according to the Minister, is a

[23] *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

[24] Drugs and Drug Trafficking Act 140 of 1992.

fundamental difference. The Minister contends that, in the present case, Parliament has not delegated its plenary legislative power to amend the Schedules to the Minister. Instead, Parliament has empowered the Minister to take certain actions that remain valid until such time as Parliament approves or expunges them.

[40] The Minister submits further that the present case is distinguishable from *Executive Council*. There, the impugned provision gave the President the power to amend both the body of the particular statute and its Schedules. The President required no parliamentary approval and the legislative scheme did not make provision for automatic lapsing if Parliament did not approve the amendments. That makes the present case distinguishable as section 48(6) saves the impugned provisions from the unconstitutionality.

[41] The Minister further relies on *Paper Manufacturers*,[25] a case where the Supreme Court of Appeal considered the power of the Minister conferred by sections 48(1)(b) and 75(15) of the Customs Act to amend, among others, Schedules 1 and 4 to that Act. The Supreme Court of Appeal held that such a power was necessary because of the need for frequent adjustment of the terms and rates contained in the Schedules. That Court further held that, because the amendments had a limited life span and a future dependent on parliamentary actions as a result of section 48(6) of the Customs Act, this was constitutionally permissible. The Minister urged us to accept that section 75(15)(a)(i)(bb) of the Customs Act and section 74(3)(a) of the VAT Act, read with section 48(6) of the Customs Act, strike an ideal balance in enabling the Minister to act swiftly, as in this case, while Parliament retains its legislative plenary powers.

[42] Regarding Nu Africa's money Bill argument, the Minister submits that the amendments do not amount to an impermissible mechanism by-passing the proper procedures applicable to a money bill in terms of section 77 of the Constitution.

[25] *Minister of Finance v Paper Manufacturers Association of South Africa* [2008] ZASCA 86; 2008 (6) SA 540 (SCA); [2008] 4 All SA 509 (SCA).

The Minister submits that this is because all the amendments to both the Customs Act and VAT Act are subject to approval of the legislation by Parliament. According to the Minister, these amendments do not fall under the categories listed in section 77 of what constitutes a money Bill.

[43] In relation to remedy and in the event his argument does not prevail, the Minister submits that the order of constitutional invalidity should have no retrospective effect. This is because, if the order were to apply retrospectively, it would hamper the proper administration of justice in that all revenue collected under the impugned provisions and Schedules would have to be refunded. He said that tracing all the transactions from multiple years previously would require the employment of additional staff, resulting in a loss of billions of Rands to the fiscus.

The Commissioner' submissions in the confirmation proceedings

[44] Like the Minister, the Commissioner filed submissions in both the confirmation and the leave to appeal proceedings. There are some overlaps between the Minister's and the Commissioner' submissions. I will accordingly not repeat the arguments where they are similar. In the confirmation proceedings, the Commissioner contends that Nu Africa's argument that it is always unconstitutional for a Minister to amend Schedules to an Act, suffers from numerous fundamental flaws. First, it amounts to an absolutist and formalistic approach. The Commissioner contends that it is the content and substance of the particular delegated powers that matter. For example, a delegation which takes the form of regulation-making may not be constitutionally compliant if the conferment of the powers thereby granted, in substance, amounts to plenary legislative power. It argues that the same principle applies in reverse: a delegation which takes the form of amending a Schedule to an Act may be constitutionally compliant if the powers granted, in substance, amount to a regulatory function.

[45] The Commissioner submits that Nu Africa has misconstrued the reasoning and outcome in *Executive Council* and *Smit*. It argues that Parliament is perfectly entitled

to delegate law-making authority.[26] The Commissioner submits that the question is not whether Parliament may delegate law-making authority to the Executive. The question instead concerns the permissible limits of such delegation. The Commissioner submits that Chaskalson P in *Executive Council* held that the power vested in the President to amend the Local Government Transition Act[27] (Transition Act) was a "general power to amend the Transition Act itself",[28] that it was "subject to no express limitation"[29] and could not be equated with regulatory powers.

[46] The Commissioner argues that the Court in that matter accordingly declared section 16A which enabled the President to amend the Transition Act by proclamation unconstitutional and invalid. He also argued that the Court expressly left open the question whether Parliament could have granted the power to amend other Acts (and not the Act in terms of which the power was given). The Commissioner argues that subsequent cases do not adopt a blinkered approach to the form of a delegation, but instead consider the nature, extent and purpose of the delegation in question. For this proposition, the Commissioner relies on *JASA*,[30] where this Court confirmed that the question whether Parliament is entitled to delegate depends on whether the Constitution permits the delegation, and that a key factor is the "nature and extent of the delegation".[31]

[47] The Commissioner, therefore, submits that the question is context specific in every case, and is whether the delegated function or power in issue is one that belongs essentially to the Legislature. The Commissioner aligns itself with the submission by

[26] The Commissioner of SARS in so doing relies on *Executive Council* above n 12 at para 51 where it was held that "[t]here is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law making."

[27] 209 of 1993.

[28] *Executive Council* above n 12 at para 65.

[29] Id at para 62.

[30] *Justice Alliance of South Africa v President of the Republic of South Africa, Freedom Under Law v Republic of South Africa, Centre for Applied Legal Studies v President of Republic of South Africa* [2011] ZACC 23; 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC).

[31] Id at para 61.

the Minister that *Smit* is distinguishable and argues that, if Nu Africa's absolutist approach were to prevail, then every statute that permits a Member of the Executive to amend a Schedule would be unconstitutional without any consideration as to the nature, extent and scope of the delegation in question. To shore up its argument, the Commissioner referred to various provisions which would be rendered unconstitutional due to Nu Africa's absolutist approach. For the sake of brevity, I mention two examples: namely section 37A of the Medicines and Related Substances Act,[32] which permits the Minister of Health to amend any Schedule prescribed under section 22A of the Medicines Act to include or delete any medicine or other substance that falls under the Medicines Act; and section 7 of the Public Service Act,[33] which permits the President by proclamation to amend Schedules 1 to 3, and thereby establish or abolish national or provincial government departments.

[48] The Commissioner submits that the Minister, in exercising a discretion to amend the Schedules, exercised a permissible method of fiscal law-making. It relies on *Shuttleworth*,[34] where this Court was called upon to consider whether section 9(1) of the Currency and Exchanges Act[35] assigned plenary legislative power to the President. Moseneke DCJ held that it did not. The Commissioner argues that the same applies in this case. Even if this Court were to find that Parliament's delegation to the Minister is "conspicuously abundant", there are circumstances that make such a delegation warranted. The Commissioner contends that Nu Africa's argument places form over substance. The rigid application of a rule that Ministers may never amend Schedules to an Act overlooks the fact that section 75(15)(a)(i)(bb) of the Customs Act and section 74(3)(a) of the VAT Act are subject to parliamentary oversight under section 48(6). According to the Commissioner, this is entirely permissible and a widely recognised method of fiscal law- making.

[32] 101 of 1965.

[33] 103 of 1994.

[34] *South African Reserve Bank v Shuttleworth* [2015] ZACC 17; 2015 (5) SA 146 (CC); 2015 (8) BCLR 959 (CC).

[35] 9 of 1933.

[49] The Commissioner submits that fiscal regulatory context has unique features that make effective and efficient law-making crucial. Taxes, levies, rebates and the like are required to be adjusted and implemented frequently. The Commissioner argues that a full Parliamentary law-making process is often impossible prior to the imposition of such measures. Where a loophole exists, the state must act speedily to close it, otherwise there is a risk that those affected may use the period of delay to engage in avoidant behaviour or to exploit the loophole (for example, by stockpiling).

[50] The Commissioner argues that Nu Africa's submission, that the impugned provisions violate section 77 of the Constitution by permitting a Minister to introduce into law what is "in substance a money Bill", is unsustainable. This, the Commissioner says, is so because the question in determining whether such a charge constituted a tax was not whether it incidentally raised revenue, but "whether the primary or dominant purpose" was "to raise revenue or to regulate conduct". If regulation was the primary purpose, it would be considered a fee or a charge rather than a tax, and could be imposed by the Executive. If the dominant purpose was to raise revenue, then the charge would ordinarily be a tax. The Commissioner relies on the majority judgment in *Shuttleworth* where this Court concluded that the exit charge was not a tax at all.[36]

[51] The Commissioner further submits that Nu Africa's complaint on this score is entirely hypothetical and abstract – generally an inappropriate basis on which to advance a constitutional challenge to legislation.[37] The Commissioner says it is hypothetical and abstract because the amended Schedules in question, which have given rise to Nu Africa's complaint, plainly have nothing to do with revenue-raising. The Commissioner submits further that section 77 of the Constitution does not apply to the Minister's Schedule-amending function. Money bills are defined in section 77 of the Constitution as bills that appropriate money, impose or alter taxes or authorise direct charges against the National Revenue Fund.

[36] *Shuttleworth* above n 54 at para 99.

[37] *Savoi v National Director of Public Prosecutions* [2014] ZACC 5; 2014 (5) BCLR 606 (CC); 2014 (1) SACR 545 (CC); 2014 (5) SA 317 (CC) at paras 9-13.

[52] The Commissioner contends that, if this Court confirms all the orders of constitutional invalidity, it should suspend the orders for a period of 24 months to allow Parliament to correct the defect. The Commissioner argues that this is plainly necessary, taking into account the interests of the parties, the public interest, and the potential disruption to the administration of justice that would otherwise be caused by a lacuna. The Commissioner argues that a period of 24 months would allow Parliament to consider and implement an appropriate amendment to the impugned Acts. It would also ensure that, in the interim, the Commissioner can continue to impose customs and excise tariffs, including in order to curb the abuse of privileges by rogue diplomats.

[53] The Commissioner argues that section 48 of the Amendment Act provides that the amendments made in terms of section 75(15)(a)(i)(bb) of the Customs Act and section 74(3)(a) of the VAT Act "shall not lapse by virtue of section 48(6)… or 75(16)" of the Customs Act or "by virtue of section 74(3)(b) of the VAT Act". The Commissioner's argument is that the Amendment Act is precisely the legislation anticipated in section 48(6) of the Customs Act. In light of this amendment, there is simply no basis on which to declare invalid the amended Schedules. Nu Africa's case is that the amended Schedules are unconstitutional because they were made in terms of an unconstitutional empowering provision and by the Executive rather than the Legislature.

[54] The Commissioner submits that, even if the empowering provisions are declared unconstitutional and invalid, the amended Schedules should not be. In the alternative, this Court should declare section 75(15)(a)(i)(bb) of the Customs Act and section 74(3)(a) of the VAT Act unconstitutional and invalid, suspend the declaration of invalidity for 24 months, and make the declaration of invalidity prospective from the date of this Court's order, but should decline to declare the amended Schedules unconstitutional and invalid. In the further alternative, this Court should declare section 75(15)(a)(i)(bb) of the Customs Act and section 74(3)(a) of the VAT Act, as well as the amended Schedules, unconstitutional and invalid, suspend all the

declarations of invalidity for 24 months, and make all the declarations of invalidity prospective from the date of this Court's order.

Minister's submissions on leave to appeal

[55] As indicated above, the Minister opposes the confirmation proceedings and brought an application for leave to appeal. The Minister submits that, according to *Fraser*,[38] the question of the lawfulness of executive and legislative conduct will always be a constitutional issue. Thus, the application for leave raises a constitutional matter. The Minister further submits that it is in the interests of justice that leave to appeal be granted because there are prospects of success and a final decision by this Court on all the disputes in this matter will provide a speedy resolution and prevent the parties from incurring unnecessary costs.

[56] The Minister makes his submissions from the premise that his decision to amend the impugned provisions does not constitute administrative action in terms of PAJA. Although the High Court agreed with this approach, the Minister is challenging the manner in which the test for legality was applied by the High Court. According to the Minister, instead of applying the test for legality holistically, the High Court engaged in a nit-picking exercise. The Minister stated that the High Court erred in its conclusions that:

(a) the maximum quantities provided in the quota system had no logic in them due to inconsistent measurements using litres in some instances and bottles in others;

(b) the Minister provided no evidence to illustrate how the quantities were determined; and

(c) the quotas were not based on any evidence or relevant facts, but were a random selection of quantities without demonstrating how the quantities were determined.

[38] *Fraser v ABSA Bank Limited* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) at paras 37-8.

[57] The Minister argued that in a legality review, a high degree of deference is accorded to the decision-maker. Accordingly, the use of different quantities does not show that the decision was irrational and furthermore that the distinction between litres and units does not create a situation where there is no clarity. The Minister criticises the High Court's conclusion that less restrictive means to combat the abuse by diplomats were available and argues that this is not relevant to legality review.

[58] According to the Minister, the contentions by the retailers that he contravened the Vienna Conventions is misplaced. Endorsing the ratio of the High Court, the Minister submits that the retailers misconstrued the Vienna Conventions and the impact of the amendments. In support of his argument, the Minister contends that Article 36(1) of the 1961 Vienna Convention and Article 50(1) of the 1963 Vienna Convention do not grant a blanket exemption from all customs duties, taxes and related charges on items for official and personal use. He contends that the dominant purpose of the amendments is to ensure that the abuse is curbed whilst at the same time complying with the requirements of the Vienna Conventions.

[59] Addressing the argument raised by the retailers that he has unlawfully delegated his powers to DIRCO and allowed it to dictate the quantities of alcohol and tobacco to be given to the diplomats, the Minister contends that there is nothing wrong in DIRCO deciding whether a lesser or greater volume is to be granted to the diplomats for personal or official use. The Minister says he did not delegate to DIRCO the power to make changes to the quota system but only the power to decide on the volumes in question.

[60] With respect to the procedural unfairness argument, the Minister submits that the proposed amendments to the Schedules were published on the SARS website and open for comment by interested parties such as the duty-free shops. The Minister contends that Ambassador specifically did not explain why it failed to respond to the draft amendments. According to the Minister, the key question to ask when determining procedural fairness is whether interested parties were afforded an opportunity to be heard. Ambassador did not use the opportunity to comment on the draft amendments.

Thus, the High Court was correct in its finding that there is no merit to the argument that the process was not procedurally fair.

[61] Regarding costs, the Minister submits that, since the retailers have approached the courts to pursue commercial interests, the *Biowatch* principle does not apply and the retailers should be ordered to pay costs.

The Commissioner's submissions on leave to appeal

[62] As stated earlier, the Commissioner in essence aligns itself with the submissions of the Minister. It emphasises that the High Court erred in declaring the amendment to the Rules unlawful and invalid. It submits that the High Court misconstrued the test for rationality, with the result that it is not clear whether its finding is based on substantive or procedural irrationality. It urges us to accept that the Minister undertook some research and conducted studies before introducing the amendments to the Schedules. This, according to the Commissioner, demonstrates that the decision was rational.

[63] The Commissioner argues that the High Court misapplied the test for rationality. The Commissioner relies on *Pharmaceutical Manufacturers*[39] in this regard. The Commissioner argues that one of the key distinctions between reasonableness and a rationality review is that, while reasonableness is "concerned with the decision itself", rationality has to do with the relationship between means and ends. Rationality concerns the relationship between the exercise of a power and the purpose for which the power was granted, and requires that "[d]ecisions must be rationally related to the purpose for which the power was given". The Commissioner argues that courts may,

[39] *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 90 states:

> "As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately."

therefore, not interfere with the means selected simply because they do not like them, or because there are better means that could have been utilised.[40]

[64] The Commissioner endorses the conclusions of the High Court that the Vienna Conventions place a limit on goods that may be purchased by diplomats, whether it is for personal or official use. Finally, he contends that leave to appeal should be granted and the appeal be upheld with costs including the costs of three counsel.

The retailers' submissions on leave to appeal

[65] Although not directly engaged in the confirmation proceedings, Flemingo and Assortim align themselves with the submissions made by Nu Africa and support the Minister and the Commissioner's applications for a leave to appeal directly to this Court because the matter raises important constitutional issues, it will save time and costs if a direct appeal is entertained, and will bring the matter to finality. These concessions were properly made. The major difference between the parties lies with the applications for leave to appeal. Flemingo and Assortim contend that the Minister and the Commissioner have failed to appreciate that the process for determining the quotas had to be rational. They argue that there was no evidence placed before the High Court that a rational process was followed when adopting the quotas. They also take issue with the High Court's conclusion that the impugned amendments are not inconsistent with the Vienna Conventions. Relying on *Progress Office Machines*,[41] they submit that the amendments by the Minister breached international law obligations.

[66] Flemingo and Assortim contend that, even though measures have been implemented to counter the abuse of the system by diplomats, the Minister should have adopted less restrictive means to achieve the purpose. Furthermore, they argue that the delegation by the Minister to DIRCO authorising the amendment of the quotas was an

[40] *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at para 51.

[41] *Progress Office Machines CC v South African Revenue Services* [2007] ZASCA 118; 2008 (2) SA 13 (SCA); 2007 (4) All SA 1358 (SCA).

unlawful delegation of authority because the delegation was to an unspecified functionary at DIRCO. In addition, no guidelines were provided to DIRCO on how to exercise that power. In so saying, they rely on Note 5 of rebate item 406.00 which provides:

> "The rebate of duty (excluding rebate items 406.04, 406.06 and 406.07) on alcohol and tobacco products imported or obtained at a licenced special shop for diplomats is subject to approval of an application, made by persons contemplated in rebate item 406.02, 406.03 and 406.05, on a six (6) monthly basis (1 January to 30 June and 1 July to 31 December) to the Director-General Department of International Relations and Co-operation or an official acting under his or her authority, *authorising the quantities referred to in the items hereto or such lesser or greater quantities as may be determined by the Department of International Relations and Co-operation.*" (Emphasis added.)

[67] Ambassador, in particular, argues that the impugned amendments are impermissibly vague in many respects, for example section 5 of the amendment to item 406 of Schedule 1 of the VAT Act in the impugned amendments in that it is impossible to understand when and how it applies. It submits that it is unclear whether it applies to all alcohol and tobacco sold in duty-free shops or only to those products and alcohol above the quantities specified in the amendments to Schedule 4 and 6 of the Customs Act.

[68] Like Ambassador, Flemingo and Assortim submit that section 10 of the Diplomatic Immunities Act makes it evident that a restriction of privileges is only provided for if reciprocity is not shown to South African diplomats in a receiving state. Section 10 states—

> "If it appears at any time to the Minister—
>
> (a) that the immunities and privileges accorded to a mission of the Republic in the territory of any state, or to any person connected with any such mission, are less than those conferred in the Republic on the mission of that state, or on any person connected with that mission; or
>
> (b) that the exemptions granted to the Government of the Republic in the territory of any state are less than those granted by the Minister to that state,

> the Minister may withdraw so much of the immunities, privileges and exemptions so accorded or granted by him or her as appears to him or her to be proper."

[69] The retailers argue that the sub-delegation of power to an unspecified functionary at DIRCO to increase or decrease the prescribed quotas is unlawful. The retailers contend that, although other countries might have imposed a quota system, no evidence was presented as to the circumstances that led to those quotas being imposed. They further contend that no evidence was presented to the effect that South African diplomats worldwide are subjected to a quota system.

[70] As with Flemingo and Assortim, Ambassador submits that the application for leave to appeal should be dismissed for lack of reasonable prospects because of the Minister's failure to explain how he decided on the quotas, which demonstrates that his decision was irrational and arbitrary.

Issues

[71] The issues for determination in this Court are:

(a) Whether this matter engages this Court's Jurisdiction;

(b) Whether the retailors have legal Standing;

(c) Whether the conferral of legislative power on the Minister by the provisions of the Customs Act and VAT Act is constitutionally impermissible;

(d) Whether the Minister's conduct in amending the Schedules violated section 77 of the Constitution;

(e) Whether the amendments to the Schedules are invalid and unlawful because they are inconsistent with the provisions of the Diplomatic Immunities Act and the Vienna Conventions;

(f) Whether the process that resulted in the impugned amendments being promulgated was rational;

(g) Whether there was unlawful delegation to DIRCO;

(h) Whether the process to adopt the amendment to Schedule 6 was procedurally unfair.

(i) Whether there has been impermissible infringement on the retailers' section 21 licence;

(j) Whether in terms of section 10 of the Diplomatic Immunities Act, the introduction of the quota system is only provided for if reciprocity is not shown to South African diplomats in a receiving State; and

(k) The effect of the Taxation Laws Amendment Act.

