

SOUTH AFRICA / JUDGMENT

Nedbank Limited v Houtbosplaas (Pty) Ltd and Another (68087/2017) [2020] ZAGPPHC 220 (17 March 2020) [2020] ZAGPPHC 220

COURT

North Gauteng High Court, Pretoria

BEFORE

S P Mothle

CASE / FILE NUMBER

68087/2017

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IN THE HIGH COURT OF SOUTH
AFRICA
GAUTENG DIVISION, PRETORIA
(1)

REPORTABLE:

YES/NO
(2)
OF
INTEREST TO OTHER JUDGES: YES/NO
(3)
REVISED.
CASE
NUMBER: 68087/2017
17/3/2020
In

the matter between:

NEDBANK
LIMITED
Applicant
and
HOUTBOSPLAAS
(PTY)
LTD
1ST
Respondent
TBS
ALPHA BELEGGINGS (PTY)
LTD
2nd
Respondent

JUDGMENT**MOTHLE J**

1. This is an application for leave to appeal against the whole of the

judgment

and orders delivered by this Court on 12 December 2019. The applicant (Nedbank), was the respondent in the main application and

the respondents in this application, (the two companies being account holders with Nedbank) were the applicants in the main application.

2. The dispute between the parties arise from the decision by Nedbank to place restrictions of access by the respondents to their bank accounts. According to Nedbank, the reason for placing the restriction of access to the accounts was to compel the respondents to provide information of its shareholders for verification purposes as required by the provisions of the Financial Intelligence Centre Act, 38 of 2001 ('FICA'), read with the Regulations published in terms of FICA, on 20 December 2002.

3. This Court found in the main judgment that in placing the restriction on the accounts, Nedbank acted unlawfully. The respondents' claims for damages incurred as a result of loss of interests due to monies

invested, were upheld. This application for leave to appeal is against the main judgment and orders.

4. Nedbank essentially advances two grounds of appeal, namely, that this Court erred in finding that the bank's interpretation of Regulation 7(f)(ii) was incorrect and that the Court relied on the provision of section 218(4) of FICA, which was not in operation at the time the respondents' bank accounts were restricted. Both grounds turn on the interpretation Nedbank attached to the relevant text in FICA and the Regulations, as a justification to restrict the access to the respondents' bank accounts.

5. Before dealing with the two grounds listed in support of the application, it is apposite to refer to the burden of proof required to be discharged, in order for one to succeed in an application for leave

to appeal. This matter was debated during the hearing of this application.

6. It is trite that in terms of Section 17(1) of the Superior Court Act 10 of 2013, the grounds on which leave to appeal may be granted are the following:

"17. Leave to appeal

(1) Leave to appeal may only be given where the Judge or Judges concerned are of the opinion that:

(a) (i) The appeal would have reasonable prospect of success; or

(ii) there is some other reason why the appeal should be heard, including conflicting judgments on the matter under consideration; ..."

7. Bertelsmann J held in *Mont Cheveaux Trust v Goosen* 2014 JDR 3225 (LCC) that Section 17(1)(a)(i) of the Superior Courts Act postulates a higher test than the one that used to be applicable at common law. This higher test is defined by the use of the word "would" in the Superior Court Act. The Judge had this to say in this regard:

"It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new (Superior Courts) Act. The former test whether leave to appeal should be granted was that a reasonable prospect that another court might come to a different conclusion. ...

The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against." My own emphasis.

8. In this application, therefore, Nedbank must prove, on a balance of probability that the envisaged appeal would have reasonable prospect of success.

9. At the heart of this matter, is the contention by the respondents that Nedbank's conduct in restricting access to the bank accounts is not authorized by FICA and thus it is unlawful in that it results in an intrusion to the right to privacy, as protected by the Constitution of the Republic of South Africa Act, 1996.

10. The background facts are that in 2017 Nedbank requested information concerning the identity of the shareholders of the two respondent companies, as required by Regulation 7(f)(ii) of the published regulations in terms of FICA. The shareholders of these companies are family trusts. This specific Regulation 7(f)(ii), provides that a financial institution is obligated to obtain information on the identity of a Trust holding 25% or more of the voting rights at a general meeting of the company concerned.

11. The Court, with reference to the percentage shareholding of the Trusts in the two companies, and considering the memoranda of the companies, concluded that "in determining the voting rights exercised by each trust shareholder in a general meeting, one has to include preferential shares held by such Trust and in essence, each Trust will in fact have 22% of the voting rights. Nedbank's contention is that this Court erred in having recourse to the memorandum of incorporation of each of these two companies in order to determine the voting rights in the general meeting.

12. This ground of appeal has no merit, as it is inconceivable how a determination of voting rights of company shareholders can be made without reference to the provisions of the Memorandum of Incorporation (MOI). Voting rights and procedures are dealt with in the MOI of a company. Nedbank's computation of the voting rights of the two companies inexplicably excludes the voting rights of the preferential shareholders.
13. Nedbank further contends that the limit imposed on preferential shareholders' rights not to vote in a decision to dispose of assets of a company, implies that the preferential shareholders have no voting rights in a general meeting, within the meaning of Regulation 7(f)(ii). The Regulation does not contain such language and even by any strained

interpretation, one cannot ascribe such meaning to it. This ground of leave to appeal has no support in law and it is thus unmeritorious.

