

SOUTH AFRICA / JUDGMENT

Leathern N.O and Others v Reserve Bank of South Africa (41306/2019) [2020] ZAGPPHC 181 (21 May 2020) [2020] ZAGPPHC 181

COURT

North Gauteng High Court, Pretoria

BEFORE

Holland-Muter

CASE / FILE NUMBER

41306/2019

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1)

REPORTABLE

(2)

OF

INTEREST TO OTHER JUDGES

(3)

REVISED

CASE

NO: 41306/2019

21/5/2020

In

the matter between: RENETTE
LEATHERN N
O
First Applicant
WILLIAM
DAVID LEATHERN N O
Second Applicant
JERIFANOS
MASHAMBA N O
Third Applicant
[In
their capacities as duly appointed trustees of
The
insolvent estate of Ahmed Dawood Bhorat (12450/16)]
And
THE
RESERVE BANK OF SOUTH AFRICA
First Respondent
GROBANK
LTD
Second Respondent

JUDGEMENT

Before: Holland-Muter AJ

- [1] The world is in the grip of the Covid-19 Pandemic and the State President announced that the country was placed in a total lockdown as from 25 March 2020 in terms of the Disaster Management Act 57 of
2002. The President issued a Presidential Directive under the provisions of the Disaster Management Act inter alia how the State is to function during the national lockdown. It is however not necessary to venture into the legality and/or detail of the directive(s) by the various stake holders in Government but to mention that the Chief Justice is empowered to regulate the functioning of the courts in general.
- [2] The Chief Justice delegated the necessary authority to the various Judge Presidents of the different divisions of the High Courts of South Africa to, in compliance with the national lockdown, issue various directives affecting the day to day running of the divisions.
- [3] The Judge President of this Court issued certain directives how the courts will function during the national lockdown. The crux of the directives is that where possible, all opposed applications, be heard
- via Case-Lines and as far as possible via teleconferencing/videoconferencing and/or any other electronic means.

- [4] There was provision made for that, in exceptional matters, hearings be conducted in court as in the past. The parties will have to show exceptional circumstances why this should happen instead of the

preferred process of electronic hearing.

- [5] This matter is a very complex and difficult matter involving various acts and case law. The following acts were referred to by counsel during arguments:

The Insolvency Act, 24 of 1936 as amended;

The Currency and Exchange Act, 9 of 1933 as amended;

The Currency and Banking Act, 31 of 1920 as amended;

The South African Reserve Bank Act, 90 of 1989 as amended;

The Prevention of Organised Crime Act, 121 of 1998;

Customs and Excise Act, 91 Of 1964 as amended ; and

The Exchange Control Regulations, 1961 issued in terms of the Currency and Exchanges Act (supra) ("The Regulations").

- [6] The matter was set down for 23 April 2020 and I had telephonic conversations with both counsel to inquire how the hearing should proceed in view of the lockdown situation. Both counsel requested an oral hearing in view of the complexity of the matter. After discussion with the ADJP and with her consent, the matter was heard in the Arbitration Facility at the Club Advocate Chambers in Hazelwood. The duration of the application was four (4) hours. The respondent's attorney agreed to have the record delivered to the Registrar.

THE APPLICANTS:

- [7] The applicants are the duly appointed joint trustees of the insolvent estate of Mr Ahmed Dawood Bharat (Bharat). Their appointment is not in dispute by the First Respondent.

THE RESPONDENTS:

- [8] The First Respondent is the South African Reserve Bank (SARB) and the Second Respondent is Growbank Ltd (formally the Bank of Athens).

RELIEF SOUGHT BY THE APPLICANTS:

- [9] The applicants moved for the following relief:

- (a) Declaring that all the funds and/or amounts standing to the credit of the insolvent trading as R & R Traders & Brokers at the Second Respondent in account numbers 30000001640 and 20000441617 vest in the insolvent estate of the insolvent and hence vest in the Applicants;
- (b) Revising and lifting the "blocking order" made by Mr Malherbe, on behalf of the First Respondent, on 15 June 2017;

- (c) Ordering the Second Respondent immediately to pay over to the Applicants in trust such funds and amounts defined in paragraph 1 above; and
 - (d) Costs of suit including the costs of two counsels of whom one is a senior counsel.
- [10] There was an interlocutory application brought on behalf of the First Respondent when the hearing commenced to extend the period of the blocking order issued on 15 June 2017 in terms of Regulation 22A and/or 22C in respect of the two accounts with 90 days from the date of an order of court finally determining the main application (including any appeal). This was settled amongst the parties before the end of the hearing and a draft order "XYZ" was made an order of court while judgement in the main application was reserved. The necessity for the extending is that a blocking order lapses after 36 months or such longer period as may be determined by the court.
- [11] Two aspects remained to be adjudicated by this court namely:
- (a) Does the claim to the funds "vest" in the trustees?; and
 - (b) Does the blocking order "trump" the sequestration order?