Jurisdiction

[72] As this matter includes confirmation proceedings, we need to consider the question of jurisdiction only in respect of the application for leave to appeal in relation to the review applications that were brought. In terms of sections 167(5) and 172(2)(a) of the Constitution, confirmation proceedings are determined by this Court. Regarding the application for leave to appeal brought by the Minister and the Commissioner, this Court does have jurisdiction. That is so because the two prongs of the application concern the principle of legality and whether the provisions of PAJA were infringed, both of which are constitutional in nature. On whether it is in the interests of justice to entertain the application, the issues raised in this application are closely linked to the issues addressed by the confirmation proceedings. It will constitute a saving in time and costs to determine this application simultaneously with the confirmation proceedings. Also, the application for leave to appeal bears reasonable prospects of success. Thus, leave to appeal must be granted.

Analysis

Legal standing

[73] The Commissioner argues that the High Court erred in rejecting the argument that the stores in this matter, such as duty-free shops, have no standing to challenge the proposed amendments that introduce the quota system because those amendments apply to diplomats alone. The Commissioner contends that the retailers lack standing to

prosecute the review application in respect of the amendments, he argued that the impugned amendments imposed limits on buyers (diplomats) but not sellers i.e. duty-free stores. The contention advanced is that the retailers do not have a sufficient interest in the validity of the impugned amendments.

[74] The High Court correctly rejected this argument and held that no distinction or differentiation should be made between the purchaser and the seller of duty-free products as both are subject to the same legislative scheme provided for in the Diplomatic Immunities Act (including the Vienna Conventions), the Customs Act and the VAT Act. It is clear to me that the retailers have a direct and substantial interest in this matter. *Giant Concerts*[42] informs us that "in determining a litigant's standing, a court must, as a matter of logic, assume that the challenge the litigant seeks to bring is justified". Therefore, my finding in this respect is that the objection regarding locus standi has no merit.

Is the conferral of legislative power on the Minister by sections 75(15)(a)(i)(bb) of the Customs Act and 74(3)(b) of the VAT Act constitutionally impermissible?

[75] Let me start by making the point that focusing on the label of the statutorily conferred legislative power may easily lead us astray. After all, the main debate in this matter is about the separation of powers. The question, therefore, is what, in accordance with South Africa's conception of separation of powers, is constitutionally permissible. Crucially, we must start by recognising the fact that our constitutionalism does not insist on absolute separation of powers between the three arms of state. In the *First Certification*[43] judgment, the Court clearly stated that "[n]o constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation".[44] The judgment further stipulates that one would have to consider the practicalities of day-to-day decisions in modern governance. The judgment held:

[42] *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* ZACC 28; 2013 (3) BCLR 251 (CC) at 41.

[43] *Certification of the Constitution of the Republic of South Africa,* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253.

[44] Id at para 109.

> "The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. *No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation.*"[45] (Emphasis added.)

[76] It is precisely because ours is not a system of complete separation that I say we must focus on what constitutes constitutionally permissible confluence. On this, Mahomed DP in *Executive Council* gives us guidance on the factors to consider:

> "[T]he constitutional instrument in question, the powers of the Legislature in terms of that instrument, the nature and ambit of the purported delegation, the subject-matter to which it relates, the degree of delegation, the control and supervision retained or exercisable by the delegator over the delegatee, the circumstances prevailing at the time when the delegation is made and when it is expected to be exercised, the identity of the delegatee and practical necessities generally."[46]

[77] This does not render labels irrelevant. Indeed, in *Executive Council*, it was the plenary nature of the delegated power that pointed to unconstitutionality. The answer turns on what the relevant factors yield based on the circumstances of each delegation. But if the delegated power is plenary in nature, it is more likely to be constitutionally impermissible than if it is merely regulatory. For this reason and despite my prefatory caution, the analysis that follows will have some focus on these concepts, if not distinctions.

[78] Sections 43 and 44 of the Constitution vest national legislative authority in Parliament. Professor Cora Hoexter explains that original legislation, which emanates from Parliament, tends to encapsulate broad principles and overarching policy,

[45] Id.

[46] *Executive Council* above n 12 at para 136.

simultaneously empowering the administration – often high-ranking Members of the Executive – to make detailed rules needed for effective regulation.[47] It follows that Parliament is entitled to delegate subordinate regulatory authority to other bodies. Subordinate legislation is also referred to as "secondary legislation" or "delegated legislation", and this category of legislation is usually in the form of rules or regulations. In *Smit*, this Court however pointed out that "[s]ubordinate legislation is one not enacted by Parliament".[48]

[79] This Court provided further clarity in *Mpumalanga Petitions Bill*[49] with respect to the scope of subordinate legislation and, in particular, regulations. It held that:

> "Regulations are a category of subordinate legislation framed and implemented by a functionary or body other than the legislature for the purpose of implementing valid legislation. Such functionaries are usually Members of the Executive branch of government, but not invariably so. A Legislature has the power to delegate the power to make regulations to functionaries when such regulations are necessary to supplement the primary legislation."[50]

[80] Nu Africa's reliance on *Executive Council* is misplaced. The Minister at the hearing correctly submitted that, in determining its applicability, one would have to consider the scope, context and nature of the legislation that was at issue in that matter. It follows that the difference lies in the substance of what is being delegated. The Minister and the Commissioner say it is a regulatory function and that when the Minister amends the Schedules to the Act, he is not exercising plenary or original legislative powers.

[81] Delegating authority to make subordinate legislation within the framework of a statute which permits delegation is permissible. What is generally frowned upon is

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[47] Hoexter *Administrative Law in South Africa* 2 ed (Juta, Cape Town 2015) at 31-2.

[48] *Smit* above n 13 at para 35.

[49] *Constitutionality of the Mpumalanga Petitions Bill* 2000 [2001] ZACC 10; 2001 (11) BCLR 1126; 2002 (1) SA 447 (CC).

[50] Id at para 19.

assigning plenary legislative powers to another body. The rationale for this rejection is that it is contrary to the Constitution insofar as it violates the separation of powers.

[82] In *Executive Council*, the President, by Proclamation R 58 of 7 June 1995, amended section 3(5) of the Transition Act by transferring, from the Provincial Government to the National Government, the power to appoint and dismiss Members of the Provincial Committee for Local Government (Committee). The amendment also served to nullify the appointments by the Minister of Local Government in the Western Cape of Mr Stafford Petersen and Ms Lesley Helene Ashton. The next day the President amended section 10 of the Transition Act by Proclamation R 59.

[83] Before this amendment section 10 of the Transition Act afforded the Administrator wide powers to make proclamations, inter alia, relating to the demarcation of Local Government structures and the division of such structures into wards. Proclamation R 59 made section 10 subject to the provisions of a new subsection (4), which effectively invalidated Committee decisions of the kind in issue taken between 30 April 1995 and 7 June 1995. Section 2 of that Proclamation then rendered the amendment explicitly retroactive. The combined effect of the Proclamations was to nullify the appointment of Mr Petersen and Ms Ashton as Members of the Committee retroactively and also to nullify the Minister of Local Government's demarcation proposal which the Committee had approved on 23 May 1995. On 15 June 1995 the Minister for Provincial Affairs, acting in consultation with the Minister of Justice and after consultation with the Premier of the Western Cape, appointed two people as Members of the Committee to replace Mr A Boraine and Mr E Kulsen.

[84] That sequence of events led to the Executive Council of the Western Cape and the Premier challenging the Proclamations before the Cape Provincial Division of the Supreme Court and in this Court. This set in motion a chain of events that culminated in the applicants challenging the constitutional validity of section 16A of the Transition Act, and the constitutional validity of the assignment of the administration

of the Act to provincial administrators. Not only did the applicants challenge the validity of the Presidential proclamation from which the Minister of Local Government derived his own authority, but in so doing and in challenging the validity of section 16A they put in doubt the validity of everything that had been done under the Transition Act since 15 July 1994, including all the preparations that had been made for the holding of the elections which were scheduled to take place in most of the country on 1 November 1995.

[85] This Court declared section 16A of the Transition Act, which authorised the President to amend the Transition Act by proclamation, to be inconsistent with the Constitution and invalid. Writing for the majority of the Court, Chaskalson P opined that the provision was overbroad and untrammelled as it empowered the President to amend the Act and its Schedules. In simple terms, it granted the President an unfettered power to amend its primary terms in any way he deemed fit.[51] In the same judgment, the Court lamented that the President's power to amend the Transition Act was overboard and subject to no express limitation and equated to law-making.

[86] The Court held that when powers are assigned, the authority and duty to exercise them, as well as the responsibility for their exercise, are transferred in full. A less complete transfer of powers is delegation, where one public authority authorises another to act in its stead. Though the practical necessity of delegation is consistently recognised, the power to delegate does not automatically exist; it must be provided for, either expressly or by implication. There are limits to how much power can be delegated. For example, Parliament cannot delegate its plenary powers to make laws to the President.

[87] In the same case, Mahomed DP agreed with Chaskalson P for different reasons. He held that Parliament is entitled to delegate law-making authority to the Executive, subject to the condition that such delegation is in line with constitutionally permissible

[51] *Executive Council* above n 12 at para 65.

limits.[52] He further highlighted that the delegation of law-making authority from Parliament to the Executive is necessary for expedient and effective law-making.[53]

[88] After examining the constitutionality of section 16A, he concluded that the section went "too far and effectively constituted an abdication of Parliament's legislative function".[54] He pointed out that, while section 16A may have been unconstitutional at that time, he left the issue open as to whether it would be permissible for Parliament through another Act to delegate to the President powers to make amendments to the Transition Act.

[89] Sachs J agreed with the reasons given by Mahomed DP and went on to state that the determination of whether Parliament has permissibly delegated law-making function authority to the Executive cannot be limited to distinguishing between an Act that extends plenary power to legislate and an Act which extends power to make subordinate legislation. He held that this determination would often be a matter of degree rather than substance.[55]

[90] According to Sachs J, in determining permissible limits of delegation of law- making authority from Parliament to the Executive, the courts should balance various interactive factors including but not limited to:

> "(a) The extent to which the discretion of the delegated authority (delegatee) is structured and guided by the enabling Act;
> (b) The public importance and constitutional significance of the measure - the more it touches on questions of broad public importance and controversy, the greater will be the need for scrutiny;
> (c) The shortness of the time period involved;

[52] Id at para 127.

[53] Id at para 128.

[54] Id at para 141.

[55] Id at para 205.

(d) The degree to which Parliament continues to exercise its control as a public forum in which issues can be properly debated and decisions democratically made;

(e) The extent to which the subject-matter necessitates the use of forms of rapid intervention which the slow procedures of Parliament would inhibit;

(f) Any indications in the Constitution itself as to whether such delegation was expressly or impliedly contemplated."[56]

[91] In *Executive Council*, the President was required to submit the proclamation to Parliament within 14 days. Section 16A prescribed that, if Parliament by resolution disapproved of the proclamation, then it ceased to be of force or effect.[57] However, if Parliament did nothing in terms of section 16A, the proclamation would remain law.[58] This is different from what Parliament can do in terms of section 48(6) of the Customs Act; the latter provision effectively mandates or compels parliamentary involvement. It states that if Parliament does not intervene then there is an automatic lapse of the amendment to the Schedule. If the amendment is to have longevity, Parliament's involvement is imperative. In *De Reuck*[59] this Court noted that schedules to any statute are inseparable from those statutes. Therefore, as Schedules form part and parcel of a statute, an amendment by the Minister to the Schedules would not qualify as the exercise of subordinate legislative powers.

Smit, upon which Nu Africa also relied, concerned section 63 of the Drugs Act. In *Smit*, the applicant, in challenging the constitutional validity of section 63 of the Drugs Act, argued that to the extent that section 63 delegated plenary legislative power to the Minister, it was inconsistent with the Constitution. Section 63 empowered the Minister of Justice, in consultation with the Minister of Health, to amend Schedules 1 and 2 to the Drugs Act. This Court found that, when the Minister decided to amend Schedules

[56] Id at para 206.

[57] Id at para 50.

[58] Id.

[59] *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) at para 37.

1 and 2 to the Drugs Act by including or deleting a substance, he or she was in fact amending the Act itself. Thus, section 63 conferred on the Minister plenary legislative power to amend the Schedules. As the Schedules are essentially part and parcel of the Act, section 63 in effect delegated original plenary legislative power to amend the Act itself. This was held to be constitutionally impermissible.

[92] A closer look at section 75(15) of the Customs Act indicates that it empowers the Minister to amend Schedules to the Customs Act whenever he deems it expedient in the public interest. The caveat is that the Minister's power must be rational, lawful and pursuant to the purpose of the legislation. *Kennasystems* supports the Commissioner' contention that when the Minster amends Schedules to the Act, he is not exercising primary or original legislative powers.[60]

[93] Parliament's entitlement to delegate does not only depend on the pure form of the amendments to the Schedule but also on the nature and extent of the delegation. The answer thus lies in the substance, nature and extent of the delegation instead of the form. It is thus clear that the delegation must not be overbroad or vague, and the authority to whom the power is delegated must be able to determine the nature and scope of the powers conferred. In *Affordable Medicines*,[61] this Court held that Parliament was permitted to afford those to whom it had delegated powers discretion in how they exercised those powers. That case concerned a delegation to the Director- General of Health (DG Health) to prescribe the conditions under which a medical practitioner could be issued a licence to dispense medicine. It was held that the purpose of providing the DG Health with discretionary powers and the obligations of medical practitioners provided the necessary and sufficient constraints on the exercise conferred by the subsection.[62]

[60] *Kennasystems* above n 20 at para 73.

[61] *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 33.

[62] Id at para 38.

[94] I agree with the Minister and the Commissioner that *Smit* is distinguishable. The fallacy in Nu Africa's submission is that it would render every statute that permits a Member of the Executive to amend a schedule unconstitutional without due regard to the nature, extent and scope of the delegation or, indeed, the several factors laid down by Mahomed DP in *Executive Council*. This absolutist approach is at odds with the rationale of this Court in *Executive Council* where it was held—

> "There is *nothing* in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making".[63] (Emphasis added.)

[95] What Nu Africa's argument boils down to is that it is automatically unconstitutional for any Act of Parliament to empower a Member of the Executive to amend a Schedule to the Act. This is not correct. What Nu Africa loses sight of is that to determine whether a delegation constitutes an affront to the Constitution, the enquiry should be context-specific, and consideration should be given to the scope of the delegation, the subject matter to which it relates, the degree of delegation and the sufficiency of the constraints on the exercise of the discretionary powers conferred by the section.[64]

[96] The Minister contends that the Schedules to the Customs Act are, for all intents and purposes, the regulations to the Act. The Commissioner contends that the powers under section 75(15)(a)(i)(bb) of the Customs Act and section 74(3)(a) of the VAT Act are regulatory in nature and form part of the Minister's general function to administer and implement the Act.

[97] If Nu Africa were correct, then it would mean that every statute that permits a Member of the Executive to amend a Schedule to an Act would be unconstitutional. The suggestion that the Executive can never amend a Schedule to an Act is an absolutist

[63] *Executive Council* above n 12 at para 51.

[64] *Executive Council* above n 12 at para 206.

rule. It follows that if Nu Africa's argument were to succeed it would mean that the Minister would be required to seek parliamentary intervention first before attending to the widespread abuse. This argument is flawed. Quite often, fiscal policy demands that fiscal measures be implemented as soon as the loophole has been determined to prevent people from taking advantage of the situation. In this case, if Parliament were to be approached first, errant diplomats would have free rein and the mischief sought to be prevented would continue unabated. To be more direct, pending Parliament's intervention which, would not be as swift as Executive intervention, such diplomats would engage in bulk buying and continue selling the ill-gotten goods long after the intervention. That, of course, would gravely disadvantage the fiscus and, thus, the general populace.

[98] In my view, if – as the *First Certification* judgment held – our idea of separation of powers does not connote hermetically sealed compartments, the present situation cries out for swift Executive intervention. There can be no legal basis for prohibiting the Minister from swiftly remedying the abuse by promulgating the amendments. This is a mechanism that ensures that there is efficient and effective fiscal regulation. In *Paper Manufacturers*, the Supreme Court of Appeal endorsed the Minister's power to amend Schedules to the Customs Act and stated:

> "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."[65]

[99] I agree with the Commissioner that these amendments to the Schedules are necessary for smooth fiscal law-making and to enable the Executive to act speedily and effectively in capping mischief or abuse. Parliament's involvement under 48(6) of the Customs Act is necessary to make the measures long-term or permanent. In sum, the legislative delegation for the Minister to amend the Schedules is not constitutionally impermissible. The following factors are key this conclusion:

[65] *Paper Manufacturers* above n 25 at para 2.

(a) Section 75(15)(a)(i)(bb) of the Customs Act provides that the Minister may amend Schedules 3, 4, 5 and 6 amongst other reasons "whenever he deems it *expedient in the public interest to do so*" (Emphasis added.)

(b) Amendments made to the Schedules (Customs Act and VAT Act) are subject to parliamentary oversight in terms of section 48(6). If Parliament does not intervene then there is an automatic lapsing of the amendment to the Schedules and, as a consequence, the lifespan of the amendments is limited.

(c) In practical terms, if Parliament does not approve the amendment of a particular Schedule that amendment will be withdrawn. This clearly shows that the power of the Minister is subject to parliamentary scrutiny and control.

[100] The Executive is in a much better position than Parliament to appreciate the day- to-day needs and demands of administering the matters contained within the Schedules to the Customs and the VAT Act. Parliament's delegation promotes co- operative governance and actually enhances efficient governance, both of which are constitutional imperatives. Parliament made the conscious choice that the prevailing circumstances dictated that the law-making work in the form of amending the Schedules be best left to the expertise and proximity of the Executive. In the circumstances, I see nothing constitutionally impermissible with that. This is especially so since Parliament retains sufficient oversight.

[101] It is against this backdrop that I hold that Parliament's delegation in respect of the Customs Act and the VAT Act is constitutionally permissible. I say this based on the cumulative effect of the following considerations:

(a) The Schedules run to hundreds of pages and contain enormous amount of detail which could permissibly have been left from the outset to the Minister to be determined by regulation.[66]

(b) The Schedules by their nature contain detail, which is likely to require frequent amendment. From time to time the classification details of the Harmonised System, on which all customs classification globally (including the Schedules) is based, are amended by the World Customs Organization in Brussels. South Africa must then bring the Schedules promptly into line. Additionally, the government may wish promptly to alter rates for reasons of industrial or economic policy.

(c) In some cases, retroactive national legislation, preceded by a budget or other public announcement, is sufficient for amendments to tax legislation. Rates of customs and excise duties and VAT are different, because the taxes are collected at the time of the relevant transactions, so it is not practicable to adjust them retroactively. Imported and excise goods are held in customs and excise warehouses until the relevant duties and VAT are paid. Retroactive national legislation would thus not suffice. It follows that the public have to know, in real time, what the rates and exemptions are.

(d) The Ministerial amendments apply for a limited period, after which, if they are to be continued, they must be adopted by Parliament pursuant to section 48(6).

[102] To conclude, *Smit* and *Executive Council* are clearly distinguishable from the present matter before this Court. Considering the aforesaid factors, it cannot be said that Parliament's delegation in respect of the Customs Act and the VAT Act is constitutionally impermissible.

[66] As published on the SARS website, the current Schedules 1 to 8 run to some 1475 pages. The agreements and protocols published as part of Schedule 10, and which the Minister may amend in terms of section 49(5)(d), run to nearly 3000 pages.

Do the impugned provisions of the Customs Act and the VAT Act violate section 77 of the Constitution?

[103] Nu Africa submits that the impugned provisions of the Customs Act and the VAT Act violate section 77 of the Constitution by permitting a Minister to introduce into law what is in substance a money Bill, outside of the legislative framework required by the Constitution. Nu Africa relies on this Court's decision in *Shuttleworth*.

[104] A Bill is a "money Bill" if it: appropriates money; imposes national taxes, levies, duties or surcharges; abolishes or reduces, or grants exemptions from, any national taxes, levies, duties or surcharges; or authorises direct charges against the National Revenue Fund.[67] Money bills are introduced in the National Assembly and can only be initiated by the Minister of Finance.[68] Once a money Bill has been passed by the National Assembly, it is sent to the National Council of Provinces, for consideration.[69] The National Council of Provinces may make recommendations, but it cannot amend the Bill. Finally, the Bill is sent to the President for assent, after which it becomes law.[70]

[105] I have read the judgment of my Colleague, Rogers J (second judgment). The second judgment holds that in assessing the retailers' arguments that the impugned provisions of the Customs Act and the VAT Act violate section 77, "we are not concerned with the character of the amendments which the Minister in this particular case made to the Schedules. We are concerned with the constitutional validity of section 75(15)(a) of the Customs Act and section 74(3)(a) of the VAT Act. It is the dominant purpose of those statutory provisions that is relevant."[71] I agree. In determining whether a charge is a tax, one has to find the dominant purpose of the legislation. This was set out by this Court in *Shuttleworth*. Moseneke DCJ held that the use of the words fees, tariffs, levies, duties, charges, or surcharges are not determinative of whether the statute

[67] Section 77(1) of the Constitution.

