

SOUTH AFRICA / JUDGMENT

Odendaal v South African Reserve Bank (2271/2022) [2023] ZAWCHC 160 (6 July 2023)

[2023] ZAWCHC 160

COURT

Western Cape High Court, Cape Town

BEFORE

Wille

CASE / FILE NUMBER

2271/2022

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FLYNOTES:

ADMINISTRATIVE – Review – Subsidiarity
principle – Reserve Bank blocking funds – Applicant
alleges
breach of her constitutional rights – Right to
healthcare services, sufficient food and water, and social
security
– Administrative action may not be reviewed
directly based on section 33 of the Constitution, but must be
challenged
on review regarding PAJA – With a review
application at her disposal, applicant cannot seek relief based on
an alleged
infringement of her constitutional rights –
Promotion of Administrative Justice Act 3 of 2000.
IN
THE HIGH COURT OF SOUTH AFRICA
(WESTERN
CAPE DIVISION, CAPE TOWN)
Case
Number: 2271 / 2022
In

the matter between:	BERDINE ODENDAAL Applicant And THE SOUTH AFRICAN RESERVE BANK Respondent
Coram:	Wille, J
Heard:	8 June 2023
Delivered:	6 July 2023

JUDGMENT

WILLE, J

Introduction:

- [1] This is an application in which the applicant seeks, among other things, mandatory interdicts against the respondent for the specific performance of alleged undertakings given by the respondent.
- [2] The applicant seeks an order directing the respondent to permit her to receive payment of her reasonable legal fees and an amount of R150,000.00 per month from certain funds subject to an attachment under 'blocking orders' issued at the instance of the respondent. The relief is sought based on an alleged agreement between the parties and relying on an alleged breach of the applicant's constitutional rights.

Overview:

- [3] The respondent caused certain funds ostensibly belonging to the applicant to be 'blocked' in terms of specific Exchange Control Regulations.[1] The primary purpose of these regulations is to: (a) effectively control foreign exchange[2]; (b) to protect the economy against the ebb and flow of capital[3], and (c) to avoid interference with the efficient operation of the financial system of our country.[4]
- [4] By operation of pure logic, these regulations permit broad discretionary powers to the respondent to issue blocking orders as it deems fit. The respondent may also release money or goods from any attachment or blocking order before the expiry of such order within thirty-six months. When evaluating any request for the release of these funds there are, by operation of law, competing interests at stake.

- [5] In the applicant's case, these competing interests are primarily the applicant's right to healthcare services, sufficient food and water, and social security.[5] By contrast, there undoubtedly is a public interest in protecting our currency and the economy of our country through effective exchange controls.
- [6] Put another way, it is not in the public interest to allow any person to benefit from exchange control contraventions in the absence of justifiable and compelling circumstances for the release of any such blocked funds under these regulations. There is no closed list of relevant factors that must be considered in this connection, and they may include:
- (a) the financial position of the affected person;
 - (b) the hardship that the affected person may suffer; (c) the sources of funds available to defray basic living expenses, and (d) the seriousness of the alleged contraventions of the regulations.

Context:

- [7] After the 'Steinhoff' corporate scandal was exposed, one of the companies that ostensibly benefitted from the accounting irregularities at the instance of Steinhoff was Mayfair Speculators, a South African company ostensibly controlled by Mr Jooste. It is common cause that the applicant received about R60 million from Mayfair Speculators.
- [8] Thus, the respondent suspected that the applicant has benefitted from contraventions of the Exchange Control Regulations in which Mr Jooste and Mayfair Speculators were involved and acted accordingly. This then resulted, among other things, in the issuing of specific blocking orders at the instance of the respondent. The applicant had also acquired several high-value immovable properties in the Val de Vie Estate, motor vehicles and other financial instruments. The respondent also ordered the attachment of several immovable properties and motor vehicles registered in the applicant's name.[6]
- [9] After that, the respondent consented to the registration of transfer of some of these specific immovable properties on the condition that the proceeds remained subject to a blocking order and held in trust by a stakeholder. In addition, the respondent issued blocking orders in accordance with the regulations regarding certain funds standing to the applicant's

credit in four of her discrete banking accounts. The applicant does not challenge the validity of these blocking orders.