MANDATE OF THE SOUTH AFRICAN RESERVE BANK (SARB):

- [12] The SARB, as the central bank of the Republic of South Africa (Republic), as contemplated in section 223 of the Constitution of the Republic is established in terms of section 9 of the Currency and Banking Act, 31 of 1920 and governed by the South African Reserve Bank Act, 90 of 1989.
- [13] The object of the SARB is to protect the value of the currency of the Republic in the national interest of the Republic. In terms of the Constitution, the SARB is mandated to perform its functions independently as contemplated in section 225 of the Constitution.
- [14] The SARB plays a pivotal role in ensuring financial stability in the country and is inter alia, responsible for monetary policy and supervising the country's remaining exchange rate. Exchange Control is primarily governed by section 9 of the Currency and Exchange Act, 9 of 1933 and read with the Exchange Control Regulations (The "Regulations"). The validity of the Regulations is not in dispute.
- [15] The Regulations prohibit various transactions inter alia the transfer of money from the Republic to any person outside the Republic unless within the ambit of the Regulations. The Regulations authorises the SARB, after a blocking order was issued, to take further steps. The Governor or Deputy Governor, if satisfied that contraventions indeed occurred, may attach and ultimately declare the attached money forfeit to the State. In this matter there is no evidence to indicate any progress since the blocking order was issued to satisfy the SARB to take further steps. No reasons are given for the "delay"

in the progress or the actual progress of the investigation itself. This in my view militates against the rights of the Applicants and all creditors of the insolvent estate.

- [16] Mr Malherbe, employed by the SARB in the Financial Surveillance Department, received information during the beginning of 2017 of alleged contraventions and this information is confidential and protected from disclosure in terms of section 33 of the Reserve Bank Act. He explained that, after receiving such information and, if on reasonable grounds the official suspects a person to be involved in a contravention of any of the Regulations, a functionary (like himself), the official is empowered to issue an order in terms of the provisions of Regulation 22A and/or 22C, prohibiting the suspected person from withdrawing any money standing to the credit of a bank account in question. Such an order is generally referred to as a "blocking order". The difference between Regulation 22A and 22C is that in the first instance so-called "tainted" money is the subject of the blocking order while under Regulation 22C untainted money is blocked. In this matter Malherbe issued a blocking order in terms of Regulation 22A & 22C. The reasonable inference is that he was not sure whether the matter involved tainted or untainted monies.
- [17] The Governor or Deputy Governor, if satisfied that the contravention indeed occurred, may declare the attached money forfeited to the State in terms of Regulation 228. As indicated supra no progress is reported on the investigation at present.
- [18] Malherbe stated that after he received information in this matter concerning the alleged conduct several entities, including R & R Traders, an investigation commenced and he concluded that there was a reasonable suspicion that R & R Traders and other persons/entities had been involved in a scheme involving the illicit transfer of funds of more than R 700 million. No further detail or information in placed before the court.
- [19] He however relies on the provisions of section 33 of the Reserve Bank Act not to disclose further details of the alleged contraventions and the persons involved. This was a bone of contention on behalf of the Applicants that the information relied upon by Malherbe was mostly hearsay and should be struck. During arguments Mr Puchrin indicated that the Applicants no longer persist with the striking application of the alleged hearsay evidence, but that the court should be mindful

of the value thereof. The evidence was about the alleged scheme involving R & R Traders (and for that matter the insolvent).

THE SCHEME:

- [20] According to Malherbe, a central feeder account held at ABC Bank in the name of s Close Corporation ("Entity 1") was mainly funded by transfers from six other South African entities that held accounts with ABC Bank. He refers to these six accounts as the funder accounts. These accounts were funded by large cash deposits made by several depositors all over the Republic into the accounts of at least three of these entities and inter-account transfers between the six South African entities. Malherbe used pseudonyms referring to the entities involved and maintains that the provisions of section 33 of the Reserve Bank Act prohibit him from disclosing the identities of the entities.