[68] Id.

[69] Section 77(3) and 75 of the Constitution.

[70] Id.

[71] Second judgment para [36].

in question imposes a regulatory charge or a tax.[72] It was held that the seminal test is whether the primary or dominant purpose of a statute is to raise revenue or to regulate conduct. It was the Court's decision that, "if regulation is the primary purpose of the revenue raised under the statute, it would be considered a fee or a charge rather than a tax. The opposite is also true. If the dominant purpose is to raise revenue then the charge would ordinarily be a tax."[73] The Court also emphasised that—

> "[t]here are no bright lines between the two. Of course, all regulatory charges raise revenue. Similarly, 'every tax is in some measure regulatory'. That explains the need to consider carefully the dominant purpose of a statute imposing a fee or a charge or a tax.[74]

[106] In *Shuttleworth* the Court referred to a string of cases in which the features of a tax were considered. It said that the factors gleaned from these cases give "open-ended but helpful guidelines" in determining the dominant purpose of a particular piece of legislation – *the factors must be weighed carefully on a case-by-case basis*.[75] An amendment to such legislation, if enacted by Parliament, constitutes a money Bill.

[107] In *Permanent Estate and Finance*,[76] the Court said that the following features identify a tax: "(i) when the money is paid into a general revenue fund for general purposes; and (ii) when no specific service is given in return for payment."[77] In *Israelsohn* ,[78] the Appellate Division held that the charge in question was a tax because it was "subject to the general machineries of tax assessment and collection".[79] In *The Master v IL Back*,[80] there was a fee, rather than a tax, because its purpose was "to

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[72] *Shuttleworth* above n 34 at para 48

[73] Id at para 48.

[74] Id.

[75] Id at para 52.

[76] *Permanent Estate and Finance Co Ltd v Johannesburg City Council* 1952 (4) SA 249 (W).

[77] Id at para 259.

[78] *Israelsohn v Commissioner for Inland Revenue* 1952 (3) SA 529 (A).

[79] Id at para 539F-G.

[80] *The Master v I L Back and Co Ltd* 1983 (1) SA 986 (A).

empower the Minister to impose a fee for services and facilities he had to provide".[81] In *Maize Board*,[82] the measure was not a tax because it was "not imposed on the public as a whole or on a substantial part of it" and its proceeds were not used for public benefit, but largely to cover administrative costs.[83] In *Gaertner*,[84] this Court considered the primary and secondary functions of customs and excise duties and held that, although the regulatory aspect of the duties served an important public function, the statute in question was "essentially fiscal".[85]

[108] The *Shuttleworth* test was applied in *Randburg Management District*,[86] where the Supreme Court of Appeal held that the dominant purpose of a municipal levy payable by landowners to the municipality's general revenue fund for general public use and to enable municipal services to be provided was in the nature of a tax.[87] In *Pioneer Foods,* the Western Cape High Court held that tariffs on wheat imports payable under the Customs and Excise Act had, as their main function, the imposition of taxes paid into a general revenue fund.[88]

[109] In its long title, the Customs Act states:

> "To provide for the levying of customs and excise duties and a surcharge; for a fuel levy, for a Road Accident Fund levy, for an air passenger tax, an environmental levy and a health promotion levy; *the prohibition and control of the importation, export, manufacture or use of certain goods; and for matters incidental thereto*." (Emphasis added.)

[81] Id at para 1002-3.

[82] *Maize Board v Epol (Pty) Ltd* [2008] ZAKZHC 99; 2009 (3) SA 110 (D).

[83] Id at para 27.

[84] *Gaertner v Minister of Finance* [2013] ZACC 38; 2014 (1) SA 442 (CC); 2014 (1) BCLR 38 (CC).

[85] Id at para 54-5.

[86] *Randburg Management District v West Dunes Properties* [2015] ZASCA 135; [2016] 1 All SA 59 (SCA); 2016 (2) SA 293 (SCA).

[87] Id at para 29.

[88] *Pioneer Foods* above n 14 at para 45-6.

[110] What one gleans from the long title is that the Customs Act's mandate is to, inter alia, control the importation and use of certain goods. In this matter, the Minister highlighted that the primary reason for the amendments was to curb abuse by diplomats. This in turn informs us that the charge is in fact regulatory in nature. I conclude that the Minister in amending the Schedules did not violate section 77 of the Constitution. I now consider whether the Minister's decision was rationally connected to the information before him and the purpose for effecting the quotas.

Was the Minister's decision rationally connected to the information before him and the purpose for effecting the quotas?

[111] The High Court held that it was pertinently clear from Flemingo's founding affidavit that the maximum quantities provided for in the amendments to the Schedules were arbitrary as the Minister had put up no evidence to show how the quantities in the amendments were determined. The High Court held that the Minister's failure to disclose the information shows that the quotas were not based on any evidence or relevant facts and, in essence, concluded that the Minister had failed to show how he determined the quantities.

[112] The retailers latched on this finding and submitted that the Minister had failed in his obligation to explain how he determined the quantities provided for in the amendments to the Schedules. As the Minister was the only person who could provide this information, his failure renders the content of the quota system irrational. The thrust of the retailers' argument was that there was a disconnect between the government purpose and the means to the asserted end. This was made worse by the fact that there was a disparity in relation to units of cigarettes and litres.

[113] In the context of rationality review, this Court in *Electronic Media Network*[89] held:

[89] *Electronic Media Network Limited v e.tv (Pty) Limited* [2017] ZACC 17; 2017 (9) BCLR 1108 (CC).

> "It needs to be said that rationality is not some supra-constitutional entity or principle that is uncontrollable and that respects or knows no constitutional bounds. It is not a uniquely designed master key that opens any and every door, any time, anyhow. Like all other constitutional principles, it too is subject to constitutional constraints and must fit seamlessly into our constitutional order, with due regard to the imperatives of separation of powers. It is a good governance-facilitating, arbitrariness and abuse of power-negating weapon in our constitutional armoury to be employed sensitively and cautiously."[90]

[114] In this case, the question to be asked is merely whether there is a rational connection between the quota system (including the process followed in adopting the system) and a legitimate purpose. The aim of the rationality test is not to determine whether some means will achieve the purpose better. It is limited to an assessment of whether the "selected one could also rationally achieve the same end".[91] Courts may, therefore, not interfere with the means selected simply because they do not like them, or because there are better means that could have been selected.[92] Rationality concerns the relationship between the exercise of a power and the purpose for which the power was granted, and requires no more than that "decisions must be rationally related to the purpose for which the power was given".[93] Put differently, there must be a rational connection between the means chosen by the decision-maker, and the end sought to be achieved. This includes the adoption of a rational procedure. Rationality is also not about justification. Nor is it about the cogency of reasons furnished for a particular decision. It concerns the question whether there exists a rational connection between the exercise of power, and the purpose sought to be achieved through the exercise of that power.

[115] The retailers submit that the amendments to the Schedules were arbitrary because they had no rational basis. The retailers argue that both the Minister and the

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[90] Id at para 6.

[91] *Minister of Safety and Security v South African Hunters and Game Conservation Association* [2018] ZACC 14; 2018 (2) SACR 164 (CC); 2018 (10) BCLR 1268 (CC) at 32.

[92] *Albutt* above n 40 at para 51.

[93] *Pharmaceutical Manufacturers* above n 39 at para 85.

Commissioner fail to appreciate that the process for determining the quota had to be rational. They argue, in summary, that there is no evidence placed before the Court that a rational process was followed when adopting the quotas, and support the findings of the High Court that the amendments to the Schedules were done in an arbitrary and irrational fashion. This submission flies in the face of the concession made by the duty-free retailors that these measures have been introduced to counter the clear abuse of the system by some diplomats. The retailers also contend that there is no evidence from the Minister that he had any involvement in determining the quotas. They contend that, because the process was administered by the Commissioner and DIRCO, the benchmarking failed to reach the standard of rationality. In essence, the nub of the retailers' argument is that the Minister should have considered less restrictive means available to achieve the purpose such as expelling errant diplomats and monitoring the purchases by them.

[116] The second judgment posits that the benchmarking adopted by the Commissioner and DIRCO failed to meet the standard of rationality. It criticised the affidavit by SARS official, Mr Parhookumar Moodley, and the table he submitted as unsatisfactory. This finding can be disposed of quickly with reference to *NICRO*[94] where this Court held:

> "There may for instance be cases where the concerns to which the legislation is addressed are subjective and not capable of proof as objective facts. A legislative choice is not always subject to courtroom fact-finding and may be based on reasonable inferences unsupported by empirical data. When policy is in issue it may not be possible to prove that a policy directed to a particular concern will be effective. It does not necessarily follow from this, however, that the policy is not reasonable and justifiable. If the concerns are of sufficient importance, the risks associated with them sufficiently high, and there is sufficient connection between means and ends, that may be enough to justify action taken to address them."[95]

[94] *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders* [2004] ZACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC).

[95] Id at para 35.

[117] In my view, the Minister and the Commissioner devised a regime in which maximum quotas are imposed. It is not relevant to the rationality of that choice to interrogate the precise information upon which the Minister relied to determine the maximum quota. Nor does rationality allow for a nit-picking exercise of combing through the Schedules in search of inconsistencies. This nit-picking alluded to in the second judgment fails to take into account the rationale of the quota system. The reality is that over a considerable period of time, diplomats have been abusing the system by purchasing the goods duty-free and thereafter selling them. This has caused the fiscus substantial losses. In my view, the retailer's argument is factually wrong and demonstrates a fundamental failure on their part to comprehend the true reason for introduction of the impugned provisions. There can be no question that seeking to curb the abuse of privileges by rogue diplomats purchasing exorbitant quantities of duty-free alcohol and tobacco products, only to resell them for personal profit, is a legitimate objective.

[118] I am satisfied that the complaints of the retailers do not satisfy the low threshold of rationality. In a rationality review, a high degree of deference is accorded to the decision-maker. It cannot be argued that a limit on alcohol consumption of 72 litres per six months (equivalent to 400 ml per day) is an irrational estimate of what consulates may need for official use. Consulates do not have official cause to serve alcohol every day, and the allocations would be averaged out over the six-month period with far more than 400 ml being used on some days and zero being used on many days.

[119] Most importantly, the discretion conferred on DIRCO serves to ensure that, should a consulate require more than what is allocated to them, it would be open to it to motivate for more. This would not be difficult to demonstrate as the consulate would need to provide, for example, a programme of official events or other similar evidence. Furthermore, the complaint that the distinction between quantities of alcohol in litres for consulates and units for individuals is misplaced. In my view, consulates are allocated 360 litres of wine for official use, and individuals are allocated 135 litres for

personal use, which allows for a full bottle of wine per person per day. The quota system was intended to achieve a legitimate purpose and not look at the complaint selectively. The Minister clearly diagnosed the problem, being the abuse by the diplomats and the means taken by the Minister are appropriate and justify the end. It is, therefore, difficult to ascertain where the irrationality lies.

[120] The Court in *Albutt* reiterated that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if objectively speaking they are not, they fall short of the standard demanded by the Constitution. I am of the view that the Minister's conduct was rational. What is important is that the Minister's objective was to curb the abuse of privileges by rogue diplomats purchasing exorbitant quantities of duty-free alcohol and tobacco products and then reselling them for personal profit. There is no doubt that the abuse by diplomats was assuming large-scale proportions, with the result that the fiscus was losing substantial amounts of money. Accordingly, it was incumbent on the Minister to curb this abuse by introducing the impugned amendments. Again, in *Albutt* this Court held:

> "Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected … What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved."[96]

[121] It is abundantly clear to me that the High Court misapplied the test for rationality. There can, therefore, be no question that seeking to curb the abuse of privileges by rogue diplomats purchasing exorbitant quantities of duty-free alcohol and tobacco products, only to resell them for personal profit, is a legitimate objective.

[96] *Albutt* above n 40 at para 51.

Procedural fairness

[122] A further argument advanced by the retailers is that they were not given adequate notice nor afforded an opportunity to participate in the decision-making process prior to the promulgation of the amended rules and regulations. To this, the second judgment states:

> "There was no indication, in the presentation made on 12 February 2020, that the rules were to be amended. SARS at the end of the meeting announced what the process was going forward and this was confirmed in its letter the next day, which gave immediate instructions about processes the retailers had to follow. There seems to have been no attempt to solicit views with a view to assessing what future processes should be."[97]

[123] I do not agree. It is common cause that the Minister announced the review of the tax treatment of duty-free shops in the 2019 Budget Speech. To give effect to this announcement, a decision was made to review the legislative framework governing duty-free shops to minimise abuse. The Commissioner investigated and reviewed previous audit findings of duty-free shops to fully understand the loss to the fiscus. Consultations were held between the DIRCO and the Commissioner to enable SARS to understand current constraints, challenges and future policies and processes. In relation to the amendment of the Rules, there were consultations within various Divisions of SARS before the amendments were published for public comment on the SARS website. All comments received were duly considered by the relevant Heads of various Divisions within SARS before the Commissioner approved them and before they were published in the *Government Gazette.* One may ask: "what more could the Minister do?" Every endeavour was made to keep all the retailers abreast of the amendments. I did not understand the retailers to be suggesting that all these endeavours were not accessible to the public and that they were not afforded adequate opportunity to make representations. The difficulty with this finding is that it is negated by one of the retailers, Ambassador who responded to the Commissioner' invitation and made comments.

[97] Second judgment at [120].

[124] In *Electronic Media Network Limited*, Mogoeng CJ considered the consultative process in the context of national policy development and held that:

> "Consultation, as distinct from negotiations geared at reaching an agreement, is not a consensus-seeking exercise. Within the context of national policy development, it must mean that a genuine effort is being made to obtain views of industry or sector roleplayers and the public. In other words, a genuine and objectively satisfactory effort must be made to create a platform for the solicitation of views that would enable a policymaker to appreciate what those being consulted think or make of the major and incidental aspects of the issue or policy under consideration."[98]

[125] Procedural fairness provides that a decision-maker must grant a person who is likely to be adversely affected by a decision a fair opportunity to present his or her views before any decision is made. It is important to note, however, that the mere fact that a procedure is classified as mandatory does not mean that it must be strictly complied with.[99] In some cases, sufficient compliance may be adequate. Courts ask "whether the procedure followed by the administrator was sufficient to achieve the purpose of the provision in question. If it was, then the procedure of the administrator will be upheld as lawful."[100]

[126] In my view proper notice to amend the Schedules was given to all the retailers. In addition, they were given an opportunity to make representations in respect of the proposed amendments. The Minister and the Commissioner took all procedural steps necessary prior to implementing the amendments. I now consider the other grounds of review.

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[98] Id at para 37.

[99] Freedman and Mzolo "The Principle of Legality and the Requirements of Lawfulness and Procedural Rationality" (2021) *Obiter* at 421.

[100] Quinot "Lawfulness" in Quinot, Corder, Maree, Murcott, Kidd, Webber, Bleazard and Budlender *Administrative Justice in South Africa: An Introduction* (OUP 2015) at 137.

The vagueness of the impugned Rules

[127] At common law, subordinate legislation could be declared *ultra vires* on grounds of uncertainty or vagueness. This position has of course been subsumed into the requirement of lawfulness under section 6(2)(i) of PAJA. This Court in *New Clicks*[101] has already confirmed that:

> "Although vagueness is not specifically mentioned in PAJA as a ground for review, it is within the purview of section 6(2)(i) which includes as a ground for review, of administrative action that is otherwise 'unconstitutional or unlawful'… Related to this is a requirement implicit in all empowering legislation that regulations must be consistent with, and not contradict, one another. Regulations which fail to comply with these requirements would therefore contravene section 6(2)(i) of PAJA."[102]

[128] The test for vagueness requires subordinate legislation to clearly indicate to those bound by it the exact act that is prohibited or enjoined and to do so with reasonable certainty and not perfect lucidity. The review applicants have not illustrated exactly how the rule amendments are not clear in their instructions. The test for vagueness imposes a standard of reasonableness in respect of the comprehension of the impugned Rules by those bound by them. Rather than requiring those bound to necessarily agree with the impugned Rules, it merely requires them to understand what is expected of them in a manner that sufficiently guides them to act accordingly.

[129] The impugned Rules leave it to the relevant authorities at DIRCO to determine the exact restrictions placed on the sale of tobacco and alcohol products. This is an appropriate, uncontroversial, and polycentric regime that allows the relevant DIRCO authorities to exercise the necessary discretion required to regulate the sale of tobacco and alcohol products. The same level of discretion is required when deciding the length of time it will take to establish a system for the sake of implementing the Rules.

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[101] *Minister of Health v New Clicks South Africa (Pty) Ltd and Others* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC).

[102] Id at para 246.

[130] A contextual reading of the impugned Rules also makes it reasonably clear who the relevant DIRCO authorities are. Requiring the impugned Rules to identify the exact DIRCO functionary would be a deviation from the vagueness test as it is a form of perfect lucidity that goes beyond reasonable certainty. Consequently, it cannot be said that the rule amendments are impermissibly vague and the length of time it will take to establish a workable system is, in the circumstances, hardly a solid ground of review under PAJA.

The delegation to DIRCO

[131] The retailers argue that the delegation by the Minister to DIRCO to amend the quotas to a lesser or greater quantity amounts to an unlawful delegation of authority. For context, the Commissioner investigated and reviewed previous audit findings of duty-free shops to fully understand the loss to the fiscus. DIRCO and the Commissioner had consultations to understand the constraints, challenges and future policies and processes. It should be borne in mind that diplomats are entitled to duty-free access of products such as alcohol and tobacco for personal use. Receiving States like South Africa can impose reasonable restrictions on access to duty-free products because diplomats purchase large quantities of duty-free alcohol and tobacco products from duty-free shops which they then sell to their domestic market.

[132] DIRCO benchmarked other jurisdictions to establish what constitutes reasonable quantities of alcohol and tobacco products which may be procured, for personal or official use, by Heads of State, diplomats and other foreign representatives. Following the consultations and investigations on how to curb the perceived abuse through the imposition of a quota system on missions and diplomats, amendments were made to Schedule 4 of the Customs Act. Note 5 was amended to provide for the making of applications to DIRCO and conferring on DIRCO the discretion to approve "lesser or greater quantities". In essence, the retailers attack the discretion conferred on DIRCO to permit the purchase of higher quantities than the quantities listed in the Schedule. However, DIRCO's discretion serves to answer the concerns raised by the retailers. It is up to the consulate to motivate why a higher volume should be permitted.

[133] The second judgment takes issue with the discretion given to officials and the basis thereof. The answer to this concern can be found in *Dawood* where this Court on explaining that, in certain circumstances the scope of discretionary powers may vary and may, at times, be broadly formulated particularly where the factors relevant to the exercise of the discretionary power are indisputably clear, held:

> "Discretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner. The scope of discretionary powers may vary. At times, they will be broad, particularly where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the Legislature to identify them in advance. Discretionary powers may also be broadly formulated where the factors relevant to the exercise of the discretionary power are indisputably clear."[103]

[134] I agree with the Minister that the extent to which the factors relevant to the exercise of a discretion must be set out in legislation, depends on the circumstances of the case and furthermore that the factors to be taken into account in the exercise of a discretion must be gleaned from the legislative scheme as a whole. An application of these principles demonstrates that the factors to be taken into account by DIRCO are clear as the purpose of the quota system as a whole is to give effect to the official or personal use rule. The purpose of the quota system is to curb the abuse of privileges by rogue diplomats purchasing exorbitant quantities of duty-free alcohol and tobacco products, only to resell them for personal profit. It, therefore, follows that DIRCO would have to consider whether to authorise a lesser or greater volume than the volumes listed in the Schedule on the basis that a different volume is the true reflection of the personal or official needs of the applicant diplomat based on the evidence produced by the applicant. The discretion given to DIRCO is not unlawful; the factors relevant to the exercise of the discretionary powers are indisputably clear.

[103] Id at para 53.

