

SOUTH AFRICA / JUDGMENT

Ecenter Trading (Pty) Ltd and Others v First National Bank Ltd and Another (28904/2022)

[2024] ZAGPPHC 318 (2 April 2024)

[2024] ZAGPPHC 318**COURT**

North Gauteng High Court, Pretoria

BEFORE

Nyathi

CASE / FILE NUMBER

28904/2022

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Source record**IN THE HIGH COURT****OF SOUTH AFRICA****GAUTENG DIVISION,****PRETORIA****CASE NO. 28904/2022****(1)****REPORTABLE: NO****(2)****OF INTEREST TO OTHER JUDGES: NO****(3)****REVISED: NO****Date: 02 APRIL 2024****Signature:****In****the matter between:**

ECENTER
TRADING (PTY) LTD
First
Applicant
BLACKIRON
TRADING (PTY) LTD
Second
Applicant
NGENISA
KONKE IMPORT & EXPORT (PTY) LTD
Third
Applicant
INTER
SPACE IMPORT & EXPORT (PTY) LTD

Fourth
Applicant
And
FIRST
NATIONAL BANK LTD
First
Respondent
THE
SOUTH AFRICAN RESERVE BANK
Second Respondent

JUDGMENT

NYATHI J

A.

INTRODUCTION

- [1] This is an application for a mandamus against the respondents ordering them to release monies on hold in respect of various accounts held by each of the four applicants with the first respondent. The respondents oppose the application.
- [2] The applicants seek a punitive cost order against the respondents.

B.

BACKGROUND

- [3] The Applicants in this matter all have their own bank accounts at the first respondent which they utilise, among others, to pay their suppliers in the normal course of their business.
- [4] During June and July 2021, the applicants made certain payments to their Chinese suppliers from their respective bank accounts but the suppliers did not receive these payments.
- [5] After several attempts to ascertain the status of the transactions, it appeared that the payments were blocked.
- [6] Neither the first nor the second respondent notified any of the applicants that the relevant transactions were blocked and/or on which grounds.
- [7] It is apparent from the answering papers filed by the first and second respondents that the holds/blocks were placed on the transactions, by the first respondent on instructions from the second respondent.
- [8] The second respondent requested specific information and documentation from the first respondent to verify and clarify certain information during their compulsory due diligence checks, before instructions could be given to release such holds/blocks.

- [9] All the information and documentation were not provided to the second respondent by the first respondent and the applicants were never informed of any required and/or outstanding information and/or documentation to be able to assist the second respondent.
- [10] Except for being referred to the second respondent at the second respondent's physical address and general contact details, the applicants were not provided with any information or the reasons for the holds/blocks placed on their accounts until receipt of the respondents' answering papers. The first respondent is of the view that the applicants should have pursued a judicial review of the second respondent's decision to issue blocking orders, but this is under circumstances that the applicants were never provided with any information to put them in a position to even consider such review.
- [11] The applicants amended their Notice of Motion after receipt of the respondents Answering Affidavits and therefore after being informed of the second respondent's instructions to the first respondent. The amended notice seeks to postpone the initial relief sought until after compliance with the interdict.

C. APPLICABLE LEGAL FRAMEWORK[1]

- [12] The SARB is the central bank of South Africa. It is governed by the South African Reserve Bank Act 89 of 1990 ("SARB Act") and the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution").
- [13] The primary objective of SARB is to protect the value of the currency in the interest of balanced and sustainable economic growth in the Republic. The powers and functions of SARB are those customarily exercised and performed by central banks, as contemplated in section 225 of the Constitution.
- [14] Exchange controls are government-imposed limitations on the purchase and sale of foreign currencies. Exchange controls are used inter alia to ensure the stability of an economy and prevent exchange rate volatility. In the Republic, exchange controls are overseen by the SARB.
- [15] In *South African Reserve Bank and Another v Shuttleworth and Another* 2015
- (5) SA 146 (CC)[2] the Constitutional Court explained the purpose of exchange control regulation in the following terms:

"Here we are dealing with exchange control legislation. Its avowed purpose was to curb or regulate the export of capital from the country. The very historic origins of the Act, in 1933, were in the midst of the 1929 Great Depression, pointing to a necessity to curb outflows of capital. The Regulations were then passed in the aftermath of the economic crises following the Sharpeville shootings in 1960. The domestic economy had to be shielded from capital flight. Regulation 10's very heading is "Restriction on Export of Capital".