- [21] The money in the account of Entity 1 was almost immediately distributed to the accounts of at least 26 other South African persons ('the forex transferring entities') managed from a central electronic banking IP address by a Mr T.
- [22] The money was then transferred from the accounts of the various forex transferring entities as foreign exchange to various bank accounts mainly in China and Hong Kong as purported pre-payments for goods ostensibly imported or to be imported into South Africa. Documentation submitted to authorised dealers in support of applications to transfer foreign currency was falsified or contained false or incorrect statements. Payments made in favour of the same offshore beneficiaries but categorised differently. None of this was placed before the court.
- [23] Malherbe avers that insufficient goods had been imported within the prescribed period in Regulation
12. Goods to the value of R 78,4 million was received in the Republic but that R & R Traders transferred approximately R201 million abroad since June 2016. This is but one of the vague allegations made by Malherbe without any proof to substantiate it. Malherbe in my view did not satisfactory explain why he formed a suspicion that the forex transferring entities were collecting agent s. It ought to be remembered that the officer imposing a blocking order should have a reasonable suspicion of the alleged contravention of the Regulations before issuing a blocking order. He could have exposed some of the findings he made during the investigation that would have shed more light on his evidence.
- [24] Mr Puckrin on behalf of the Applicants argued that this reliance on section 33 was wrong and made it almost impossible for the Applicants to respond to. I have doubts whether on the evidence of Malherbe, covered with a secret veil to preserve it; a reasonable suspicion can be inferred from his evidence. If the argument on behalf of the First Respondent is correct, it may well result in an ambush to which the Applicant has almost no defence. In my view the position with regard to section 33 ought to be that a person in the situation as Malherbe should place the necessary information before the court in the

affidavit from the start of proceedings and not to wait for the court to make a specific ruling for disclosure thereof. It will be untenable and result in trial by ambush if a party litigate in this way and wait for a court to direct disclosure of information. To litigate like this would not be in the spirit of the Constitution of a fair hearing.

THE SEQUESTRATION ORDER:

- [25] The estate of Mr Bharat (the insolvent) was provisionally sequestrated on 20 June 2017 in this court after the South African Revenue Services (SARS) after obtaining a civil judgement against the Insolvent for R 44 360 076,59 in the Johannesburg High Court during March 2015. The final sequestration order was granted on 5 March

2018. The effective date of the sequestration for all purposes is 20 June 2017 in terms of section 2 of the Insolvency Act.

THE "BLOCKING" ORDER:

[26] The applicants were appointed the trustees of the insolvent estate and during the performance of their duties it came to their knowledge that the insolvent (Bhorat), trading as R & T Traders and Brokers, held two accounts with the second respondent (formally the Bank of Athens), namely account numbers 30000001640 and 20000441617.

[27] The blocking order was issued by Malherbe. The order was issued on 15 June 2017 with regard to the two bank accounts held by the Second Respondent standing to the credit of the Insolvent. The two amounts blocked was for R 13 132 887, 98 held in account number 30000001640 and R 1868 955, 05 in account number [...].

DOES THE CLAIM TO THE FUNDS "VEST" IN THE TRUSTEES?

[28] In terms of section 20(1){a) of the Insolvency Act, one of the effects of the sequestration of the estate of an insolvent is to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and upon appointment, to vest in the trustee.

[29] One of the functions of the trustee is to deal with the estate and to administer the estate in relation to the property of the estate. Subject to certain exceptions, in terms of section 20(2) (a) and (b) of the Insolvency Act, an insolvent estate comprises all property, movable and immovable, owned by the insolvent at the date of sequestration, and all property acquired by him during sequestration. Property is defined in section 2 of the Insolvency Act situated within the Republic and includes contingent interests in property other than the contingent interest of a fideicommissary heir or legatee.

[30] In terms of section 20(2) the estate of the insolvent shall include all property of the insolvent at the date of sequestration or proceeds thereof which are in the hands of a sheriff or messenger under a writ of attachment.

[31] If at the date of the sequestration, the insolvent is in possession or in control of property that he does not own, that property will not be included in the insolvent estate. In *Rutgen v Thiergen* 1962(3) SA 737 A at 744 A the court held that if a trustee contends such ownership and wishes to vindicate the property, the trustee will carry the onus of proving the title of the property.