Section 10 of the Diplomatic Immunities Act

[135] There is no merit in the contentions by the retailers that in terms of section 10 of the Diplomatic Immunities Act, the introduction of the quota system is only provided for if reciprocity is not shown to South African diplomats in a receiving State. I agree with the Minister's contention that none of the circumstances contained in section 10 of the Diplomatic Immunities Act, in which the Minister may withdraw diplomatic immunities, is applicable in this matter as "there is no suggestion that reciprocity has not been shown to South African diplomats".

The section 21 licence

[136] Section 21 of the Customs Act provides for a special customs and excise warehouse licence to be issued by the Commissioner. This licence allows for the licensee such as the retailers to sell certain goods to diplomats and missions. The Commissioner readily accepts that it issued the retailers with section 21 licences as well as permission to conduct their businesses in a "supermarket fashion".

[137] The retailers contend that the impugned amendments infringe their rights in terms of their section 21 licences. In summary, they contend that their licences permit them to operate businesses that caters to diplomats seeking to purchase goods duty-free in line with their privileges as set out in the Vienna Conventions and the Diplomatic Immunities Act. In addition, they argue that SARS granted them permission to conduct their businesses in a "supermarket fashion". In other words, they were entitled to stock and display goods as if they were an ordinary retailer. According to the retailers, the impugned amendments actively suppress demand, causing immediate harm to their business and operations.

[138] At first glance, the retailers' argument appears to be attractive. However, it is misguided. What the retailers lose sight of is that while the section 21 licence permits them to sell goods duty-free to diplomats and missions, this is subject to the Customs Act, the Rules and Regulations. The restrictions on the quantity of goods that

may be sold by the retailers to diplomats and missions emanate from the quota system implemented in accordance with the impugned Regulations. It follows that impugned Regulations were lawful and as a consequence, there has been no impermissible infringement of their rights in terms of their section 21 licence.

Vienna Conventions

[139] There are contradictory arguments by the parties on the applicability of the Vienna Conventions to the impugned amendments. The retailers are of the view that the amendments are inconsistent with the Vienna Conventions. The argument advanced is that both the 1961 and the 1963 Conventions have been incorporated into domestic law by section 2 of the Diplomatic Immunities Act, and that Article 36 of the 1961 Vienna Convention and Article 50 of the 1963 Vienna Convention grant exemption from all customs duties and taxes on goods purchased by diplomats for their personal or official use. In other words, they do not provide for any limitation based on the quantities of goods purchased by diplomats for their personal or official use. On the other hand, the Minister contends that the amendments are consistent with the Vienna Conventions and, therefore, comply with the Diplomatic Immunities Act. The High Court found as follows:

> "The one possibility is to postulate a result where the receiving State may not regulate the quantities of the goods (alcohol and tobacco) that may be purchased by Diplomats. Put differently, this is a right afforded to the Diplomats that should be regarded as an absolute right, cast in stone indefinitely. This may lead to the result that a Diplomat will be entitled to buy hundreds of litres of alcohol or kilograms of tobacco for one person only for the purpose of reselling it at a profit or for any other purpose. This possibility is not so far-fetched as it is common cause that there already was an abuse of this nature, perpetrated by some Diplomats, in reselling alcohol and tobacco products purchased by them in large quantities from the duty-free retailers."[104]

[104] High Court Judgment at para 100.

[140] I agree and further endorse the reasoning of the High Court to the effect that the contents of the Articles should be considered having regard to the context provided by reading all of them as a whole, taking into account the language used, the apparent purpose to which they are directed and choosing a sensible meaning as opposed to one that leads to insensible or unbusinesslike results. Care should be taken not to read the words "exemption from all customs duties, taxes and related charges" in isolation. The purpose of the qualifications in Article 50(1)(b) appears to be an acknowledgment that different countries may have different laws and regulations regarding the sale of liquor and tobacco.

[141] I accept as correct that the quota system is intended to limit diplomats to quantities required for personal or official use. This is to ensure that the abuse by diplomats is curbed and that the requirements of the 1961 and 1963 Vienna Conventions are met. The quota system has a built-in mechanism for exemptions; if diplomats require more volumes, they can approach DIRCO to purchase more volumes duty-free.

[142] Professor Eileen Denza, in her commentary on Article 36 of the 1961 Vienna Convention,[105] writes that prior to the conclusion of the Vienna Convention the granting of customs privileges to diplomats was not a legal requirement of customary international law, but a matter of courtesy, comity or reciprocity only. The reason for this was that "all states found it necessary to impose some controls and limits on the privilege" and that, "[o]f all the various diplomatic privileges, customs privileges are notoriously the most open to abuse". Virtually, all states imposed some quantitative restrictions.[106] Although, in the negotiating of the 1961 Vienna Convention, there was general agreement that the granting of exemption from customs duties should be made a binding rule, "a great deal of importance was attached to ensuring that State Parties would preserve their former freedom to administer detailed national control of the privileged imports".[107] There was considerable debate about the wording of Article 36

[105] Denza *Diplomatic Law: Commentary on the Vienna Convention* 4 ed (OUP, 2016).

[106] Id at 309-10.

[107] Id at 311.

in this regard. In the end, the Conference declined to specify the kinds of regulation which would be permissible:

> "It is, however, clear from the Conference records that the common understanding was that permissible regulations would include those which laid down procedural formalities and those which were designed to prevent abuse – for example, quantitative restrictions, a limit on the period of duty-free entry of goods related to establishment … , and regulations on subsequent disposal of Articles imported duty-free. Regulations whose effect is to nullify the substantive privileges … or whose motive is neither control of procedure nor control of abuse are not justified by the words 'in accordance with such laws and regulations as it may adopt'."[108]

[143] Article 34 states that a "diplomatic agent shall be exempt from all duties and taxes". However, it should be noted that the exemption is subject to the crucial qualifications in Article 36(1) of the 1961 Vienna Convention and Article 50(1)(a) of the 1963 Vienna Convention which provides that they should be "in accordance with such laws and regulations as [the receiving State] may adopt". According to Prof Denza, during the preparatory work on Article 36 at the Vienna Conference, there was a common understanding that permissible regulations would include those which laid down procedural formalities and those which were designed to prevent abuse, for example, quantitative restrictions, a limit on the period of duty-free entry of goods related to establishment, and regulations on the subsequent disposal of Articles imported duty- free. In sum, Article 36 imposes obligations on the receiving State and entitles the receiving State to prescribe a procedural framework to counter abuse.

[144] In my view, the Vienna Conventions do not confer a right to a blanket exemption from duties and taxes. This allows a receiving State (South Africa) to regulate the quantities of products which may be purchased by diplomats or missions. Thus, the quota system does not violate international law. I am not persuaded by the retailers' argument that the amendments violate the Vienna Conventions. Rebates may only be claimed by diplomats who are accredited to a diplomatic or consular mission registered

[108] Id at 312.

with DIRCO. It is a safety net to ensure that diplomats and missions receive their full quota of exemptions for personal and official use.

The effect of the Taxation Laws Amendment Act

[145] Before I conclude, there is an issue that requires further consideration. It relates to the effect of the Taxation Laws Amendment Act. The issue here was that the ministerial amendments to the Schedules came into operation on 1 August 2021. Section 48 of the Amendment Act came into force on 19 January 2022.

[146] The effect of section 48 is that, as from 19 January 2022, the amendments to the Schedules have been in force as national legislation enacted by Parliament rather than as amendments promulgated by the Minister under section 75(15)(a)(i)(bb) of the Customs Act and section 74(3)(a) of the VAT Act.

[147] The Schedules do exist today, because their constitutional invalidity has not been confirmed, and the High Court held that the declaration of invalidity – including in relation to the Schedules – would only become effective once confirmed. The Taxation Laws Amendment Act confirmed the Schedules, thus providing a further reason why the declaration of invalidity of the amended Schedules should not be confirmed.

Conclusion

[148] I conclude that the High Court erred in declaring section 75(15)(a)(i)(bb) of the Customs Act and section 74(3)(a) of the VAT Act unconstitutional and invalid. Consequently, the application for confirmation must be refused. It follows that the High Court also erred in setting aside the decision of the Minister and the Commissioner to amend the Schedules to the Customs Act and VAT Act. Accordingly, I uphold the Minister's and the Commissioner' appeal.

Costs

[149] The award of costs is a matter which is within the discretion of the Court. The ordinary rule is that costs follow the result and that the unsuccessful party must pay the costs of the successful party. Even though the retailers were unsuccessful before us, they should enjoy *Biowatch* protection despite the fact that they are pursuing a commercial interest. In essence, their case was about a review application which concerned the control of the exercise of public power in terms of the principle of legality and PAJA. Clearly they were seeking to vindicate their constitutional rights. Their applications were not frivolous or otherwise inappropriate.

Order

CCT 29/22: Nu Africa (Pty) Limited v Minister of Finance and Others

1. The orders of the High Court, declaring section 75(15)(a)(i)(bb) of the Customs and Excise Act 91 of 1964 (Customs Act) and section 74(3)(a) of the Value-Added Tax Act 89 of 1991 (VAT Act) inconsistent with the Constitution and invalid, are not confirmed.
2. The High Court's orders setting aside the amendments made by the Minister of Finance to Schedules 4 and 6 of the Customs Act and Schedule 1 of the VAT Act on 23 April 2021 and 14 June 2021, are set aside.
3. There is no order as to costs in the High Court and this Court.

CCT 57/22 and CCT 58/22: Commissioner for the South African Revenue Service and the Minister of Finance v Ambassador Duty Free Retailers (Pty) Limited and Others

1. The Commissioner for the South African Revenue Service and the Minister of Finance are granted leave to appeal.
2. The appeals by the Commissioner for the South African Revenue Service and the Minister of Finance are upheld.
3. The order granted by the High Court reviewing and setting aside the amendments and the Rules is set aside and replaced with the following:

(a) The applications by Ambassador, Flemingo and Assortim are dismissed.

4. There is no order as to costs in the High Court and this Court.

ROGERS J (Kollapen J concurring):

Introduction

[150] I have had the pleasure of reading the judgment of my Colleague Mathopo J (first judgment). I write separately because on some aspects I disagree with the first judgment on the outcome while on other aspects my reasoning differs from the first judgment even though I agree with the outcome.

[151] Nu Africa Duty Free Shops (Pty) Ltd (Nu Africa), Ambassador Duty Free (Pty) Ltd (Ambassador), Flemingo Duty Free Shops International SA (Pty) Ltd (Flemingo) and International Trade and Commodities 2055 CC t/a Assortim (Assortim), to whom I shall refer collectively as the retailers, are the four entities in South Africa which hold licences issued in terms of section 21 of the Customs Act and Excise Act[109] (Customs Act) entitling them to sell goods to foreign diplomats and consular officials free of duties and tax. For convenience, I refer to such foreign diplomats and consular officials collectively as diplomats.[110] The duties are customs duties on imported goods and excise duties on excisable goods. The tax is value-added tax (VAT) imposed by the Value-Added Tax Act[111] (VAT Act) on imported goods. In this judgment, duty-free means free of these duties and tax.

[109] 91 of 1964.

[110] This collective term is obviously not technically accurate. A diplomat is an official who is concerned with political affairs and relations between the sending state (from which the diplomat heralds) and the receiving state (where the diplomat is posted). The head of a diplomatic mission is usually styled an ambassador or *charge d'affaires*. A consul is an official who is concerned with fostering the welfare and commercial affairs of the sending state's subjects in the receiving state and with performing functions such as the issuing of visas and passports.

[111] 89 of 1991.

[152] The privilege which diplomats enjoy of buying goods in this country duty-free has its source in the Vienna Convention on Diplomatic Relations of 1961 (1961 Convention) and the Vienna Convention on Consular Relations of 1963 (1963 Convention)[112] as domesticated by the Diplomatic Immunities and Privileges Act[113] (Diplomatic Immunities Act). Practical effect is given to the privilege by way of rebate items in Schedules 4 and 6 of the Customs Act and by paragraph 8 of Schedule1 of the VAT Act. Historically, these Schedules placed no quantitative limit on the goods which diplomats could buy duty-free. With effect from 1 August 2021, the Minister, acting in terms of section 75(15)(a)(i)(bb) of the Customs Act and section 74(3)(a) of the VAT Act, amended the Schedules so as to impose quantitative limits on the duty-free sale of alcohol and tobacco products to diplomats (quota system). With effect from the same date, the Commissioner of the South African Revenue Service (Commissioner and SARS respectively) amended the Rules promulgated under the Customs Act (Rules) by inserting administrative procedures for the implementation of the quota system.

[153] Ambassador brought an application in the High Court to review and set aside the decisions of the Minister and Commissioner to amend the Schedules and Rules. Flemingo and Assortim later brought a joint application for similar review relief. I shall refer to Ambassador, Flemingo and Assortim collectively as the review applicants. Nu Africa subsequently applied to intervene in order to seek more radical relief, namely an order declaring section 75(15)(a)(i)(bb) of the Customs Act and section 74(3)(a) of the VAT Act inconsistent with the Constitution and invalid.

[154] The High Court upheld Nu Africa's challenge. In the review proceedings, the only ground which the High Court upheld was the claim that the Minister had not arrived at the content of the quota system in a substantively rational way. The

[112] The Vienna Convention on Diplomatic Relations, 18 April 1961 (ratified by South Africa on 21 August 1989) and the Vienna Convention on Consular Relations, 24 April 1963 (acceded to by South Africa on 21 August 1989). The relevant provisions, which I quote later in this judgment, are Article 36(1) of the 1961 Convention and Article 50(1) of the 1963 Convention.

[113] 37 of 2001.

High Court dismissed the grounds of review directed at the Rules, finding that the amendments to the Rules should be set aside only to the extent that they were dependent on the validity of the amendments to the Schedules to the Customs Act.

[155] In the first case before us, CCT 29/22, Nu Africa seeks confirmation of the High Court's declarations of constitutional invalidity. The Minister and Commissioner, who are the first and second respondents respectively in the confirmation application, oppose that application. In the other two cases before us, CCT 57/22 and CCT 58/22, the Minister and Commissioner respectively seek leave to appeal the review relief granted by the High Court in favour of the review applicants. The review applicants oppose the applications for leave to appeal. If leave to appeal is nevertheless granted, they contend that the appeals should be dismissed, not only on the grounds which the High Court upheld but also on other grounds which the High Court either rejected or did not consider.

Case CCT 29/22: Nu Africa's confirmation application

[156] I shall not repeat the background material set out in the first judgment nor the summary of the parties' submissions in the confirmation application. I shall, however, repeat and supplement the relevant statutory provisions.

Statutory provisions

The Customs Act

[157] Section 75(1) of the Customs Act provides for various classes of goods to be admitted under rebate of various duties, including customs and excise duties. Section 75(1)(b) provides for such rebates on imported goods described in Schedule 4, while section 75(1)(d) provides for such rebates on excisable goods manufactured in South Africa and described in Schedule 6.

[158] Section 75(15)(a)(i) reads thus:

> "(15)(a) The Minister may from time to time by notice in the *Gazette*—
>
> (i) amend Schedule 3, 4, 5 or 6—
>
> (aa) in order to give effect to any request by the Minister of Trade and Industry; or
>
> (bb) whenever he deems it expedient in the public interest to do so;"

[159] Section 75(16) states that the provisions of section 48(6) shall apply mutatis mutandis in respect of section 75(15). Section 48(6) provides:

> "Any amendment, withdrawal or insertion made 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."

[160] Schedule 4 provides for rebates of the customs duties specified in Parts 1 and 2 of Schedule 1. Note 1 to Schedule 4 states:

> "The goods specified in the Column headed 'Description' of this Schedule shall, subject to the provisions of section 75, be admitted under rebate of the customs duties specified in Parts 1 and 2 . . . in respect of such goods at the time of entry for home consumption thereof, to the extent stated in the Column headed 'Extent of Rebate' of this Schedule in respect of those goods."

[161] As I have said, prior to 1 August 2021 the relevant rebate items in Schedules 4 and 6 did not impose quantitative limits on rebates on sales of goods to diplomats. By way of notices promulgated in the *Government Gazette* on 23 April 2021 and varied on 14 June 2021, the Minister amended the rebate items and accompanying Notes by introducing a quota system. Following these amendments, rebate item 406 and the Notes to that rebate item in Schedule 4 (that is, the Schedule dealing with rebates on imported goods) read in relevant part as follows:[114]

[114] By way of Customs and Excise Act, 1964: Amendment of Schedule No 4 (No. 4/1/379), GN R2187 *GG* 46589 of 24 June 2022, these rebate items were further amended to include reference to new motor vehicles purchased from customs and excise storage warehouses. Those amendments have no bearing on the present case.

Rebate item	Tariff heading	Rebate Code	CD	Description	Extent of Rebate
406.00	**GOODS FOR HEADS OF STATE, DIPLOMATIC AND OTHER FOREIGN REPRESENTATIVES** **NOTES:** 1. The provisions of this rebate item (excluding items 406.03 and 406.04) may only be applied if the Director-General: Department of International Relations and Co-operation or an official acting under his or her authority has certified that any person who is claiming rebate facilities has been listed in the register maintained by Department of International Relations and Co-operation in accordance with the provisions of the Diplomatic Immunities and Privileges Act, 2001. 2. For the purposes of rebate items 406.03 and 406.04, 'an organisation or institution' means an organisation which the Director-General: Department of International Relations and Cooperation or an official acting under his or her authority has certified as an organisation or institution with which the Republic has concluded a formal agreement, which provides, inter alia, for the granting of such rebate facilities. 3. The provisions of this rebate item may not apply to South African citizens or permanent residents of the Republic unless— (a) they are South African citizens who are also citizens of a state the territory of which formerly formed part of the Republic; or (b) the Government of the Republic has by agreement with an organisation or institution undertaken to grant rebate facilities to a South African citizen who is a representative, member, agent or officer with or to such organisation or institution. 4. . . . 5. The rebate of duty (excluding rebate items 406.04, 406.06 and 406.07) on alcohol and tobacco products imported or obtained at a licensed special shop for diplomats is subject to approval of an application, made by persons contemplated in rebate items 406.02, 406.03 and 406.05, on a six (6) monthly basis (1 January to 30 June and 1 July to 31 December) to the Director-General: Department of International Relations and Co-operation or an official acting under his or her authority, authorising the quantities referred to in the items hereto or such lesser or greater quantities as may be determined by the Department of International Relations and Co-operation. 6. The six-month allowance is not transferable to the following six-month period and unused allowances lapse at the end of the six-month period. 7. The onward supply of goods obtained in terms of this rebate item for reward or financial gain is prohibited.				
406.01	**[Deleted]**				
406.02	**GOODS IMPORTED OR OBTAINED AT A LICENSED SPECIAL SHOP FOR DIPLOMATS FOR DIPLOMATIC MISSIONS AND DIPLOMATIC REPRESENTATIVES ACCREDITED TO DIPLOMATIC MISSIONS**				
406.02	00.00	01.00	00	Goods (excluding alcohol and tobacco products) for the official use by a diplomatic mission and goods for the personal or official use by diplomatic representatives accredited to a diplomatic mission and members of their families provided the said goods are imported or obtained at a licensed special shop for diplomats in accordance with an approval of the Director-General: Department of International Relations and Co-operation or an official acting under his or her authority	Full duty
406.02	00.00	02.00	05	Alcohol and tobacco products per Mission (Office) for official use:	Full duty