14. Turning to the second ground of appeal, Nedbank submitted that section 218(4) of FICA was introduced by an amendment that took effect after the restriction had been imposed on the respondents' bank accounts and thus the Court erred in relying on this section for its decision.
15. It is correct that the amendment introducing section 21B came by way of section 10 of Act 1 of 2017, which took effect on 2 October 2017, after the restriction to access the bank accounts had been removed in July 2017. The amendment introduced a new text to the effect that financial institutions are obligated to establish the address of the offices of the Master of the High Court.
16. Prior to the amendment, the financial institutions relied on Regulation 15 which provided that the information concerning the identity of the trust shareholders must be obtained from the natural person, in this case the companies. There is no such provision in the FICA. Thus Nedbank's contention is that Regulation 15 requires financial institutions to obtain information on the identity of trust shareholders "only" from the company. As it shall be demonstrated below, this contention is without merit. It is the view of this Court that the new text appears to have been inserted purposely to point to the official source from which information to verify or prove the identity of a shareholder Trust may be obtained, namely, the offices of the Master of the High Court.
17. Nedbank's contention thus ignores two issues. Firstly, this case was decided on the interpretation of Regulation 7(f)(ii) as stated in paragraph 18, 19 and 23 of the judgment, and not on the basis of the provisions of section 218(4) of FICA. In addition, no party, either on the papers or in argument, raised the question of section 218(4) of FICA as a matter to be decided by this Court. Reference in the judgment to section 218(4) of FICA was therefore in obiter, with the view to illustrate that Nedbank could and should have had recourse to other official sources such as the Masters of the High Court offices, to verify the text of the "illegible" Trust document that Judge van Dijkhorst had allegedly provided. In this regard, the judgment also made further references to other official sources of information not referred to in the Regulations, by way of example. The point made in the judgment is that

nothing prevented Nedbank, not even Regulation 15, to consult these official sources of information for verification purposes, rather than resort to placing restrictions on the bank accounts of their customers.

18. Thus, it was the interpretation attached by the Court to Regulation 7(f)(ii) as stated in paragraphs 10 to 13 of this judgment, that was dispositive of the matter, and not section 218(4) of FICA as contended by Nedbank.
19. Secondly, and as already stated, prior to the amendment that introduced section 21B(4) of FICA, the statute made no reference to the source from which the proof of identity may be found. This was introduced by Regulation 15, which is a subordinate legislation. The Regulation cannot confer more rights to financial institutions to demand the identity proof only from the natural persons and conversely more obligations on the natural persons as the only source to furnish such proof on demand, as contended by Nedbank in argument.
20. Thus, even prior to the amendment, any reasonable interpretation of clause Regulation 15 could not have been restrictive. The Regulation 15 could not be construed to mean that a financial institution is prohibited to consult official sources of information to verify the identity of a customer or shareholder. In particular, in instances where the document purporting to prove the identity of the customer or shareholder appears to have been forged or "is illegible" as alleged by Nedbank in this case, only the official sources such as the companies' office for identity of companies, the Master of the High Court for identity of Trusts or Department of Home Affairs for identity of persons, would be in a position to verify the authenticity of such proof of identity from the original source documents.
21. Nedbank instead, resorted to drastic, stringent and unlawful measures, by prohibiting the companies access to their bank accounts, as a means to compel demand of documents in order to verify the the identity of the particular Trust. Apart from being unable to access monies in their bank accounts, the restriction had the effect that the companies were deprived of the interests they would have otherwise earned on their investments, as part of the normal banking terms and conditions.
22. The subsequent amendment of section 21 of FICA thus makes the point that even prior to its enactment, a court of law would have favoured an interpretation of Regulation 15 that permits financial institutions to approach any official sources for verification of proof of identities, instead of imposing stringent, drastic and unlawful measures to restrict access to the bank account.
23. In conclusion, in paragraph 1 of the main judgment, it is recorded that the two respondents had been conducting business with Nedbank for several years before the enactment of FICA in 2001 and certainly before the restrictions on the accounts were effected in
2017. The companies were known to Nedbank as envisaged in Regulation 7(g) and in 2017 or at any time before, there was no evidence that would have caused suspicion that the two companies were involved in

money laundering or any unlawful activity, which is the mischief FICA intends to address. There really were no compelling reasons for Nedbank to resort to stringent measures to compel submission of information on identity verification of the Trust.

24. The grounds raised in the application for leave to appeal are without merit and therefore there would be no reasonable prospect of success on appeal. This application must therefore fail.

25. In the premises it is ordered that:

(i) The application for Leave to appeal the judgment and order in this matter

is refused.

(ii) The applicants are ordered to pay the respondents the costs of this application including costs of counsel.

JUDGE S P MOTHLE

Judge of the High Court.

Gauteng Division, Pretoria.

17 March 2020.

Advocate Kate Hofmeyr

Counsel for the applicant

Advocate CA Da Silva SC

Counsel for the Respondents

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