[32] Monies fall within the definition of movable property and will be included in a debtor's insolvent estate. See *Land en Landbou Bank van Suid-Afrika v Joubert* 1982 (3) SA 643 C at 653 and *Fev N O v Van der Westhuizen* 2005 (2) SA 236 C with regard to monies unlawfully obtained. Monies deposited into a banking account become the property of the bank by virtue of commixtio but the resulting credit belongs to the customer. See *S v Kearney* 1964

- 92) SA 495 A at 502H•S03A. A similar view was held in *The Trustees of the Insolvent Estate of GE J Whitehead v I J A Dumas and Absa Bank LTD* (323/120 [2013] ZASCA 19 920 March 2013) par [13] and [15]. Under ordinary circumstances the credit in the bank accounts will fall in the insolvent estate of the insolvent. Taking into account the maxim of expression *unius est exclusio alterius*, there is no provision in the Regulations providing that "frozen" funds do not fall within to be dealt with under the insolvency laws. See *CSARS v Van der Merwe* NO 2017 (2) All SA 335 SCA [22] & [26].
- [33] The First Respondent contends that the monies do not fall into the insolvent estate for the following reasons:
- (a) The monies was deposited into the insolvent's banking account in his capacity as agent; and
 - (b) The insolvent obtained the money through fraud.
- [34] It is clear from *South African Reserve Bank v ACE Currency Exchange(Pty) Ltd* 2014 JDR 2106 {GP} at
- [13] 7 [148) that "a blocking order does not deprive an account holder of possession of or its contractual claim against the bank in respect of the money standing to the credit in the account and when the blocking order is cancelled, uplifted or lapses, the account holder can then proceed to deal with the money ..." if this is correct, the effect of a blocking order is only to prevent the account holder to deal with the money in the account while the blocking order is in force.
- [35] It is only when a credit in the account was obtained by theft or fraud, or erroneously paid into the account that the client will have no claim against the bank for that money. See *Nissan South Africa (Pty) Ltd v Maritz* NO 2005 (1) SA 441 SCA at 448-449. The necessary proof is lacking in this matter.
- [36] The First Respondent argues that the monies blocked do not vest in the trustees as it is the fruit of either theft or fraudulent action. There are only vague unsubstantiated allegations in this regard and no proof of any kind was placed before the court. As indicated supra, Malherbe's reliance on section 33 in my view is not correct and will result in trial by ambush. It is not the duty of the court to indirectly ensure that all relevant evidence is placed before the court. It is unsatisfactory that after almost three years the investigation is not finalised and no reasonable time frame is stipulated for the completion of the investigation. It is not the duty of the trustees to gather the "outstanding" evidence was suggested on behalf of the First Respondent.
- [37] In light of the above I am satisfied that the Applicants made out a case that the monies blocked in the two accounts indeed vest in the Trustees of the insolvent estate of Bhorat. The blocking order only prohibits the trustees to deal with the money in accordance to the Insolvency Act and the *concursum creditorum*. In terms of *Walker v Syfret* 1911 AD 141 the purpose of the Insolvency Act is to ensure a due distribution of assets among creditors in order of their preference. The contention of the Applicants is that SARS has a preferent

claim of R 44 360 076, 59 in terms of section 101 against the insolvent estate. I am also of the view that the First Respondent failed to prove that Bharat received the monies as an agent or that there was any fraud involved in obtaining the monies.

PROPERTY EXCLUDED FROM THE INSOLVENT ESTATE:

[38] The general rule is that all the property of the insolvent on the effective date vests in the Master and after appointment, in the trustee(s) of the insolvent estate. There is certain property excluded from the insolvent estate, either by the Insolvency Act or by other statutes. It is not necessary for purposes of this judgement to venture into the exclusions thereof in the Insolvency Act (sections 23· remuneration for work done; pensions; compensation for personal injuries; section 82(6) - wearing apparel, bedding etc;).

[39] I here are other statutory exclusions providing for excluding of property from the insolvent estate. Examples are as follows:

- (a) Section 10 of the Admiralty Jurisdiction Regulations read with section 11 (13) of such act;
- (b) Section 27(1) of the Securities Services Act, 36 of 2004;
- (c) Section 1(1) of the Friendly Societies Act, 25 of 1956;
- (d) Various sections in the Long-Term Insurance Act, 52 of 1998;
- (e) Various sections in the General Pensions Act, 29 of 1979;
- (f) Section 78(7) of the now repealed Attorneys Act, 53 of 1979;
- (g) Chapter 1 of the Matrimonial Property Act, 88 Of 1984;
- (h) Compensation payable under the Occupational Injuries and Diseases Act, 130 of 1994;
- (j) Unemployment Insurance Benefits;
- (k) Section 35(1) of the Prevention of Organised Crime Act, 121 of 1998 (POCA.)