				Cigars: 200 units Spirits/Liquor: 72 litres Wine: 360 litres Beer: 1 200 (340 ml) units	
406.02	00.00	03.00	02	Alcohol and tobacco products per Head of Diplomatic Mission: Cigarettes: 11 000 cigarette sticks Rolling Tobacco: 3 kilograms Cigars: 200 units Spirits/Liquor: 144 litres Wine: 360 (750 ml) bottles Beer: 1 200 (340 ml) units	Full duty
406.02	00.00	04.00	04	Alcohol and tobacco products per qualifying diplomatic staff member: Cigarettes: 11 000 cigarette sticks Rolling Tobacco: 1.5 kilograms Cigars: 100 units Spirits/Liquor: 72 litres Wine: 180 (750 ml) bottles Beer: 600 (340 ml) units	Full duty
406.03	**GOODS IMPORTED OR OBTAINED AT A LICENSED SPECIAL SHOP FOR DIPLOMATS FOR OTHER APPROVED FOREIGN REPRESENTATIVES (EXCLUDING THOSE OF REBATE ITEM 406.05)**				
406.03	00.00	01.00	02	Goods (excluding alcohol and tobacco products) for the personal or official use by members, agents, officers, delegates or permanent representatives of, to or with an organisation or institution, and the members of their families provided the said goods are imported or obtained at a licensed special shop for diplomats in accordance with an approval of the Director-General: Department of International Relations and Co-operation or an official acting under his or her authority	Full duty
406.03	00.00	02.00	07	Alcohol and tobacco products per Mission (Office) for official use: Cigars: 200 units Spirits/Liquor: 72 litres Wine; 360 litres Beer: 1 200 (340 ml) units Full duty	Full duty
406.03	00.00	03.00	01	Alcohol and tobacco products per Head of Mission of Agencies of the United Nations or International Organisations: Cigarettes: 11 000 cigarette sticks Rolling Tobacco: 3 kilograms Cigars: 200 units Spirits/Liquor: 144 litres Wine: 360 litres Beer: 1 200 (340 ml) units	Full duty
406.03	00.00	04.00	06	Alcohol and tobacco products per qualifying staff member of the international organisation: Cigarettes: 11 000 cigarette sticks Rolling Tobacco: 1.5 kilograms Cigars: 100 units Spirits/Liquor: 72 litres Wine: 180 (750 ml) litres Beer: 600 (340 ml) units	Full duty

406.04	**…**	**…**	**…**	**…**	**…**
406.05	**GOODS FOR THE OFFICIAL USE BY A CONSULAR MISSION AND GOODS FOR THE PERSONAL OR OFFICIAL USE BY CONSULAR REPRESENTATIVES ACCREDITED TO A CONSULAR MISSION AND FOREIGN REPRESENTATIVES (EXCLUDING THOSE REFERRED TO IN REBATE ITEMS 406.02 AND 406.03) AND MEMBERS OF THEIR FAMILIES PROVIDED THE SAID GOODS ARE IMPORTED OR OBTAINED AT A LICENSED SPECIAL SHOP FOR DIPLOMATS IN ACCORDANCE WITH AN APPROVAL OF THE DIRECTOR-GENERAL: DEPARTMENT OF INTERNATIONAL RELATIONS AND CO-OPERATION OR AN OFFICIAL ACTING UNDER HIS OR HER AUTHORITY**					
406.05	00.00	01.00	06	Goods (excluding alcohol and tobacco products) for the official use by a consular mission and goods for the personal or official use by consular representatives accredited to a consular mission and foreign representatives (excluding those referred to in rebate items 406.02 and 406.03) and members of their families	Full duty
406.05	00.00	02.00	00	Alcohol and tobacco products per Consular Mission (Office) for Official use: Cigars: 200 units Spirits/Liquor: 72 litres Wine: 360 litres Beer: 1 200 (340 ml) units	Full duty
406.05	00.00	03.00	05	Alcohol and tobacco products per Head of Consular Mission: Cigarettes: 11 000 cigarette sticks Rolling Tobacco: 3 kilograms Cigars: 200 units Spirits/Liquor: 144 litres Wine: 360 litres Beer: 1 200 (340 ml) units	Full duty
406.05	00.00	04.00	09	Alcohol and tobacco products per Qualifying Consular staff member: Cigarettes: 11 000 cigarette sticks Rolling Tobacco: 1.5 kilograms Cigars: 100 units Spirits/Liquor: 72 litres Wine: 180 (750 ml) bottles Beer: 600 (340 ml) units	Full duty
406.06	…	…	…	…	…
406.07	**GOODS IMPORTED OR OBTAINED AT A LICENSED SPECIAL SHOP FOR DIPLOMATS BY ADMINISTRATIVE AND TECHNICAL REPRESENTATIVES ACCREDITED TO DIPLOMATIC OR CONSULAR MISSIONS**				
406.07	00.00	01.00	09	Goods (excluding food, drink and tobacco in any form) imported by administrative and technical representatives accredited to diplomatic or consular missions, on their first entry on appointment by their governments, for their personal or official use, provided the said goods are imported in accordance with an approval of the Director-General: Department of International Relations and Co-operation or an official acting under his or her authority	Full duty
406.07	00.00	02.00	04	Once-off allowance for alcohol and tobacco products within the first Six Months per Qualifying Administrative/Technical staff member: Cigarettes: 11 000 cigarette sticks Rolling Tobacco: 1.5 kilograms	Full duty

				Cigars: 100 units Spirits/Liquor: 72 litres Wine: 180 (750 ml) bottles Beer: 600 (340 ml) units Full duty Date:	

[162] The specified quantities in the amended rebate items, which were new, are the quota system. Notes 1 to 4 to the amended rebate item 406.00 were similar to Notes 1 to 4 of the previous version of rebate item 406.00. Notes 5, 6 and 7 were new.[115]

[163] In respect of alcohol and tobacco products, the impugned amendments in Schedule 6 (the Schedule dealing with locally manufactured excisable goods) were made in Sections A to E of Part 1 and in Parts 2 and 3 of that Schedule. Part 1 of Schedule 6 provides for rebates in respect of the excise duties specified in Part 2A of Schedule 1. Sections A to E of Part 1 of Schedule 6 provide for a full rebate of duty in respect of rebate items commencing with the numbers 618 to 622. Items 618 to 621 (Sections A to D) cover various alcoholic beverages while item 622 (Section E) covers tobacco products. Note 1 to each of these Sections was amended to read thus:

> "Items [618 to 622] apply to the excisable goods specified therein, supplied for use by the diplomatic and other foreign representatives mentioned in rebate item 406.02, 406.03 or 406.05 of Schedule No 4, subject to the requirements of those rebate items and the provisions of Notes 1 to 7 to rebate item 406.00."

[164] Part 2 of Schedule 6 provides for rebates of *ad valorem* (according to value) excise duty specified in Part 2B of Schedule 1. It covers rebate items commencing with the numbers 630 to 634. Note 8 to Part 2 of Schedule 6 was amended to read:

> "For the purposes of rebate item 631.00 the provisions of Note 1 to 7 to rebate item 406.00 of Schedule No 4 shall mutatis mutandis apply to this rebate item."

[115] I have excluded, from my reproduction of rebate item 406: Note 4, since it relates to motor vehicles; rebate item 406.04, which relates to goods imported by an international institution or organisation in terms of an international agreement referred to in Note 2 and rebate item 406.06, which deals with stationery, uniforms and appointments for honorary consular officers.

Rebate item 631.00 was amended to provide for a rebate of full duty in respect of "excisable goods for use by the diplomatic and other foreign representatives".

[165] Part 3 of Schedule 6 sets out rebates in respect of the fuel levy and Road Accident Fund levy. The amendment to that Part, which was along similar lines to those mentioned above, need not detain us.

The VAT Act

[166] Section 13(3) of the VAT Act provides that the importation of the goods set out in Schedule 1 to the VAT Act is exempt from the tax imposed in terms of section 7(1)(b), in other words, from VAT.

[167] Section 74(3) of the VAT Act provides:

> "(a) Whenever the Minister amends any Schedule under any provision of the Customs and Excise Act, 1964 (Act No. 91 of 1964), by notice in the *Gazette* and it is necessary to amend in consequence thereof Schedule 1 of this Act, the Minister, may by like notice amend the said Schedule 1.
>
> (b) The provisions of section 48 (6) of the Customs and Excise Act, 1964, shall apply mutatis mutandis in respect of any amendment by the Minister under this subsection."

[168] Paragraph 8 of Schedule 1 of the VAT Act identifies various goods exempt from the levying of VAT with reference to rebate items in Schedule 4 of the Customs Act. Paragraph 8 states that, in order to qualify for an exemption, the Notes to paragraph 8 must be complied with. Among the listed rebate items qualifying for the exemption is rebate item 406 under the heading "Goods imported for diplomatic and other foreign representatives". Notes 1, 3 and 5 to this item in paragraph 8 were amended by the Minister when amending Schedules 4 and 6 of the Customs Act. The amended Notes 1 and 5 read thus:

> "1. This exemption (excluding items 406.03 and 406.04) is allowed if the Director-General: Department of International Relations and Cooperation or an official acting under his or her authority has certified that any person requiring this exemption has been listed in the register maintained by the Department of International Relations and Cooperation in accordance with the provisions of the Diplomatic Immunities and Privileges Act, 2001.
>
> . . .
>
> 5. Alcohol and tobacco products exempted in terms of item no.'s 406.02, 406.03, 406.04, or 406.05: Provided that the importer of the alcohol and tobacco products will be held liable to pay tax on the supply of such products to the persons contemplated in item no.'s 406.02, 406.03, 406.04 or 406.05."

The Amendment Act

[169] On 19 January 2022, the Taxation Laws Amendment Act[116] (Amendment Act) was promulgated in the *Government Gazette*. Section 48 of the Amendment Act contained a provision which is substantially the same as similar provisions which feature annually in our tax statutes. It reads:

> "Every amendment or withdrawal of or insertion in Schedules No. 1 to 6, 8 and 10 to the Customs and Excise Act, 1964, made under section 48, 49, 56, 56A, 57, 60 or 75(15) of that Act during the period 1 October 2020 up to and including 31 October 2021, shall not lapse by virtue of section 48(6), 49(5A), 56(3), 56A(3), 57(3), 60(4) or 75(16) of that Act and in Schedule No. 1 to the Value-Added Tax Act, 1991, made under section 74(3)(a) of that Act during the period 1 October 2020 up to and including 31 October 2021, shall not lapse by virtue of section 74(3)(b) of that Act."

[170] The amendments to the Schedules at issue in the present case were made during the period specified in the above section.

[171] When I deal with the applications for leave to appeal in the two review cases, I shall set out the amendments which the Commissioner made to the Rules and the

[116] 20 of 2021.

relevant provisions of the Vienna Conventions and the Diplomatic Immunities Act. They are not germane to the confirmation application.

Standing and non-joinder

[172] In the High Court, the Minister and SARS disputed Nu Africa's own-interest standing to bring the application for constitutional invalidity. SARS also contended that Nu Africa had failed to join all interested parties. The High Court rejected these defences. Although Nu Africa, in anticipation, addressed these matters in its written submissions in this Court, the Minister and SARS in the event made no written or oral submissions on them, and it is thus unnecessary to deal with them.

First constitutional complaint: impermissible assignment of plenary legislative power

[173] Nu Africa seeks to have the High Court's declarations of constitutional invalidity confirmed on two grounds. The first is that the impugned provisions of the Customs Act and VAT Act assign plenary legislative power to the Minister to amend Schedules to those Acts in circumstances where (and this is uncontentious) the Schedules are part and parcel of the Acts. Subject to what follows, I agree with the first judgment on this part of the case. Nu Africa's argument rests on an approach to the separation of powers and the delegation of law-making power which is too absolute for efficient governance in a modern state. In particular, I agree that the cumulative effect of the factors listed in the first judgment[117] is such as to render permissible the temporally-limited power conferred on the Minister to amend the Schedules to the Customs and VAT Acts.

[174] To the factors listed by my Colleague I would add the following. When Parliament, acting in terms of section 48(6) of the Customs Act, passes legislation providing that ministerial amendments to the Schedules will not lapse, such legislation must be, and is in practice, processed as a money Bill in accordance with section 77 of the Constitution. And to the extent that public participation, as an element of participatory democracy, is required, it will occur at that stage.

[117] See first judgment at [101].

[175] There are numerous statutory provisions which give the Minister powers akin to those found in section 75(15)(a) of the Customs Act and section 74(3) of the VAT Act, and it is safe to infer that such provisions have been found necessary for sound fiscal administration. All of them are characterised by a requirement of reasonably prompt subsequent legislative confirmation. These provisions take various forms:

(a) In one class, the legislation does not specify a rate of tax, instead leaving it to the Minister to make a rate applicable by way of a budget announcement, subject to confirmatory legislation within 12 months. Examples are the rate of normal tax in section 5(2) of the Income Tax Act[118] and the rate of VAT in section 7(4) of the VAT Act.

(b) In a second class, the legislation states that the rate is a specified amount or such other rate as the Minister may determine in a budget announcement, subject to confirmatory legislation within 12 months. Examples from the Income Tax Act[119] include sections 47B(2), 49B(1), 50B(1), 64(2) and 64E of the Income Tax Act.[120]

(c) In a third class, similar to the second, the legislation specifies a rate but goes on to state that this rate may be amended from time to time by the Minister by a budget announcement, subject to confirmatory legislation within 12 months. Examples from the Income Tax Act are sections 6(6), 6A(5), 6B(5) and 10B(7) and items 5(3), 10(2), 45(1A) and 57(7) of Schedule 8.[121]

(d) Finally, there is a fourth class to which section 75(15) of the Customs Act and section 74(3)(a) of the VAT Act belong. In this class, the Minister makes the change not by way of a budget announcement but by way of

[118] 58 of 1962. See also section 35A(1) and (1A) of the Income Tax Act.

[119] 58 of 1962.

[120] Other examples will be found in section 3 of the Mineral and Petroleum Resources Royalty Act 28 of 2008, section 6 of the Unemployment Insurance Contribution Act 4 of 2002 and the First Schedule of the Estate Duty Act 45 of 1995.

[121] For other examples, see section 2(3) of the Securities Transfer Tax Act 25 of 2007, section 2(3) of the Transfer Duty Act 40 of 1949 and section 7A of the Employment Tax Incentive Act 26 of 2013. See also item 20 of the Seventh Schedule of the Income Tax Act.

> promulgation in the *Government Gazette*, subject once again to confirmatory legislation within 12 months. There are a number of these provisions in the Customs Act[122] and at least one in the Income Tax Act.[123]

[176] Although I agree with the first judgment that efficient fiscal management may require prompt amendments to the Schedules, the emphasis in the first judgment on curbing abuse and plugging loopholes[124] needs to be placed in context. The power conferred on the Minister to amend the Schedules to the Customs and VAT Acts has not been conferred solely or even mainly in order to curb abuse and plug loopholes. The provisions in Schedules 4 and 6 dealing with exemptions for diplomats are a minuscule part of the voluminous Schedules. Most amendments to the Schedules are far more mundane in character. And tax abuse can, and often is, addressed quite satisfactorily by way of retrospective legislation enacted by Parliament, with taxpayers having been forewarned, for example during a budget speech, that such legislation should be expected. The important point, in the context of amendments to the Schedules to the Customs and VAT Acts, is that retroactive parliamentary legislation is not a practical way of dealing with taxes that have to be collected at the time the relevant transactions take place.

[177] The first judgment states[125] that the Executive is in a much better position than Parliament to appreciate the day-to-day needs and demands of governing the matters contained in the Schedules. That may be true, but it is not a factor that can be given any weight. One could probably say of most national legislation that it contains detail with which the Executive would be much better acquainted than Parliament. That is why one of the important constitutional functions of the Executive is to formulate bills for

[122] Sections 21A(10), 47A(2)(b)(ii), 48(1) to (5), 49(5), 53(2), 56, 56A, 57 and 60(3).

[123] Item 20 of Schedule 7 of the Income Tax Act.

[124] See particularly at paras [99] to [100].

[125] Id at para [102].

consideration by Parliament and to brief Parliament's committees on such bills.[126] In *Smit*,[127] for example, it would have been the Executive rather than Parliament that knew the details of various drugs and the dangers they posed to society, but this did not save the delegation to the Minister of Justice of the power to amend the Schedules of the Drugs and Drug Trafficking Act.[128]

Second constitutional complaint: violation of section 77 of the Constitution

[178] Nu Africa's second constitutional complaint is that section 75(15)(a) of the Customs Act and section 74(3)(a) of the VAT Act violate section 77 of the Constitution, which regulates how Parliament must deal with a "money Bill". In terms of section 77(1) a Bill is a money Bill if it—

> "(a) appropriates money;
>
> (b) imposes national taxes, levies, duties or surcharges;
>
> (c) abolishes or reduces, or grants exemptions from, any national taxes, levies, duties or surcharges; or
>
> (d) authorises direct charges against the National Revenue Fund, except a Bill envisaged in section 214 authorising direct charges."

[179] In terms of section 77(3) of the Constitution, all money Bills must be considered in accordance with the procedure established by section 75. An Act of Parliament must provide for a procedure to amend money Bills before Parliament. That Act is the Money Bills and Related Matters Act.[129]

[126] See in particular section 85(2)(e) of the Constitution, which provides that the President exercises the executive authority of the Republic, together with other members of the Cabinet, by "preparing and initiating legislation". See also *Helen Suzman Foundation v President of the Republic of South Africa; Glenister v President of the Republic of South Africa* [2014] ZACC 32; 2015 (1) BCLR 1 (CC); 2015 (2) SA 1 (CC) at para 13.

[127] Above n 13.

[128] 140 of 1992.

[129] 9 of 2009.

[180] This complaint by Nu Africa is misconceived. Any Bill which Parliament enacts has to be enacted in accordance with the provisions laid down in the Constitution. All Bills, regardless of their character (thus including money Bills), have to conform with section 73 of the Constitution. Sections 74 to 77 then lay down additional requirements, depending on the character of the Bill. If the Bill amends the Constitution, section 74 applies. An ordinary Bill not affecting the provinces must follow the procedure laid down in section 75, while an ordinary Bill affecting the provinces must follow the procedure laid down in section 76. And in the case of a money Bill, section 77 applies. By virtue of section 77(3), the procedure for enacting a money Bill is the procedure stated in section 75. The only special rule that section 77 creates is that a money Bill, that is, a Bill dealing with one or more of the matters listed in section 77(1), may not deal with any other matter except for the matters listed in section 77(2).

[181] If Nu Africa's argument were right, it would mean that there could never be a delegation to a Minister to amend national legislation, regardless of the character of the legislation. This would be so because section 73 of the Constitution together with one of sections 74 to 77 of the Constitution would govern the enactment of such legislation; and in each case it could be said that conferring the law-making power on the Minister is a circumvention of the relevant provisions of the Constitution. There is nothing unique about money Bills in that regard.

[182] Of course, it is indeed Nu Africa's submission that it is never permissible for a Minister to be given the power to amend national legislation, regardless of the character of the legislation. That is Nu Africa's first constitutional complaint. But if the first complaint is rejected, as I think it should be, there is no absolute prohibition against giving a Minister such a power. In that event, Nu Africa's second complaint becomes unsustainable, because the premise of the second complaint is that conferring such a power will inevitably circumvent the relevant provisions of the Constitution relating to the enactment of Bills.

[183] The short answer to the second complaint, in my view, is that sections 73 to 77 of the Constitution in their own terms only govern how legislation is to be enacted *by Parliament*. For example, if national legislation confers on a Minister the power to promulgate regulations, sections 73 to 77 of the Constitution are inapplicable to the promulgation of the regulations. That is so even though Parliament, if it had wanted to enact legislation on the same subject-matter as the regulations, would have had to observe section 73 of the Constitution together with, for example, section 75.

[184] The first judgment refers to a number of authorities addressing the question how one determines whether an enactment is imposing a "tax". The first judgment's conclusion, if I understand it correctly, is that the amendments made by the Minister to the Schedules were not of the character described in section 77(1) of the Constitution because they were "regulatory", with a dominant purpose of curbing abuse by diplomats. I cannot agree with this reasoning.

[185] We are not concerned with the character of the amendments which the Minister in this particular case made to the Schedules. We are concerned with the constitutional validity of section 75(15)(a) of the Customs Act and section 74(3)(a) of the VAT Act. It is the dominant purpose of those statutory provisions that is relevant. Their dominant purpose cannot, in my view, be in any doubt. The dominant purpose of the Customs Act, including its Schedules, is to impose various kinds of duties, chief among them, customs duties and excise duties on all manner of goods, together with circumscribed exemptions (in the form of rebates) from those duties. Customs and excise duties are national duties as contemplated in section 77(1)(b) of the Constitution. Together with income tax and VAT, they are the chief sources of this country's revenue.

[186] In *Gaertner*,[130] this Court stated:

[130] Above n 84.

> "Customs duty can be described as a 'tax levied on imports . . . by the customs authorities of a country to raise state revenue, and/or to protect domestic industries from more efficient or predatory competitors from abroad'.
>
> Excise duty is an inland tax on the sale, or production for sale, of specific goods or a tax on specified goods produced for sale, or sold, within a country or licenses for specific activities.
>
> Customs duty is levied, primarily, to:
>
> (a) raise revenue;
>
> (b) regulate imports of foreign goods into South Africa;
>
> (c) conserve foreign exchange, regulate the supply of goods into the domestic market; and
>
> (d) provide protection to domestic industries from foreign competition.
>
> Excise duties and levies are imposed mostly on high-volume daily consumable products (for example, petroleum, alcohol and tobacco products) as well as certain non-essential or luxury items (for example, electronic equipment and cosmetics). *The primary function of these duties and levies is to ensure a constant stream of revenue for the state*, with a secondary function of discouraging consumption of certain products that are harmful to health or the environment. The revenue generated from these duties and levies amounts to approximately ten per cent of the total revenue received by SARS.
>
> This means customs and excise controls serve an important public purpose. *The Act is essentially a fiscal piece of legislation.* The tight regulation of customs and excise is calculated to reduce practices that are deleterious to the purpose of the customs and excise regime."[131] (Emphasis added.)