- [10] Following this, the applicant's attorneys requested the respondent to allow her:

'...access [to all] the [moneys] in her [blocked] bank accounts in order to cover her fixed monthly expenses and living costs, as well as her legal costs...'

[11] After that, the respondent requested the applicant to provide a breakdown of her current income and her fixed monthly expenses, reasonable living expenses and legal costs. The applicant provided this to the respondent and indicated her anticipated legal expenses and current income. The amount that the applicant required to be released was the sum of R150,000.00 per month. Significantly, R80,000.00 of this amount was related to the upkeep of the applicant's horses. The respondent countered as follows to this proposal by the applicant:

'...With regard to your client's purported monthly expenses and her estimated legal fees, please take cognisance of the following:

- o Our client agrees that your client's reasonable legal fees may be paid from the funds available in her blocked bank accounts upon receipt and approval by us of tax invoice(s) as deemed necessary, and

- o Your client's current income appears to be sufficient to cover her essential monthly expenses....'

[12] The applicant did not expressly accept or reject this proposal, and it seems she kept her options open. After that, the applicant communicated in the following terms with the respondent's attorneys, namely:

'...With regards to access to our client's Nedbank Account Number [X] (the Nedbank account), we are instructed as follows:

- o This is our client's primary transactional account, from which she pays the majority of her monthly living and other fixed expenses.

- o A balance in the amount of approximately R1,776,334.61 was secured in the Nedbank account at the time that the SARB attached same.

- o We request [i.e. propose] that the Nedbank account be released from attachment for our client to use same as the transactional account and attend to payments of inter alia her legal fees and other expenses. The balance in the Nedbank account should be sufficient for current purposes. If the amount is depleted before this matter is resolved, our client shall submit another formal request to the SARB...'

Consideration:

[13] The respondent contends that it has been amenable to releasing some funds to the applicant in terms of an agreement. They say any agreement reached between them has since been lawfully cancelled. Thus, the respondent argues that the applicant has not established a clear right regarding any additional agreement and has pursued no review application in this connection. They say this is because of their communications with the applicant. The respondent maintains that the subsequent correspondence with the applicant amounted in law to no more and no less than a counteroffer, which was spelt out in their correspondence in the following terms:

‘...Our client is prepared to consent to the upliftment of the blocking order placed on the withdrawal of funds from your client’s Nedbank account with account number [X] to enable her to transact therefrom on the following terms:

- o the current balance on the account is transferred to another bank account to be opened at Nedbank on behalf and in the name of your client. Your client is requested to open a new bank account and provide us with the account particulars.

- o an amount of R150,000.00 will be released from this newly opened bank account to your client each month for all the reasonable expenses of your client, and

- o the remaining funds in the new bank account will be subject to the blocking order issued by our client....’

[14] The response to this communication by the applicant is significant and bears scrutiny. The applicant responded in the following terms:

‘...With respect to the “allowance” granted to our client, our client has opened another account with Nedbank with account number [Y]...’

[15] Most significantly, in the same letter, the applicant requested an additional amount of R89,067.50 to be released regarding her legal fees relating to a discrete dispute with SARS.

[16] Following these communications, the funds standing to the credit in the applicant’s blocked Nedbank account were transferred into the separate Nedbank account she had opened, and this account was made subject to the terms of the blocking order. An amount of R150,000.00 was released to her from this account by transfer to her transactional account at Nedbank, and after that, the same amount of R150,000.00 was released to her every month in terms of the agreement struck between the parties.

[17] In addition, an amount of R89,067.50 was also released to the applicant following her request. This amount did not relate to her legal fees in the present dispute with the respondent. More requests followed for the payment of insurance costs and the repayment of R100,000.00 regarding specific occupational interest that was inadvertently deposited into the applicant’s blocked Nedbank account.