[40] In each of the above mentioned statutes the legislator included exclusion clauses. With reference to POCA, monies subject to a restraint order in terms of section 26 of POCA, is specifically excluded from an insolvent estate. The situation under POCA in my view is similar to Regulation 22A & C where tainted or untainted monies under a reasonable suspicion of contravening the Regulations, is at stake but for no excluding provision in the Regulations. I would have thought that the legislator would have similarly included an exception clause to leave no uncertainty . in my view the Regulations should contain similar exclusions as in the other statutes, particular as in section 35 of POCA to v.mrr3nt the desired outcome. To argue that monies subject to a blocking order do not vest in the trustee(s) in the absence of an exclusion provision, is not convincing and should be rejected. It is not for the court to read into Regulations what is not included. There is no ambiguity with regard to the Regulations and the argument on behalf of the First Respondent cannot succeed.

[41] The Applicants relied upon *CSARS v Van der Merwe* supra where the issue was whether a statutory lien to the benefit of SARS disentitled the liquidators to claim possession of goods in custody of SARS until tax had been paid on such goods. The court held in [22] "There is nothing in either the Customs Act or the Insolvency Act which expressly provides that goods subject to a lien in favour of SARS do not fall to be dealt with under the laws on insolvency. This is to be contrasted with section 10 of the Admiralty Jurisdiction Act which excludes the vesting of certain property in the trustee on insolvency...". This favours the view supra that a blocking order does not exclude the vesting of property in the trustee(s) in this instance.

RELIEF SOUGHT (REVIEW OR DECLARATORY ORDER):

[42] The First Respondent argued that the Applicants relief sought is not competent in that the application is not brought in terms of PAJA (Promotion of Administrative Justice; Act 3 of 2000. Before PAJA was enacted, there were various views regarding the review process of administrative action, whether via the inherent jurisdiction of the courts or that the ultra vires doctrine justified review. Since the inception of PAJA in 2000, some arguments were that administrative review can only be done in terms of PAJA. De Ville, *Judicial review of Administrative Action in South Africa* p5 opines that PAJA does not exhaustively regulate the review of acts of the executive branch of state. Legislation often makes express provision for an appeal or review to the courts. Such review and appeal powers remain in a certain sense unaffected by PAJA. Neither the Constitution nor PAJA preclude the Applicants to approach the court for the relief sought. The amended Regulations came into force on 8 June 2012. Should the drafter of the Regulations have viewed the provisions of Regulation 220 to be superfluous, it could have deleted Regulation 220. The rule of interpretation is to give each word (clause) its normal meaning.

[43] If one read Regulation 22D it is clear that the Regulation provides for the review of actions in connection with attachment and forfeiture of certain money or goods. The Applicants do not seek to have the original blocking reviewed, but a declaratory order that the monies vests in the trustees. This is internal remedy to be exhausted in the ordinary way before the court is approached on review in terms of PAJA.

[44] The blocking order may also be lifted by SARB itself if the circumstances justifies the lifting thereof. It would be somewhat different should the Governor or Deputy Governor of SARB declared the monies forfeit to the state. That would be a final determination not reversible by the officials involved. This is not the case before the court.

[45] I am therefore of the view that the relief sought is competent and the following order is made:

1. The application is granted (prayers 1 to 4 thereof);
2. The draft order "XYZ" granted on 23 April 2020 (extending the blocking order as set out and annexed hereto), is incorporated hereby.

J HOLLAND-MUTER

Acting Judge of the Pretoria High Court

Date heard: 23 April 2020

Date of Judgement: 21 May 2020

(On Case-Lines)

TO: TINTINGERS INCORPORATED (For Applicants)

Adv C Puckrin SC

Adv M Coetzee

E-mail: stintinger@tintingers.co.za

lwillemse@tintingers.co.za

sharon@lawcircle.co.za or ronel@lawcircle.co.za

miluska@lawcircle.co.za

TO: GILDENHUYS MALATJI INC (For First Respondent)

Adv W Luderitz SC

Adv E Muller

Adv J Hlongwane

E-mail: adutoit@gminc.co.za

wluderitz@gmail.com

emuller@clubadvocates.co.za

FASKEN ATTORNEYS (c/o SAVAGE JOOSTE & ADAMS)(Second Respondent) E-mail:
hspies@fasken.com

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