[187] The power conferred on the Minister by section 75(15)(a) to amend, among others, Schedules 4 and 6 of the Customs Act is a power to grant exemptions from national duties, namely customs and excise duties respectively. That falls squarely within the scope of section 77(1)(c) of the Constitution. Elsewhere in the Customs Act,[132] the Minister is given the power to amend Schedules 1 and 2, and in this way to impose, increase or reduce customs and excise duties on all conceivable types

[131] Id at paras 51-5.

[132] See in particular sections 48(1) to (5), 53(2), 56, 56A and 57.

of goods, within the scope of section 77(1)(b) of the Constitution. It is for this reason that, when Parliament confirms amendments to the Schedules by way of legislation contemplated in section 48(6) of the Customs Act, such confirmatory legislation constitutes a money Bill.[133] The same analysis applies to the Minister's power to amend Schedule 1 of the VAT Act. However, and for reasons I gave earlier, these provisions of the Constitution do not apply where the Minister is validly given the power to amend the Schedules by way of notice in the *Gazette*.

Conclusion

[188] For these reasons, I conclude that the High Court's declarations of constitutional invalidity should not be confirmed. It is thus unnecessary to consider the parties' submissions on remedy and the implications of the Amendment Act. For reasons I shall explain at the end of this judgment, I consider that the parties should pay their own costs in the High Court and this Court.

Cases CCT 57/22 and CCT 58/22: The Minister and Commissioners applications for leave to appeal in the review cases

[189] If Nu Africa's application for the confirmation of the High Court's declarations of constitutional invalidity had succeeded, an adjudication of the review cases might – depending on the remedy granted in the confirmation case – have become moot. However, because we will not be confirming the High Court's declarations of constitutional invalidity, the review cases present live issues.

[190] I shall not repeat what the first judgment has said about the background to the review applications and the submissions of the parties in this Court. Once again, however, I find it convenient to repeat and amplify the summary of relevant legislative and other instruments.

[133] For example, the Bill which became the Taxation Laws Amendment Act 20 of 2021 had the following standard formula below the title of the Bill: "(As introduced in the National Assembly (proposed section 77))."

The relevant legislative and international instruments

The Customs Act, VAT Act and the amendments to their Schedules

[191] I have already set out the amendments which the Minister made to Schedules 4 and 6 of the Customs Act and Schedule 1 of the VAT Act and the statutory powers under which he acted when making those amendments.[134]

The Rules

[192] The only amendment to the Rules promulgated on 23 April 2021 was a substitution of the prescribed form DA 185 and the insertion of additional forms DA 185.4A18, DA 185.4A19 and DA 185.4A20. These forms are application forms for the registration and licensing of customs and excise warehouses.

[193] Extensive rule amendments were promulgated on 14 June 2021.[135] The Rules were supplemented by the insertion of a new rule 21.05, comprising 13 sub-rules. The new rule 21.05 introduced a new type of licensed business, namely a "special shops for diplomats". Sub-rule 12.05.01 contained definitions. The terms "special shops for diplomats" (special shop) was defined as meaning—

> "(a) a special customs and excise warehouse licensed in terms of section 60, read with rule 21.05.03, for the duty-free retail sale of goods to persons contemplated in rule 21.05.07(a); or
>
> (b) premises of a person referred to in rule 21.05.12 that successfully updated licensing details in terms of that rule;
>
> and includes any storage facilities on the premises referred to in paragraph (a) or (b)."

[194] The following is a summary of the other sub-rules:

[134] See at paras [163] to [170] above.

[135] There was a correction notice on 16 June 2021 to amend the new rules inserted on 14 June 2021.

(a) Rule 21.05.02: Nobody may sell or continue selling duty-free goods to diplomats unless the premises are licensed as a special shop in terms of rule 21.05.03.

(b) Rule 21.05.03: A person intending to operate as a special shop must comply with all the requirements specified on form DA 185 and its annexures.

(c) Rule 21.05.04: A special shop for diplomats may be licensed only in the metropolitan areas of Tshwane, Johannesburg and Cape Town.

(d) Rule 21.05.05: This rule deals with the display and price-ticketing of goods at special shops.

(e) Rule 21.05.06: No goods in respect of which the importation, possession or exportation is prohibited or restricted may be sold in a special shop.

(f) Rule 21.05.07: Goods in a special shop may only be sold to a person entitled to diplomatic privileges who is in possession of a valid diplomatic identity card and a six-monthly approval issued by the Department of International Relations and Cooperation (DIRCO) and in accordance with the allowable quantities as per the DIRCO approval.

(g) Rule 21.05.08: This rule sets out administrative procedures to be followed by a special shop when selling goods to a diplomat. A serially-numbered sales receipt or other sales document must be issued specifying various matters. The licensee must retain the original, give a copy to the purchaser, and endorse the purchaser's six-monthly DIRCO approval with a certification of various matters – the date of sale, categories of goods purchased, quantities purchased, the shop's customs and excise code, and the signature of a designated shop official.

(h) Rule 21.05.09: Every seven days the shop must deliver to the Controller a form SAD 500 specifying goods sold under rebate and goods lost, destroyed or damaged in the last seven-day period. In each of these two categories, separate forms SAD 500 must be delivered for

locally-produced and imported goods. The form SAD 500 for goods sold must be supported by a list of all sales receipts or sales documents and the dates of issue. The form SAD 500 for goods lost, destroyed or damaged must be supported by a list reflecting the stock inventory code, the date and circumstances of loss, destruction or damage, and be accompanied by payment of duty due on such goods.

(i) Rule 21.05.10: This rule requires a licensee to establish and maintain an inventory control system approved by the Commissioner and in which the documents and information specified in the rule must be recorded.

(j) Rule 21.05.11: This rule contains detailed provisions as to the maintaining by a licensee of books, accounts and documents and the documents and information to form part of those records.

(k) Rule 21.05.12: In respect of existing special shops (in other words, the four retailers), the licensee must provide updated licensing information in accordance with rule 60.10(1)(a)(i) within 15 days. The Commissioner may cancel the licence if this is not done or if a special shop thereafter fails to comply with any requirements set out in rule 21.05. Although the rules come into effect on 1 August 2021, a grace period until 30 September 2021 is allowed to prove compliance before suspension or cancellation will be resorted to. The Commissioner may extend the grace period.

(l) Rule 21.05.13: Rule 21.05.12 comes into effect on the date of promulgation, that is, 14 June 2021. For the rest, the amended rules come into effect on 1 August 2021.

[195] The requirement of a six-monthly approval mentioned in rule 21.05.07 is formulated thus:

> "a six-monthly approval by the Director-General of [DIRCO] or an official acting under his or her authority, authorising the duty-free sale to that person of the categories

> of goods in the quantities as determined by [DIRCO], and referred to in the rebate items applicable to persons entitled to diplomatic privileges in Schedules No 4 and 6, and the Notes to those Schedules applicable to such persons;"

[196] Rule 60, which deals with registration and licensing applications, was amended to include special shops as a new class of operation requiring registration and licensing. Rule 119, which deals with the form in which documents by a licensee must be submitted to SARS, was likewise amended to include special shops.

The Vienna Conventions

[197] Article 36(1) of the 1961 Convention, in relation to which South Africa is for present purposes the "receiving State", reads thus:

> "The receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services, on:
>
> (a) Articles for the official use of the mission;
>
> (b) Articles for the personal use of a diplomatic agent or members of his family forming part of his household, including articles intended for his establishment."

[198] Article 50(1) of the 1963 Convention is in the same terms, save that the following additional sentence appears in paragraph (b): "The articles intended for consumption shall not exceed the quantities necessary for direct utilisation by the persons concerned".

The Diplomatic Immunities Act

[199] Section 2(1) of the Diplomatic Immunities Act declares that, subject to the Act's provisions, the Vienna Conventions have the force of law in South Africa. Section 10, which is headed "Restrictions on immunities, privileges and exemptions", provides:

> "If it appears at any time to the Minister—

> (a) that the immunities and privileges accorded to a mission of the Republic in the territory of any state, or to any person connected with any such mission, are less than those conferred in the Republic on the mission of that state, or on any person connected with that mission; or
>
> (b) that the exemptions granted to the Government of the Republic in the territory of any state are less than those granted by the Minister to that state,
>
> the Minister may withdraw so much of the immunities, privileges and exemptions so accorded or granted by him or her as appears to him or her to be proper."

[200] The Minister referred to in section 10 is the Minister whose current designation is Minister of International Relations and Cooperation. In this Court, the said Minister is cited as the third respondent in Nu Africa's confirmation application and as the sixth respondent in the Minister and Commissioner's applications for leave to appeal. She did not actively participate in the High Court and has not done so in this Court. The Department of which she is the political head is DIRCO.

Jurisdiction

[201] The applications for leave to appeal the High Court's judgment in the review cases engage our constitutional jurisdiction, since the review of the exercise of public power, whether in terms of the principle of legality or the Promotion of Administrative Justice Act[136] (PAJA), is a constitutional matter.[137] Several of the review grounds also raise arguable points of law of general public importance, namely (a) whether, in terms of the Vienna Conventions as domesticated by the Diplomatic Immunities Act, the lawmaker can validly impose a quota system on the duty-free purchase of goods by diplomats; and (b) whether, in terms of section 75(15)(a)(i)(bb) of the Customs Act, the Minister may permissibly confer on officials in a government department the power to vary the quantity of goods which enjoy a rebate.

[136] 3 of 2000.

[137] *Harrielall v University of KwaZulu-Natal* [2017] ZACC 38; 2018 (1) BCLR 12 (CC) at paras 17-8 and *Notyawa v Makana Municipality* [2019] ZACC 43; 2020 (2) BCLR 136 (CC); (2020) 41 ILJ 1069 (CC) at para 31.

Leave to appeal

[202] The range of issues raised in the review cases is of sufficient importance and merit that it would be in the interests of justice to grant leave to appeal.

The implications of the Amendment Act

[203] Although the implications of the Amendment Act were addressed by the parties in Nu Africa's confirmation application, it has not been dealt with in the review cases. The validity of the amendments made by the Minister to the Schedules depend on the lawfulness of his decisions, at least in respect of the period 1 August 2021 (when the impugned amendments came into force) to 19 January 2022 (when the Amendment Act came into force).

[204] The position as from 19 January 2022 depends on the interpretation of section 48(6) of the Customs Act and section 48(6) the Amendment Act. The submissions made on behalf of Nu Africa and the Commissioner in the confirmation proceedings, while not directly addressing this issue in relation to the review proceedings, hint at several possibilities. On one view, section 48 of the Amendment Act, which is a standard annual formula used when Parliament wishes to act in terms of section 48(6) of the Customs Act, keeps alive only those amendments to the Schedules which the Minister validly made. Parliament itself does not enact the amendments to the Schedules, it merely states that the amendments made by the Minister shall not lapse. If the Minister's amendments are set aside on review, the non-lapsing provision has no application to them. On another view, the amendments are effectively enacted by Parliament and thus acquire statutory force as national legislation as from the date of the Amendment Act. In my view, the first of these possibilities is to be preferred.

Standing

[205] In the High Court, the Commissioner disputed the review applicants' standing to bring the review applications. The High Court rejected this objection. The Commissioner persists with his contention in this Court.

[206] The requirement for standing in review proceedings, whether in terms of the principle of legality or PAJA, is that the applicant's "interests or potential interests are directly affected" by the impugned decision or conduct.[138] In assessing whether the review applicants' interests or potential interests are directly affected by the impugned decisions, their pleaded case must be assumed to be correct.[139]

[207] Insofar as the Minister's amendments to the Schedules are concerned, those amendments restrict the quantities of alcohol and tobacco products that may be sold duty-free to diplomats. Prior to the amendments, the retailers could sell alcohol and tobacco products to diplomats duty-free without regard to quantitative limits. The retailers were not part of any process to monitor whether diplomats were abusing their privileges by buying these products in quantities exceeding those required for official or personal use. The retailers exist for the purposes of selling goods duty-free to diplomats. They are licensed to do so. Even if the retailers are permitted to sell goods inclusive of duty (this is not clear from the papers), diplomats would have no reason to buy alcohol and tobacco products from them except on a duty-free basis.

[208] The Minister intended that the amendments should reduce the quantity of alcohol and tobacco products sold to diplomats duty-free, thereby (in the Minister's view) curbing the abuse of which some diplomats were guilty. In other words, the amendments would have the effect of reducing the retailers' turnover. According to the retailers' affidavits in the High Court, this was indeed the effect of the amendments once they came into operation.

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[138] *Tulip Diamonds FZE v Minister for Justice and Constitutional Development* [2013] ZACC 19; 2013 (2) SACR 443 (CC); 2013 (10) BCLR 1180 (CC) at para 31.

[139] *Giant Concerts* above n 42 at para 32.

[209] It may be said that the retailers had no legitimate interest in selling duty-free goods to diplomats exceeding the quantities properly required for the diplomats' official and personal use. However, the retailers' interests could obviously be prejudicially affected by the level at which limits were set. The retailers contest that the quantities specified by the Minister invariably allow diplomats to purchase, duty-free, the full quantity of alcohol and tobacco products properly required for the diplomats' official and personal use.

[210] Apart from this effect on the retailers' turnover, the amendments of the Schedules inevitably required the retailers to become parties to the administrative processes for monitoring the quota system. This would involve administrative burdens which did not previously exist. It is thus clear that the quota system is one which directly affects the interests of the retailers. SARS itself evidently appreciated this, because it convened a meeting with the four retailers in February 2020 in order to give them details of the abuse by diplomats and to forewarn them of changes to the regulatory process.

[211] Insofar as the Commissioner's amendments to the Rules are concerned, they contain the type of administrative burdens which were made inevitable by the quota system. It is the retailers, in the main, who carry this administrative burden. In its supplementary founding affidavit in the High Court, Ambassador stated that it would take about six months for it to develop systems to comply with the new rules. The system would require Ambassador to print about 45 000 pages every week or 2.16 million pages annually, for delivery to SARS and retention by Ambassador. The requirement to retain the shop's copies for five years would eventually mean that Ambassador at any one time would be storing 5.4 million pages, equating to 2 100 five-ream boxes. According to Flemingo, some diplomats reported that they would rather purchase alcohol and tobacco products from ordinary commercial outlets than go through the rigmarole which the new rules imposed.

[212] The High Court was thus correct to reject the Commissioner's challenge to the review applicants' standing.

The review directed at the amendments to the Schedules of the Customs and VAT Acts

[213] The High Court found that the Minister's amending of the Schedules was reviewable only in terms of the principle of legality, not in terms of PAJA. The review applicants in this Court were content to argue the matter on that basis.

Ground 1: The Vienna Conventions and section 10 of the Diplomatic Immunities Act

[214] The review applicants contended that the Minister's amendments to the Schedules are unlawful because they are in conflict with the Vienna Conventions and section 10 of the Diplomatic Immunities Act. The High Court rejected this ground of review. The review applicants submit that, if the Minister and Commissioner are granted leave to appeal, the appeal should be dismissed inter alia because the High Court should have upheld this ground of review.

[215] In my view, the High Court did not err in rejecting this ground of review. Article 36(1) of the 1961 Convention and Article 50(1) of the 1963 Convention require the receiving State (here, South Africa) to grant the stated exemptions "in accordance with such laws and regulations as it may adopt". Having regard to the passages from Professor Denza's work summarised and quoted in the first judgment,[140] the phrase I have quoted must be understood as entitling the receiving state to impose quantitative limits, provided those limits are aimed at curbing abuse rather than nullifying the exemption. The Minister's quota system was indeed aimed at curbing abuse, not at nullifying the exemption.

[216] The Vienna Conventions, as international treaties, should be interpreted by our courts as far as possible in a way that is consistent with international consensus on the

[140] First judgment at [144].

meaning of the Conventions. The fact that the "laws and regulations" referred to in Articles 36(1) and 50(1) of the 1961 and 1963 Conventions may permissibly include quantitative limits aimed at curbing abuse is borne out by international practice. In an affidavit filed on behalf of the Commissioner in the High Court, the deponent (who occupied the position of Executive Customs and Excise: Illicit Trade Unit) stated that the following countries are among those which as at 2020 imposed quantitative limits: the United Kingdom, Spain, Australia, Belgium, Switzerland, Kenya, China and Jordan. My own research indicates that many more countries could be added to the list.[141]

[217] The review applicants contend that the only way in which quantitative limits may be imposed is in terms of section 10 of the Diplomatic Immunities Act, in regard to which the decision-maker would have to be the Minister of International Relations and Cooperation, not the Minister of Finance. I cannot accept that contention. Section 10 permits the Minister of International Relations and Cooperation to withdraw immunities, privileges and exemptions in the case of a particular country, wholly or in part, due to lack of reciprocity on the part of that other country. Section 10 gives effect to the non-discrimination provisions of Article 47 of the 1961 Convention and Article 72 of the 1963 Convention. In terms of these provisions, a receiving state may not discriminate between states. However, discrimination shall not be regarded as taking place inter alia "where the receiving State applies any of the provisions of the present Convention restrictively because of a restrictive application of that provision to its consular posts in the sending State".

[218] The amendments which the Minister of Finance made to the Schedules did not involve a partial withdrawal of privileges and exemptions on account of lack of reciprocity. The Minister imposed a general limit with a view to giving full effect to the Conventions while curbing abuse. He intended that there should be ample provision for diplomats to obtain, duty-free, all the alcohol and tobacco products they could

[141] The Netherlands, Italy, Germany, Austria, Hungary, the Czech Republic, Serbia, Türkiye, India, Nepal, Mauritius, Zimbabwe, Argentina and Bolivia.

reasonably require for official or personal use. What he wanted to stamp out was the duty-free purchase of such products for profiteering.

Ground 2: Process irrationality – failure to consult the retailers

[219] The High Court did not adjudicate the review applicants' attack on the procedural rationality of the process followed by the Minister in amending the Schedules. In this Court, Ambassador argues that this is a further basis on which appeals by the Minister and Commissioner should be dismissed. Flemingo and Assortim advance a similar contention, but limit their submissions to the amending of Schedule 6 of the Customs Act.

[220] The review applicants rely, in this regard, on the proposition that, in the exercise of public power, there should be a rational connection between the means followed and the purpose sought to be achieved by the decision-maker. To this end, the means followed must rationally be capable of leading to the attainment of the purpose for which the power has been conferred. This includes following a procedure that allows the collecting and evaluating of information relating to the rational exercise of the power.[142] In *Democratic Alliance*,[143] this Court concluded its survey on this topic with the following statement:

> "The conclusion that the process must be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitute means towards the attainment of the purpose for which the power was conferred."

[142] *Democratic Alliance v President of South Africa* [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) at paras 30-6; *Law Society of South Africa v President of the Republic of South Africa* [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC) at paras 61-4; *Minister of Water and Sanitation v Sembcorp Siza Water (Pty) Ltd* [2021] ZACC 21; 2021 (10) BCLR 1152 (CC); 2023 (1) SA 1 (CC) at paras 45-54.

[143] Above n 142 at para 36.

[221] The question is whether, in achieving the purposes of section 75(15)(a) of the Customs Act and section 74(3)(a) of the VAT Act in the particular context of this matter, the principle of procedural rationality required the Minister to consult with the retailers and, if so, whether adequate consultation took place. In my view, there was indeed a requirement of consultation with the retailers. They would inevitably be materially affected by the introduction of a quota system and would be required to play an important and potentially burdensome part in the administration of the system. They might not only have had important things to say about the content of a quota system and how it should be administered; they might also have proposed alternative ways of curbing the abuse which SARS had identified. There were only four retailers, so consultation with them would not be burdensome.

[222] It was not necessary for the Minister personally to consult with the retailers. This was something that could be done by other officials, including SARS officials, provided the input from the retailers was fed back to the Minister. The Minister and Commissioner placed reliance on the meeting which SARS convened with the retailers in February 2020 and on the draft amendments published on SARS' website in December 2020.