[18] In response, the respondent agreed to release additional amounts to the applicant to the sum of R276,365.49 on a highly exceptional and once-off basis to allow her to defray expenses concerning her insurance and repay to her the occupational interest that a lessee paid into her blocked Nedbank account in error. Despite this agreement with the respondent and the respondent releasing R150,000.00 per month, the applicant continued requesting the release of additional funds to her.[7] Further correspondence followed, and it was again confirmed that the respondent had agreed to a monthly release of R150,000.00 for ‘all the reasonable expenses’ of the applicant. It is argued that this amount included her reasonable legal expenses. The applicant persisted with her requests, and the respondent once more confirmed that it was not amenable to agree to any further requests for legal fees. The

respondent again emphasized that the R150,000.00 per month for reasonable expenses, included the applicant's reasonable legal expenses.

[19] From July 2021 to March 2022, an amount of R150,000.00 per month was released to the applicant, yet the applicant persisted with her requests for additional funds, primarily for legal expenses. On 4 February 2022, the applicant launched this application seeking an order directing the respondent to pay her reasonable legal fees from her blocked account in addition to the R150,000.00 per month as agreed. The applicant demanded this payment as of right and not as a request for further payments at the respondent's discretion.

[20] Thus, the applicant insisted on the specific performance of an alleged agreement term. The respondent contends this was contrary to the terms of the agreement concluded with the applicant. Again, further correspondence followed in which the respondent informed the applicant that her subsequent conduct constituted a repudiation of the agreement. The letter from the respondent indicated as follows:

‘...[The] application constitutes a repudiation of the agreement entered into between [the respondent] in terms of which [it] would release R150,000.00 per month for [the applicant's] reasonable expenses.

o The repudiation of the agreement is accepted by [the respondent], and it hereby cancels that agreement.

o Going forward, [the respondent] will only consider and subsequently release any funds for the reasonable expenses of your client after the presentation of sufficient proof that the alleged expense has been incurred, and that is an expense that justifies the release of funds...’

[21] By this time, the applicant had already received funds of over R1.7 million originating from her blocked Nedbank account and the account was nearly depleted. The closing balance was about R158,563.33. Following the repudiation at the instance of the applicant, which the respondent accepted, the applicant amended her notice of motion to now also seek payment of the initially agreed monthly amount in the sum of R150,000.00. To advance matters further, the respondent requested that the applicant provide the respondent with an updated list of her monthly income and her balance sheet. Also, the applicant was invited to attach this updated list of her monthly income and her balance sheet to her replying affidavit.

[22] No such response or documentation was attached to the applicant's replying affidavit, and the recent financial position of the applicant is absent from the papers that were presented before me at the hearing of the matter. The core dispute is whether the respondent validly cancelled the agreement between them, and if it was not, whether the applicant enjoys a contractual or another legal right to payment of monies to cover her reasonable legal fees.

[23] Repudiation occurs by an unequivocal intimation, by word or conduct, and without lawful excuse, that all or some of the obligations arising from the agreement will not be performed according to their tenor. The test is objective, and the matter is approached from the point

of the innocent party.[8] It has been authoritatively established that a bona fide insistence on the performance of an incorrect interpretation of a material term of a contract may amount to the repudiation of a contract.[9] A party's insistence on a contrary interpretation of an agreement may constitute a repudiation. The interpretation of a contract is to be approached holistically considering the text, context and purpose of the contract.[10]