The measures were introduced and kept to shore up the country's balance of payments position. The plain dominant purpose of the

measure was to regulate and discourage the export of capital and to protect the domestic economy.

...[T]he exchange control system is designed to regulate capital outflows from the country. The fickle nature of the international financial environment required the exchange control system to allow for swift responses to economic changes. Exchange control provided a framework for the repatriation of foreign currencies acquired by South African residents into the South African banking system. The controls protected the South African economy against the ebb and flow of capital. One of these controls which we are here dealing with specifically, serves to prohibit the export of capital from the Republic (unless certain conditions were complied with)". (Underlined for emphasis).

D. APPLICANTS' CONTENTIONS

[16] Both FirstRand and the Reserve Bank assert that the applicants should have brought a review application in terms of PAJA, but the applicants say that PAJA either does not apply or is not the only relief provided for in section 9 of the Currency and Exchanges Act; an aggrieved person may also institute action or lodge proceedings in court for any other relief.

[17] It was contended on behalf of the applicants that they were not afforded a right to be heard before the blocking orders were issued.

[18] Mr. Du Preez referred to caselaw, more specifically Evergrand Trading (Pty) Ltd v. SARB & Another [2022] ZAGPPHC, Yanling International Trade CC v SARB [2023] ZAGPPHC 79, Odendaal v SARB [2023] ZAWCHC 160 and SARB v Leathern & Others 2021

(5) SA 543 (SCA).[3] I will deal with each in paragraphs that follow hereunder.

E. THE RESPONDENTS' CONTENTIONS:

[19] the second respondent issued blocking orders in terms of regulations 22A and or 22C of the Exchange Control Regulations[4] ("the regulations"), read with section 9(2) of the Currency and Exchanges Act 9 of 1933 ("the Act") in respect of each of the four applicants. The issue of the blocking orders constitutes "administrative action" as

contemplated in the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

[20] The respondents contend that instead of pursuing a review of the blocking orders in terms of regulation 22D, the applicants brought a mandatory interdict to release the funds subject to the blocking orders. Which application was later amended to seek orders against the first respondent only, that the first respondent be compelled to furnish to the second respondent all the information which the second respondent had previously requested from the first respondent pertaining to the applicants' banking transactions, alternatively that the second respondent be compelled to tell the applicant what information is required so that the

applicants can assist the first respondent to provide the information to the first respondent.

- [21] A blocking order may endure for a period of up to 36 months as provided for in section 9(2)(g) of the Act read with regulation 22B.
- [22] Firstly, the respondents submitted that the relief sought by the applicants is not competent, given that the 36 months period afforded under section 9(2)(g) of the Act has not yet expired, and the blocking orders remain valid unless and until reviewed and set aside.
- [23] Secondly, the second respondent in this regard submits that the applicants, jointly or severally, have not demonstrated the grounds contained in section 9(2)(d)(i) of the Act read with regulation 22D, and therefore have failed to make out a proper case for the relief sought.
- [24] Thirdly, the relief sought against the first respondent in terms of prayers 1 and 2 of the amended notice of motion is a precursor to the relief sought in terms of prayers 4 and 5 therein. Therefore, given prayers 4 and 5 are wholly incompetent and unsustainable, the relief sought in prayers 1 and 2 will serve no purpose and should also be dismissed.
- [25] As regards the applicants' contention that they were not given a right to be heard before the blocking orders were issued, Mr Maritz submitted that a party has no right to be heard in respect of the issue of a blocking order. A party has no right to be heard before seizure of their funds which are suspected to be involved in a contravention of the Exchange control legislation. He referred to the Constitutional Court decision of *Ambruster v SARB*[5] which dealt with the seizure and forfeiture of foreign currency under the Exchange Control Regulations and the constitutional validity of the forfeiture provision. The Constitutional Court held that the Regulations would never work if a party was warned and given a hearing before action was taken by the SARB. The SARB preserves first, then grants the hearing before forfeiture.
- [26] Finally, the second respondent submits, a punitive costs order is justified given the conspectus of this matter.