[223] At the meeting in February 2020, SARS made a presentation in which it provided details of the abuse by diplomats, outlined a proposed quota system and explained the altered administrative processes which were envisaged. In this presentation, SARS said that DIRCO would approve the quantities available to diplomats. Information was given of proposed six-monthly quantities determined by DIRCO per "qualifying individual", "Head of Mission" and "Mission (Office) for Official Events" respectively.

[224] The next day, SARS sent a letter to the four retailers, thanking them for their attendance and for the "informative discussion". The retailers' "positive inputs and engagement [were] highly appreciated". The letter recorded that the retailers had been invited to raise their points of concern, and these were summarised in SARS' letter.

This letter set out the material which had been covered in the previous day's presentation, including DIRCO's proposed quotas.

[225] The precise mechanics of the proposed quota system are not clear from the presentation and letter. It was not stated that the Schedules to the Acts were to be amended. The presentation made no reference to the VAT Act. The presentation and letter stated that, going forward, there would be regular interventions from SARS' Customs division; that DIRCO's approved quotas would be communicated to the embassies and retailers; that there would be monthly audits to identify diplomats who were in contravention of the limitations; that contravening diplomats would be reported to DIRCO for appropriate action; and that compliance by the retailers would be strictly monitored over the next 6 to 12 months. The letter ended with a SARS requirement, made in terms of section 4(4)(a)(iii) read with section 101(1)(a) of the Customs Act and rule 101.01(a) of the Rules, that the retailers each month submit spreadsheet containing particulars of their duty-free sales to diplomats, containing prescribed information.

[226] The proposed DIRCO quotas, set out in the presentation and repeated in the letter, accord exactly with those subsequently imposed in the amended rebate item 406 in Schedule 4 the Customs Act: the quotas proposed by DIRCO as at February 2020 per "qualifying individual", "Head of Mission" and "Mission (Office) for Official Events" found expression respectively in the amended rebate items per "qualifying diplomatic staff member" (items 406.02.04, 406.03.04 and 406.05.04), "Head of Diplomatic Mission" (items 406.02.03, 406.03.03 and 406.05.03) and "Mission (Office) for official use" (items 406.02.02, 406.03.02 and 406.05.02).

[227] The retailers' contention, that SARS was intending to implement the system through a new policy or procedure rather than through the amendment of legislation, appears to be justified. In itself, I do not think this would be a fatal objection, provided SARS on behalf of the Minister was engaged in a genuine process of soliciting views and information in order to decide on the way ahead. However, there is nothing to show that SARS was engaged in any process on behalf of the Minister or that ministerial

amendment of the rebate items was at that stage envisaged or that input received by SARS from the retailers was to be passed on to the Minister. The documents suggest that SARS and DIRCO were going to implement new processes administratively, and monitor them for 6 to 12 months to see how they worked. And the presentation and letter indicate that these new processes were communicated to the retailers as a *fait accompli* (an accomplished fact). The letter called for the immediate implementation of the new regime, inter alia by the submission of monthly spreadsheets.

[228] Furthermore, the presentation and letter made no reference to any change to the VAT system or amendments to Schedule 1 of the VAT Act. As later promulgated, the VAT exemption was now to be limited to the quotas set out in rebate item 406, though this is not altogether from the opening part of the new Note 5 to paragraph 8 of Schedule 1 of the VAT Act. And importantly, the proviso to the said Note 5 provided that the "importer" of the products would be liable to pay VAT on the supply of those products to the diplomats. In respect of the goods held by the retailers in their licenced customs and excise warehouses, the retailers are the "importers".

[229] I thus conclude that SARS' interaction with the retailers in February 2020 did not in itself constitute compliance with the Minister's duty to follow a rational process. This takes me to the publication of the draft amendments in November and December 2020. SARS states that the draft amendments to Schedule 4 of the Customs Act were published on its website on 20 November 2020, with a closing date for comments of 4 December 2020, later extended to 15 January 2021. According to SARS, on 17 December 2020 draft amendments to Schedule 1 of the VAT Act were published on the SARS website, also with a closing date for comment of 15 January 2021. Flemingo learnt of the proposed amendments to Schedule 4 on 23 November 2020 from its attorneys, who had received an email from the South African Association of Freight Forwarders. Through its attorneys, Flemingo commented on the proposed amendments on 15 January 2021. It is apparent from Flemingo's comments that it was unaware of proposed amendments to Schedule 1 of

the VAT Act, and it is common cause that there was no notice of the proposed amendments to Schedule 6 of the Customs Act.

[230] None of the other three retailers commented on the draft amendments. Ambassador's evidence in the High Court was that it was not aware of the material published on the SARS website in November and December 2020, and that it only learnt of the amendments after they were promulgated on 23 April 2021. Although Flemingo happened to learn of the proposed amendments to Schedule 4 of the Customs Act and to the Rules (the drafts published on the SARS website on 20 November 2020), it was unaware of the proposed amendment to Schedule 1 of the VAT Act published on the SARS website on 17 December 2020, only learning of the VAT amendment after it was promulgated on 23 April 2021.

[231] Flemingo's replying affidavit in the High Court sheds light on why retailers may not have been aware of the proposed amendments published on the SARS website. In reply to SARS' allegations that the retailers were given notice by way of the publications on its website, Flemingo said that it was unclear, from the SARS affidavit, on what part of SARS' website the draft amendments were contained. (The material was no longer on the website at the time affidavits were exchanged.) According to Flemingo, claims for VAT are submitted via the SARS eFiling platform, where notices of this nature are not contained. The retailers submit customs documents on SARS' Electronic Data Interface. SARS' website "contains a huge amount of information and if the person does not know exactly what it is they are looking for it is easy to get lost therein".

[232] Both Ambassador and Flemingo make the point that there were only four retailers. SARS had consulted and communicated with them directly in February 2020. If SARS was genuinely interested in soliciting their views on behalf of the Minister in regard to proposed amendments to the Customs and VAT Acts, the obvious course would have been to send the draft amendments directly to them for comment, as it had written to them individually on 13 February 2020. It is very likely that they would all

have responded to such an invitation. Whether their views would have made a difference to the Minister is not a relevant enquiry.

[233] The first judgment, having referred to the publication of the proposed amendments on the SARS website, asks rhetorically, "What more could the Minister do?".[144] I will accept the challenge of answering the question: the Minister, or SARS on his behalf, could have sent the draft amendments to the only four retailers who had an interest and expertise in the matter and whose contact details were known to SARS and readily available to the Minister.

[234] I thus conclude that the Minister did not follow a rational process in amending the Schedules to the Customs and VAT Acts.

Ground 3: Arbitrariness and informational irrationality

[235] The review applicants alleged that the quota system was vitiated by arbitrariness and irrationality, in that there was no explanation from the Minister as to how he arrived at the quantities comprising the quota system or how they correlated with information available to him. This was the only review ground upheld by the High Court. The Minister and SARS seek leave to appeal the upholding of the review on this ground. The review applicants contend that the High Court's conclusion was right.

[236] Executive action must be capable of being analysed and justified rationally. Arbitrariness is fundamentally dissonant with this requirement and is a violation of the rule of law.[145] There must be a rationally objective basis to justify the decision.[146] If an executive decision is to avoid arbitrariness and comply with the requirement of

[144] First judgment at [125].

[145] *Pharmaceutical Manufacturers* above n 25 at paras 84-5.

[146] *Merafong Demarcation Forum v President of the Republic of South Africa* [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) at para 63. See also *National Energy Regulator of South Africa v PG Group (Pty) Limited* [2019] ZACC 28; 2019 (10) BCLR 1185 (CC); 2020 (1) SA 450 (CC) at paras 63-75, where the Court concluded, with reference to the particular decision there under review: "In order for NERSA to rationally decide the maximum price which would include both costs and the chosen allowable profit, it needed to know and consider Sasol's marginal costs of production."

rationality, it must, among other things, be founded on information available to the decision-maker that rationally justifies the decision. The cases to which I have referred in respect of procedural rationality again find application here. If, in order to arrive at a rational and non-arbitrary decision, it is necessary to obtain and consider information, the decision-maker's failure to obtain and consider such information vitiates the decision.

[237] Although this Court will be finding that section 75(15)(a) of the Customs Act and section 74(3)(a) of the VAT Act are constitutional, it needs to be emphasised that the permissibility of a ministerial power to amend national legislation is very much the exception rather than the rule. When permissibly conferred, the power must be carefully exercised. The review applicants squarely advanced the case, in their founding papers, that the Minister had acted arbitrarily and irrationally in determining the content of the quota system. The Minister did not make any affidavits in the High Court. The affidavits on his behalf were made by Mr Dondo Mogajane, the Director-General of the National Treasury. Mr Mogajane gave no evidence, not even hearsay evidence, as to how the Minister arrived at the quantities or what material was available to the Minister when he did so. Mr Mogajane stated that DIRCO conducted benchmarking research in other jurisdictions as early as 2011, but he did not disclose that research or allege that it was furnished to and considered by the Minister.

[238] Since the quantities the Minister enacted in April 2021 were exactly the same as those furnished by SARS to the retailers in February 2020, and since SARS told the retailers then that those quantities had been determined by DIRCO, it is a fair inference that the quantities had already been determined (though not by the Minister) by February 2020. So how did DIRCO arrive at them?

[239] In the High Court, there was no affidavit from a DIRCO official on this question. What there was an affidavit, made not on behalf of the Minister but on behalf of the Commissioner, in answer to the Flemingo/Assortim application. The deponent was Mr Parhookumar Moodley, a SARS official with the designation Executive Customs

and Excise: Illicit Trade Unit. In defending the quota system, he alleged that the imposition of quotas is not unique to South Africa. He continues:

> "I was presented with the outcome of a study conducted by DIRCO during 2020 in which they found that the following quotas and duty-free purchases are currently being imposed at the following South African missions abroad."

He then reproduced the following table:

COUNTRY	**ITEM**	**QUOTA/QUANTITY**	**ANNUAL QUANTITY**
UK		*Per year*	
	Cigarettes	375 000	15 000
	Rolling Tobacco	75	3
	Cigars	25 000	1 000
	Spirits/Liquors	2 861	114
	Wine	11 260	450
	Beer	20 520	820
SPAIN	Cigarettes	9 000	9 000
	Rolling Tobacco		
	Cigars	65	65
	Spirits/Liquors	90	90
	Wine	30	30
	Beer		
AUSTRALIA		*6 months*	
	Cigarettes		40 000
	Rolling Tobacco		
	Cigars		
	Spirits/Liquors		520
	Wine		
	Beer		2 000
BELGIUM	*Full Diplomatic*	*Per year*	
	Cigarettes	5 000	5 000
	Rolling Tobacco		
	Cigars		
	Spirits/Liquors	60	60
	Wine	300	300
	Beer		
	Admin & Technical		
	Cigarettes	5 000	5 000
	Rolling Tobacco		
	Cigars		
	Spirits/Liquors	20	20
	Wine	100	100
	Beer		
SWITZERLAND		*Quarterly*	
	Cigarettes	7 000	28 000
	Rolling Tobacco		

	Cigars Spirits/Liquors Wine Beer	 50 300	 200 1 200
KENYA	Cigarettes Rolling Tobacco Cigars Spirits/Liquors Wine Beer	 40 180	 40 180
CHINA	Cigarettes Rolling Tobacco Cigars Spirits/Liquors Wine Beer	 100 300	 100 300
JORDAN (double for the HoM)	*Quarterly* Cigarettes Rolling Tobacco Cigars Spirits/Liquors Wine Beer	 10 000 50 36 36 288	 40 000 200 144 144 1 152
Average per Annum			
Cigarettes Rolling Tobacco Cigars Spirits/Liquors Wine Beer	23 000 3 200 143 338 1 068		

[240] In oral argument, lead counsel for the Minister candidly, described this table, not without justification, as "gobbledygook". The table does not indicate the units in which any particular item is quantified. In the case of the United Kingdom, there is no correlation between the figures in the third and fourth columns. Even if one could say that all the figures for any particular product are given in the same units (so that one is "comparing apples with apples"), the annual averages in the concluding part of the table are mathematically wrong.[147] Nobody attempted to relate the content of this table to the quotas which the Minister determined. And perhaps I should say, in fairness to Mr Moodley, that he did not claim that this table formed the basis on which DIRCO or

[147] The correct annual averages, using the totals in the fourth column and dividing the totals by the number of countries that impose a quota for that particular product, are the following: cigarettes – 22 833; rolling tobacco – 3; cigars – 422; spirits/liquors – 167; wine – 384; and beer – 1 324. In the case of Belgium, I have included only the "full diplomatic" quantities to avoid double-counting.

the Minister determined the quantities making up the quota system. He merely put up the table as evidence that South Africa was not the only country which imposed quotas.

[241] The first judgment[148] brushes these concerns aside with reference to a passage from this Court's judgment in *NICRO*.[149] The passage in question does not, however, address the present problem. It is plainly so that not all legislative choices can be arrived at by "courtroom fact-finding" and may be based on "reasonable inferences unsupported by empirical data". However, the quantitative limits placed by other countries on the exemptions enjoyed by diplomats in respect of customs and excise duties can indeed be determined precisely and constitute empirical data. If a Minister relies on material which purports to be such data but the data is nonsensical (or "gobbledygook"), the resultant decision cannot be rational. To borrow computer modelling's colourful acronym, this is the GIGO principle: "garbage in, garbage out". The position is even worse in the present case – we do not even know what information was before the Minister when he took his decision, because nobody has told us. The Minister has not stated what inferences he drew from what material.

[242] SARS alleged in the High Court proceedings that, if in any instance the quota was found to be too conservative, Note 5 to rebate item 406 and the new rule 21.05.07(a)(ii) gave DIRCO the discretion to determine a different quota. Even if the discretion thus given to DIRCO were valid, it would not render the quotas specified in rebate item 406 substantively rational, since those quotas are binding unless DIRCO can be persuaded to change them. However, and as I shall presently explain, it was not competent for the Minister or the Commissioner to give DIRCO this discretion.

[243] For these reasons, the Minister and Commissioner's appeal against the High Court's decision on this ground of review must fail. I should emphasise that my conclusion concerns the content of the quota system, not the principle of a quota system.

[148] At [118].

[149] *NICRO* above n 94 at para 35.

In my view, a quota system was in principle a rational response to the abuse that SARS uncovered, even if it was not the only rational response available to the authorities.

Ground 4: The delegation to DIRCO

[244] In terms of Note 5 to rebate item 406, the availability of the rebates is dependent on DIRCO's approval of an application by the diplomat, made on a six-monthly basis, authorising the quantities stated in the rebate items "or such lesser or greater quantities as may be determined by [DIRCO]". The requirement of a six-monthly authorisation is a permissible part of the administrative machinery for monitoring the rebate system. Such a process ensures that the rebate is only claimed by a foreign official who qualifies to purchase goods duty-free and that purchases made by the diplomat against the authorised quantities can be recorded as part of a running record over the six-month period. The issue is the permissibility of the power granted to DIRCO to authorise lesser or greater quantities than those specified in the rebate items. The High Court did not address this ground of review.

[245] There are several potential difficulties with the concluding part of Note 5. The first is the failure of the Note to specify which official at DIRCO has the authority to determine a greater or lesser quantity. The Note simply refers to a determination by "the Department of International Relations and Cooperation". Having regard, however, to the content of Note 5 as a whole as well as the content of Notes 1 and 2, I think that the concluding reference to DIRCO in Note 5 should be interpreted as referring back to the "Director-General . . . or an official acting under his or her authority".

[246] The next potential difficulty is the absence of guidelines governing the exercise of the power thus conferred on the DIRCO official. The Minister and Commissioner argue that the principle which must guide the official is clear, namely the quantities which the diplomat requires for the official use of the mission or for personal use as the case may be. That may seem clear to those involved in the current litigation, but is this

principle clear from the terms of the empowering provision, read in its context?[150] Rebate item 406 does not refer to or embody the language contained in Article 36(1) of the 1961 Convention or Article 50(1) of the 1963 Convention. The Vienna Conventions are nowhere mentioned in the Customs Act and its Schedules.

[247] Even if the guiding principle put forward by the Minister and SARS is necessarily implied in Note 5 read in its broader context, is it sufficient?[151] The official's power has to be exercised before the commencement of the six-month period to which the lesser or greater quantities relate. What evidence or information can the official regard as sufficient to justify imposing lesser or greater quantities? If the official intends to impose lesser quantities, does he or she have to give the diplomat a chance to be heard? Must the official be guided by what he or she thinks the diplomat will actually use for official or personal use in the next six months or can the official apply a test of reasonableness? If a diplomat has in the past abused the duty-free privilege (something that could occur even if the diplomat stayed within the limits specified in the rebate items), can the official reduce the quantities for that diplomat to zero or to some other small quantity as a sanction for the abuse?

[248] In my view, the imposition of taxes and duties, and the granting of rebates from taxes and duties, is a matter of such importance that the guiding principle which the Minister and SARS say is to be implied is insufficient. There would need to be guidelines in order to guard against an abusive or capricious exercise of the power conferred on DIRCO.

[249] The third and more fundamental question is whether, even with sufficient guidelines, the granting of such a power to a DIRCO official is permissible. Customs and excise duties are imposed by Parliament in Parts 1 and 2 of Schedule 1 of the Customs Act. In terms of section 48(1) and (2) of the Customs Act, the Minister may

[150] *Affordable Medicines* above n 61at para 34.

[151] Compare *Janse van Rensburg v Minister of Trade and Industry* [2000] ZACC 18; 2000 (11) BCLR 1235 (CC); 2001 (1) SA 29 (CC) at para 25.

amend those Schedules for a limited period of time, subject thereafter to a legislative decree of non-lapsing in terms of section 48(6). Rebates from those customs and excise duties are granted by Parliament in Schedules 4 and 6 of the Customs Act. In terms of section 75(1)(b) and (d), the Minister may amend those Schedules for a limited period of time, subject thereafter to a legislative decree of non-lapsing in terms of section 48(6).

[250] In my view, the meaning of these provisions is clear. The extent of duties and the extent of rebates, that is, the relevant amounts, must be specified in the relevant Schedules. Those Schedules are Parliament's creation. The Minister's temporally-limited power to amend them is a power to change the amounts specified by Parliament. The Minister is granted that power, and his amendments lapse in the absence of a timeous legislative decree in terms of section 48(6). The Minister may not grant to another official the power to vary the extent of duties or the extent of rebates. This flows, in my view, from the limited power conferred on the Minister in section 48(1) and (2) and section 75(1) of the Customs Act.

[251] This view is fortified by two further considerations. The first is section 118,[152] which governs the Minister's power to delegate and assign his powers and duties. The only person to whom the Minister may delegate the amending powers conferred by sections 48 and 75(15) is the Deputy Minister of Finance.

[152] Section 118 provides:

> "The Minister may, subject to such conditions as he may in each case impose—
>
> (a) delegate any of the powers which may be exercised or assign any of the duties which shall be performed by him in accordance with the provisions of sections 48, 49, 51, 52, 53, 56, 56A, 57, 60 (3), 75 (15), 99 (4), 105 and 113 (4) to the Deputy Minister of Finance;
>
> (b) and for such period as he may specify in each case, delegate any of his powers under this Act (except any power relating to the amendment of any Schedule or the making of any regulation) to the Commissioner."

[252] The second consideration is the presumption against sub-delegation, expressed in the maxim *delegatus delegare non potest* (a person to whom there has been a delegation is not able to delegate). This maxim—

> "is based upon the assumption that, where the legislature has delegated powers and functions to a subordinate authority, it intended that authority itself to exercise those powers and to perform those functions, and not to delegate them to someone else, and that the power delegated does not therefore include the power to delegate. It is not every delegation of delegated powers that is hit by the maxim, but only such delegations as are not, either expressly or by necessary implication, authorised by the delegated powers."[153]

[253] Although the Minister has not, as a matter of form, purported to authorise a DIRCO official to amend Schedule 4, he has, as a matter of substance, authorised a DIRCO official to vary quantities which only the Minister has the power to determine by way of temporary amendments to the Schedule.

[254] The first judgment observes that the delegation to DIRCO addresses one of the retailers' concerns, namely that a diplomat may require greater quantities than those specified in the rebate items. However, the fact that the delegation may on occasion operate to the advantage of the retailers is not the test. The retailers objected, and still object, to the delegation, and we must thus decide the objection.

[255] I thus consider that the Minister acted beyond his powers when he provided, in the latter part of Note 5, that a DIRCO official, when providing a diplomat with a six-monthly authorisation, could impose lesser or greater quantities. The question whether Parliament itself could confer such a power on a DIRCO official is not before us. It might raise similar issues to those discussed in Nu Africa's confirmation

[153] *Attorney-General, OFS v Cyril Anderson Investments (Pty) Ltd* 1965 (4) SA 628 (A) at 639C-D. See also, for example, *Government of the Province of the Eastern Cape v Frontier Safaris (Pty) Ltd* [1997] ZASCA 84; [1997] 4 All SA 500 (A); 1998 (2) SA 19 (SCA) at 28B-D.

application – the delegation of lawmaking power and the doctrine of separation of powers.

[256] It might be said that fixed quantities for the rebates creates undesirable inflexibility, given that different diplomats and missions may have different requirements. It might be feasible for the rebate items themselves to draw rational distinctions between different kinds and sizes of missions. But if there has to be a single, perhaps generous, limit applicable to all diplomats and missions, the only consequence is that a diplomat buying products in excess of those limits will have to pay duties and taxes on the excess. The sky won't fall.

Ground 5: Vagueness

[257] It is a requirement of the rule of law that legislation be expressed with sufficient clarity that those bound by it may know what it requires of them. Reasonable certainty, not perfect lucidity, is the standard.[154] The retailers submit that the amendments to the Schedules violate the rule of law in this respect.

[258] Ambassador submits that rebate items 406.02.02 and 406.03.02 both apply to alcohol and tobacco products "per Mission (Office) for official use" but have differing codes – CD05 and CD07 respectively. It is thus unclear, according to Ambassador, which code a retailer should use when a Mission makes a purchase. The answer lies in the headings to rebate items 406.02 and 406.03 respectively: rebate item 406.02 relates to goods purchased at a special shop "for diplomats for diplomatic missions and diplomatic representatives accredited to diplomatic missions" whereas item 406.03 applies to goods purchased at a special shop "for diplomats for other approved foreign representatives (excluding those of rebate item 406.05)". Since Ambassador has not said that these headings do not draw a comprehensible distinction, I reject this complaint of vagueness.

[154] *New Clicks* above n 101at para 246.

[259] Ambassador also complains of vagueness in relation to Note 3 to rebate item 406. This Note starts with the words, "The provisions of this rebate item may not apply". The complaint is that "this rebate item" is not identified by number. This complaint is without merit. Note 3 of the amended rebate item 406 is a repeat of Note 4 of the pre-amended version of the Notes, save that the old Note 4 began with the words: "The provisions of this rebate item (excluding rebate item 406.01) may not apply". The words in parenthesis in the old Note 4 have been omitted in the new Note 3 for the simple reason that rebate item 406.01 has been deleted. So Note 3 now applies to all the sub-items within rebate item 406.

[260] Ambassador's last instance of alleged vagueness is the amended Note 5 to paragraph 8 of Schedule 1 of the VAT Act. Ambassador says that the part of Note 5 before the semi-colon appears merely to be a heading, while the second part seems to set a condition for a requirement in circumstances where the requirement itself is not specified. In their answering affidavits, the Minister and SARS met Ambassador's complaint with bare denials. The point was also not addressed in their written submissions. Nevertheless, and despite the fact that paragraph 8, in relation to rebate item 406, is not a model of clarity, I think the meaning is tolerably clear.

[261] Paragraph 8 provides that imported goods covered by rebate item 406 are exempt from VAT in terms of section 13(3). In the case of alcohol and tobacco products covered by rebate items 406.02, 406.03, 406.04 and 406.05 (namely sub-items 02-04 within rebate items 406.02, 406.03, and 406.05 and sub-items 406.04[155] and 406.07.02), the exemption from VAT is, by virtue of Note 5, subject to the proviso that the importer of those products must still pay VAT when those goods are supplied to diplomats. Goods other than alcohol and tobacco products are covered by rebate items 406.02.01, 406.03.01, 406.04.01, 406.05.01, 406.06.01 and 406.07.01. These are listed separately at the end of the Notes and are not subject to the proviso that applies to imported alcohol and tobacco products.

[155] This rebate item covers all goods, including but not limited to alcohol and tobacco products.

[262] The only vagueness complaint made by Flemingo and Assortim in their written submissions concerns the amendment to rebate item 631 in Schedule 6 of the Customs Act. They submit that it was irrational for rebate item 631 to provide for a full rebate of duty in respect of local excisable goods, including alcohol and tobacco products, while imposing quotas on imported alcohol and tobacco products. In response to this complaint in Flemingo and Assortim's founding affidavit, the Minister's deponent stated that rebate item 631 was indeed subject to the same quantitative limits as those contained in rebate item 406. This flowed, the deponent submitted, from the fact that the amended Note 8 to Part 2 of Schedule 6 stipulated that Notes 1 to 7 to rebate item 406 in Schedule 4 applied mutatis mutandis to rebate item 631 in Schedule 6. A contextual and businesslike interpretation was that the rules, including quantities, established by rebate item 406 applied to rebate item 631. A contrary interpretation would not only undermine the purpose of the amendments but render the amended Note 8 meaningless. The Commissioner likewise contended that the quantitative limits in rebate item 406 applied to rebate item 631.

[263] In light of the responses put up by the Minister and Commissioner, Flemingo and Assortim contend that the formulation of Note 8 read with rebate item 631 may fall foul of the rule against vagueness. I do not agree. Vitiating vagueness would only exist if a sensible meaning cannot be given to the amendments. In this case, I think the amendments are capable of bearing the meaning advanced by the Minister and Commissioner. The amended Note 8 in Part 2 of Schedule 6 makes Note 5 to rebate item 406 applicable. In terms of Note 5, the rebates within item 406 are subject to six-monthly approvals of quantities by DIRCO. Those quantities are determined by the limits specified in the various rebate items forming part of item 406. Those quantitative limits thus also govern rebate item 631 in Schedule 6.

[264] I should add that rebate item 631 has subsequently been amended to state that excisable goods obtained from a licensed special shop for diplomats have to be obtained

"in accordance with and approval of the Director-General: [DIRCO] or an official acting under his or her authority".[156]

Conclusion on the review grounds impeaching the amendments to the Schedules

[265] I thus conclude that review grounds 1 and 5 should be rejected but that grounds 2, 3 and 4 should be sustained.

The review directed at the amendments to the Customs Rules

[266] If the amendments to the Schedules are set aside on review, those amendments to the Rules that are dependent on the validity of the amendments to the Schedules would likewise fall. The High Court identified these as being rules 21.05.07(a)(ii), 21.05.07(b) and 21.05.08(b)(iii). I agree that at least these subrules would fall away, though it seems unlikely that any of the amendments to the Rules would have been made but for the fact that the Schedules were being amended.

[267] The review applicants contend, however, that all the amendments to the Rules should be set aside on grounds which do not depend on the validity of the amendments to the Schedules, and it is these which I must now consider.

Ground 1: Procedural unfairness/ process irrationality

[268] The High Court found, and it was not contested in this Court, that the Commissioner's amendments of the rules were subject to review in terms of PAJA. Accordingly, and if the amendments materially and adversely affected the rights or legitimate expectations of the retailers, they were thus entitled to procedurally fair administrative action in terms of section 3 of PAJA.

[269] As with the amendments to the Schedules, the only suggested compliance which the Commissioner alleged took the form of the engagement with the retailers on

[156] Customs and Excise Act, 1964: Amendment of Schedule No. 4 (No. 4/1/370), GN R2186 *GG* 46589, 24 June 2022.

12 February 2020 and the publication of the draft amendments on the SARS website on 20 November 2020. I have already explained in relation to the amendments to the Schedules, this was not a procedurally rational course of action and for similar reasons it fails the test of procedural fairness. There was no indication, in the presentation made on 12 February 2020, that the rules were to be amended. SARS at the end of the meeting announced what the process was going forward and this was confirmed in its letter the next day, which gave immediate instructions about processes the retailers had to follow. There seems to have been no attempt to solicit views with a view to assessing what future processes should be. When, by November 2020, SARS had evidently decided that the rule should be amended, it made no effort to engage directly with the retailers, despite the fact that it had the means of sending the draft amendments directly to them for comment.

[270] Ambassador contends that the Commissioner's process was in any event procedurally irregular because there was no evidence that SARS consulted with DIRCO despite the fact that the amendments to the rules imposed certain duties on DIRCO. There was also no evidence, according to Assortim, that DIRCO was ready and able to implement the new system. SARS alleged that there was full consultation with DIRCO while DIRCO claimed that it was ready and able to implement the new system. On the papers this version cannot be rejected.

[271] Nevertheless, and for the other reasons I have given, the complaint of procedural unfairness must be sustained.

Ground 2: The DIRCO delegation

[272] Although rule 21.05.07(a)(ii) must in any event fall (as the High Court found) with the amendments to the Schedules, it is also impermissible for the same reason that the latter part of Note 5 to rebate item 406.

Conclusion on review grounds impeaching the amendments to the Customs Rules

[273] Ground 1 (to the extent indicated above) and ground 2 thus should have succeeded in the High Court. Although this would justify setting aside the amendments to the Rules as a whole, the review applicants did not seek leave to cross-appeal the High Court's order setting aside only some of the amendments. They merely sought to defend the High Court's order on additional grounds. Accordingly, the review applicants are not entitled to additional review relief beyond that granted by the High Court.

The remedy in the review cases

[274] The High Court, in upholding the reviews, did not consider what relief would be just and equitable in terms of section 172(1)(b) of the Constitution. The Court simply set aside the impugned decisions of the Minister and Commissioner. The setting aside has been suspended pending the appeals by the Minister and Commissioner. Since I would uphold the reviews on grounds additional to those which found favour with the High Court, it is necessary to consider afresh what the appropriate order at this stage is.

[275] The impugned amendments have been in force since 1 August 2020, that is, more than three years. The prejudice which the retailers feared was a loss of turnover and the administrative burdens of complying with the new regime. If the quantitative limits have caused the retailers to suffer a loss of turnover since 1 August 2020, that is not something that can now be undone. Any administrative burdens which the retailers have suffered since 1 August 2020 can likewise not be undone. The question is what should happen going forward.

[276] Notionally, diplomats who had to pay duties and taxes on quantities exceeding those laid down by the quota system could say that they wish to recover the duties and taxes which they should not have had to pay. However, we do not know whether there are any diplomats who purchased quantities exceeding those laid down by the quota system and in any event no such diplomats have come forward to seek a remedy. In my

view, therefore, it would be just and equitable for the setting aside of the impugned amendments not to have retrospective effect.

[277] As to the future, an immediate setting aside of the impugned amendments could have prejudicial consequences for the fiscus. On the papers, it is clear that some diplomats were guilty of gross abuses. Although I have found that the quantitative limits imposed by the Minister were arrived at by a process which was arbitrary and irrational, it has not been shown that the quantities are in fact unreasonable. At least in the case of individual diplomats, the quantities do not strike me, admittedly an outsider in these matters, as parsimonious. The allowances over a six-month period equate to the following daily allowances: two 30-cigarette packs, one bottle of wine, 400 ml of spirits and slightly more than three 340 ml beers. In regard to diplomatic missions and organisations, the position may be different. Nevertheless, allowing these quotas to remain in place for a modest period is unlikely to cause any significant hardship and will prevent current processes being thrown into immediate confusion.

[278] In my view, it would therefore be just and equitable to suspend the setting aside of the amendments to the Schedules and Rules for a period that will give the Minister and Commissioner adequate time to investigate appropriate quantitative restrictions and consult adequately with the retailers and to promulgate fresh amendments. It would also be convenient for the period of suspension to terminate at the end of a six-month cycle in the current quota regime. I would thus grant a suspension until 30 June 2024, a period of about nine months, which in my view is sufficient to enable the Minister and Commissioner to take the necessary steps.

Costs

[279] Nu Africa's challenge to the constitutionality of section 75(15)(a)(i)(bb) of the Customs Act and section 74(3)(a) of the VAT Act was not a frivolous one. It involved fundamental questions of constitutional law. Unless the *Biowatch* principle[157] is

[157] *Biowatch* above n 23.

inapplicable to litigants who bring constitutional litigation with a commercial motive, the parties in the Nu Africa application should pay their own costs in the High Court and in this Court.

[280] Because the review applicants are in my view entitled to succeed in their reviews, they should be awarded costs in the High Court and in this Court, including the costs of two counsel where employed. However, even if the review applicants were to fail, they would again enjoy *Biowatch* protection unless there is an exception for litigants who bring constitutional litigation with commercial motives. The review applications concerned the control of the exercise of public power in terms of the principle of legality and PAJA, and the review applicants were seeking to vindicate their constitutional rights. Their review applications were not frivolous or otherwise inappropriate.

[281] Both the Minister and the Commissioner sought costs if they succeeded in this Court. The Minister's submissions assert that, since *Biowatch* was decided, it has repeatedly been held that a party pursuing commercial interests in public law litigation must pay the costs when it loses. I do not agree that such a rule appears clearly from this Court's jurisprudence. Sitting in a different Court, I considered this question in some detail in *SMEC*.[158] I concluded my survey of the cases to which my attention had been drawn as follows:

> "I have not found authority for the proposition that *Biowatch* is inapplicable where the applicant has a strong commercial interest in vindicating a constitutional right. Even in a case like *Harrielall*, a commercial motive (the desire to qualify for a more remunerative profession) might be present. The formulation in *Harrielall* appears to cover the present case. Whether a carve-out should be recognised for commercially inspired review proceedings in general, or for reviews by disappointed tenderers in particular, is a question for a higher court."[159]

[158] *SMEC South Africa (Pty) Ltd v City of Cape Town* [2022] ZAWCHC 131 at paras 133-43.

[159] Id at para 143.

[282] Since writing the above, I have not had reason to change my view. The Minister's counsel referred to three decisions of this Court. One of them, *Big Five Duty Free*, I discussed in *SMEC*,[160] and for the reasons there stated it is not authority for the Minister's contention. The other two cases cited by the Minister are *Pickfords Removals*[161] and *International Trade Administration Commission*.[162] These are likewise distinguishable. *Pickfords Removals* dealt with an exception in competition proceedings. *ITAC* concerned an interdict in advance of review proceedings.

[283] In *Weare*,[163] a pre-*Biowatch* case, Van der Westhuizen J said, in a unanimous judgment, that there was an exception to the normal rule that no costs should be awarded against litigants who unsuccessfully raise important constitutional issues against the state, namely where the litigation is pursued for "private commercial gain".[164] However, *Weare* has not subsequently been cited by this Court in relation to costs, and the exception it propounded appears to me to be at odds with what this Court said the following year in *Biowatch*:[165]

> "In my view, it is not correct to begin the enquiry by a characterisation of the parties. Rather, the starting point should be the nature of the issues. Equal protection under the law requires that costs awards not be dependent on whether the parties are acting in their own interests or in the public interest. Nor should they be determined by whether the parties are financially well-endowed or indigent or, as in the case of many NGOs, reliant on external funding. The primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice.
>
> Section 9(1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law. No party to court proceedings

[160] Id at para 139.

[161] *Competition Commission of South Africa v Pickfords Removals SA (Pty) Limited* [2020] ZACC 14; 2020 (10) BCLR 1204 (CC); 2021 (3) SA 1 (CC).

[162] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2010 (5) BCLR 457 (CC); 2012 (4) SA 618 (CC).

[163] *Weare v Ndebele N.O.* [2008] ZACC 20; 2009 (1) SA 600 (CC); 2009 (4) BCLR 370 (CC).

[164] Id at para 77.

[165] *Biowatch* above n 23.

should be endowed with either an enhanced or a diminished status compared to any other. It is true that our Constitution is a transformative one based on the understanding that there is a great deal of systemic unfairness in our society. This could be an important, even decisive factor to be taken into account in determining the actual substantive merits of the litigation. It has no bearing, however, on the entitlement of all litigants to be accorded equal status when asserting their rights in a court of law. Courts are obligated to be impartial with regard to litigants who appear before them. *Thus, litigants should not be treated disadvantageously in making costs and related awards simply because they are pursuing commercial interests and have deep pockets.* Nor should they be looked upon with favour because they are fighting for the poor and lack funds themselves. What matters is whether rich or poor, advantaged or disadvantaged, they are asserting rights protected by the Constitution.

. . .

[E]ven allowing for the invaluable role played by public interest groups in our constitutional democracy, courts should not use costs awards to indicate their approval or disapproval of the specific work done by or on behalf of particular parties claiming their constitutional rights. It bears repeating that what matters is not the nature of the parties or the causes they advance but the character of the litigation and their conduct in pursuit of it. This means paying due regard to whether it has been undertaken to assert constitutional rights and whether there has been impropriety in the manner in which the litigation has been undertaken. *Thus, a party seeking to protect its rights should not be treated unfavourably as a litigant simply because it is armed with a large litigation war-chest, or asserting commercial, property or privacy rights against poor people or the state*. At the same time, public interest groups should not be tempted to lower their ethical or professional standards in pursuit of a cause. As the judicial oath of office affirms, judges must administer justice to all alike, without fear, favour or prejudice."[166] (Emphasis added.)

[284] Subsequent decisions of this Court appear to me to accord with the above passages from *Biowatch.* Substantial companies were shielded from adverse costs in

[166] Id at paras 16, 17 and 20.

Senwes,[167] *Shoprite Checkers*[168] and *Standard Bank*,[169] even though they were pursuing constitutional litigation in their own commercial interests. The question whether commercial litigants should be deprived of *Biowatch* protection is an important one which we should not decide without full argument. Difficult questions may arise as to the boundaries of the exception. What about a person with a foreign legal qualification who claims that the restrictions on admission as a legal practitioner in South Africa are unconstitutional? Such an individual is seeking to advance his or her own commercial interests.[170] What of the single mother who seeks to review a municipality's refusal to grant her planning permission to conduct a hairdressing business from her home? Is a litigant only to be deprived if it is a corporation? And if so, does the size and wealth of the corporation matter?

Order

[285] I would thus make the following order:

Case CCT 29/2022

1. The High Court's orders, declaring section 75(15)(a)(i)(bb) of the Customs and Excise Act 91 of 1964 (Customs Act) and section 74(3)(a) of the Value-Added Tax Act 89 of 1991 (VAT Act) inconsistent with the Constitution and invalid, are not confirmed.
2. The High Court's consequential orders, setting aside the amendments made by the first respondent (the Minister of Finance) to Schedules 4 and

[167] *Competition Commission of South Africa v Senwes Ltd* [2012] ZACC 6; 2012 (7) BCLR 667 (CC) at para 57.

[168] *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 89.

[169] *Competition Commission of South Africa v Standard Bank of South Africa Limited; Competition Commission of South Africa v Standard Bank of South Africa Limited; Competition Commission of South Africa v Waco Africa (Pty) Limited* [2020] ZACC 2; 2020 (4) BCLR 429 (CC) at para 206.

[170] In *Rafoneke v Minister of Justice and Correctional Services (Makombe Intervening)* [2022] ZACC 29; 2022 (6) SA 27 (CC); 2022 (12) BCLR 1489 (CC) it was taken for granted that persons suing constitutional litigation with this motive were entitled to *Biowatch* protection.

6 of the Customs Act and Schedule 1 of the VAT Act on 23 April 2021 and 14 June 2021, are set aside.

3. The parties must pay their own costs in the High Court and in this Court.

Cases CCT 57/2022 and CCT 58/2022

1. The applicants (the Minister of Finance and the Commissioner for the South African Revenue Service respectively) are granted leave to appeal.
2. The appeals are dismissed.
3. The High Court's setting aside of the amendments made by the Minister of Finance on 23 April 2021 and 14 June 2021 to Schedules 4 and 6 of the Customs and Excise Act 91 of 1964 (Customs Act) and Schedule 1 of the Value-Added Tax Act 89 of 1991 shall not have retrospective effect and shall be suspended until 30 June 2024.
4. The High Court's setting aside of certain of the amendments made by the Commissioner for the South African Revenue Service on 23 April 2021 and 14 June 2021 to the Rules made in terms of the Customs Act shall not have retrospective effect and shall be suspended until 30 June 2024.
5. The applicant in each case must pay the costs of the first, second and third respondents in this Court (that is, the costs of Ambassador Duty Free (Pty) Ltd, Flemingo Duty Free Shops International SA (Pty) Ltd and International Trade and Commodities 2055 CC t/a Assortim Duty Free), such costs to include the costs of two counsel where employed.

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