F. CONSIDERATION

- [27] In *Yangling International Trade CC v SARB*, the court dealt with an application for condonation where a review application was out of time. The court confirmed the findings in *Evergrand Trading (Pty) Ltd v SARB and Another*. In *Evergrand Trading, Ceylon AJ* found that an application to review a forfeiture decision is governed by the Currency Act, read with the Regulations, and not PAJA. The importance of this distinction is that an application to review a forfeiture decision must be made within 90 days as provided in the Currency Act and Regulations. In reviews under PAJA, the timeframe is 180 days.
- [28] A case that is more on point is *SARB v Leathern and Others*. In an application for a review of a blocking order by the SARB, which succeeded in the High Court, the Supreme Court of Appeal held that provided the Reserve Bank's blocking order complies with the regulations,

it may block the funds and the trustees (applicants in the case)[6] cannot enjoy access to them, whatever is ultimately proven as to who has a claim to the funds. Viewed in this light, Makgoka JA concluded, the trustees' application to the High Court was premature and should not have succeeded.

- [29] In *SARB and Another v Maddocks N.O. and Another* [7] the respondents upon their appointment as liquidators of the companies whose monies had been declared forfeit consequent to blocking orders, demanded that the forfeited monies be paid out to them to be administered in terms of the insolvency laws. The SARB refused to accede to the demand contending that the forfeiture orders were validly made pursuant to blocking orders made prior to the liquidation of the companies. The liquidators launched a review of the forfeiture orders and were successful in the High Court. This led the SARB to escalate their unhappiness to the Supreme Court of Appeal.
- [30] The SCA stated in *Maddocks* that the effect of the blocking orders issued in terms of Regulation 22A and/or Regulation 22C of the Regulations is that 'no person may withdraw or cause the withdrawal of funds together with the interest thereon and/or accrual thereto in accounts held at the banks.'[8]
- [31] *Maddocks* further confirms that in terms of the Act and the regulations the Reserve Bank notifies the companies whose funds are flagged as suspicious and to the attorney representing them, advising them of the issue of the blocking orders and informing them that the funds in the blocked banking accounts could be forfeited to the State. The Reserve Bank invites them to make representations as to why all or any of the monies should not be forfeited.
- [32] In *Maddocks*, responses were sent to the Reserve Bank, but the liquidators failed to provide valid reasons as to why the amounts standing to the credit of the blocked banking accounts should not be declared forfeited to the State. They instead contended that forfeiture could not validly take place after the winding-up of the companies. In the result the appeal by the Reserve Bank succeeded and the liquidators' review application was dismissed.

G.

CONCLUSION

- [33] The weight of authority points out emphatically that the applicants' review application is not founded on a sustainable legal basis and stands to be dismissed. The issue of the award of costs needs determination during events. There is nothing suggestive of a departure from the normal rule applicable in applications of this nature.
- [34] The following order is hereby made:

The application is dismissed with costs, including costs of two Counsel where so employed.

J.S. NYATHI

Judge of the High Court

Gauteng Division, Pretoria

Date of hearing: 05 October 2023 Date of Judgment: 02 April 2024 On behalf of the Applicant: Adv. D.B. Du Preez SC With him: Adv. E. de Lange Attorneys for the Applicant: Muthray and Associates Inc. Tel:

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[1] Excerpted from second respondent's heads of argument Para 10.

[2] South African Reserve Bank and Another v Shuttleworth and Another 2015 (5) SA 146 (CC) at paras 53 to 54.

[3] Evergrand Trading (Pty) Ltd v. SARB & Another [2022] ZAGPPHC, Yanling International Trade CC v SARB [2023] ZAGPPHC 79, Odendaal v SARB

[2023] ZAWCHC 160 and SARB v Leathern & Others 2021 (5) SA 543 (SCA).

[4] GNR 1111 of 1 December 1961: Regulations made under the Currency and Exchanges Act 9 of 1933.

[5] Armbruster v SARB [2007] ZACC 17, 2007 (6) SA 550 (CC).

[6] Inserted for clarity.

[7] SARB and Another v Maddocks N.O. and Another [2023] ZASCA 04

[8] Para 7 of SARB and Another v Maddocks N.O. and Another [2023] ZASCA 04.

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