- [24] According to the applicant, the relief sought for her reasonable legal expenses involves a disputed agreement and the remaining relief concerns an agreement between the parties. Put another way, the applicant claims payment of her reasonable legal fees in terms of one part of a proposal which specifically excluded any contribution towards her monthly expenses and still, the applicant seeks payment of R150,000.00 according to an undertaking given to her by the respondent.
- [25] The applicant's position must be considered against the canvass of the correspondence at this time. The respondent's proposal suggested reasonable legal fees and no contribution towards monthly expenses. This was the 'package deal' presented to the applicant by the respondent. This package deal was subsequently rejected as the applicant suggested unblocking the Nedbank account to cover her legal fees and other expenses.
- [26] The respondent suggested the unblocking of the Nedbank account to allow it to be used as a transactional account with the transfer of the credit balance of about R1.7 million to a new account subject always to the terms of the blocking order and the release of R150,000.00 per month from the funds in the new blocked account to cover all the applicant's reasonable expenses.
- [27] Thus, the applicant's reasonable expenses must have included her legal fees. I say this because she had an income to cover her living expenses following the initial list she submitted to the respondent. Further, I view the undertaking only concerning the funds standing to her credit in her blocked Nedbank account [X] with an opening balance of R1,776,334.61. Shortly after the cancellation of the agreement, the closing balance in that account was R158,563.33.
- [28] The fact that the respondent reasonably and in the exercise of discretion subsequently decided to release a further amount of R89,067.50 (to be used by the applicant for her legal expenses incurred in respect of her dispute with SARS), as well as an amount of R276,365.49 (for insurance and occupational rent accidentally paid into her blocked account), does not detract from or in any way dilute the terms of the agreement. Put another way, this did not constitute an amendment to the terms of the agreement between the applicant and the respondent.
- [29] Thus, for more than a year, the respondent allowed the release of R150,000.00 per month to the applicant without releasing additional amounts regarding legal fees save for the ad hoc release of the two amounts referred to above. On a proper interpretation of the correspondence, it seems clear to me that the respondent: (a) agreed to the release of R150,000.00 per month to the applicant from the blocked Nedbank account to cover all her

reasonable expenses, inclusive of her legal expenses and, (b) on depletion of these funds the applicant would be required to submit a further request for release of funds from her other blocked accounts.[11]

[30] The respondent relies in the main on the jurisprudence of Highveld.[12] In Highveld, the court concluded as a general proposition that the seller's insistence on the terms of the disputed agreement amounted to a repudiation of the agreement. In Highveld, the seller unequivocally made it clear that he considered himself bound by the terms of the disputed agreement and not by the original agreement, which was binding on him. Thus, the seller repudiated the original agreement, and the purchaser validly cancelled it.[13]

[31] By way of application, the applicant insisted on terms inconsistent with the correct interpretation of the agreement by launching the present application and demanding payment of legal expenses in addition to the R150,000.00 monthly payment she received. Thus the applicant unequivocally indicated that she did not consider herself bound by the valid agreement, being the agreement on the terms contended for by the respondent.

[32] Objectively assessed, the applicant repudiated the agreement with the respondent even though the applicant may not subjectively have intended to repudiate the agreement. In these circumstances, the applicant provided an opening salient for the respondent to cancel the agreement, which it did. Thus, the contractual obligation to release an amount of R150,000.00 per month to the applicant from the funds in the blocked Nedbank account was validly terminated by the respondent.

[33] Further, the respondent's decision to block the applicant's funds undoubtedly constitutes administrative action as contemplated in the Promotion of Administrative Justice Act.[14] In addition, any decision, under any further request by the applicant to release any of the blocked funds to her, also falls to constitute an administrative action on the part of the respondent. Thus, if the applicant disagrees with the respondent's

decisions following her requests, her appropriate remedy would be a review application under PAJA. This must be so because

administrative action may not be reviewed directly based on section 33 of the Constitution,[15] but must be challenged on review regarding PAJA.[16]

[34] This is consistent with the principle of subsidiarity that dictates that where legislation has been enacted to give effect to a constitutional right, initial recourse must be to that legislation rather than other possible constitutional remedies. Put another way, a litigant is not permitted to directly invoke a constitutional right when legislation has been enacted to give effect to that right.

- [35] A litigant must either challenge the constitutionality of the enacted legislation or rely upon it to make its case.[17] Thus, the applicant cannot directly rely on what she believes are constitutional remedies for her relief against the respondent but must vindicate her remedies through administrative action. With a review application at her disposal, there is no basis for the applicant to seek relief against the respondent based on an alleged infringement of her constitutional rights.
- [36] Finally, these blocking orders are due to expire due to the effluxion of time in less than a year unless an order of forfeiture is made before the expiry of three years from the date of the attachment or blocking order. Before any potential forfeiture is made, the applicant will be allowed to explain and make representations to the respondent why the funds or any part thereof ought not to be declared finally forfeited.
- [37] Despite the invitation extended to the applicant to make a full and frank disclosure in her replying affidavit of assets, income and expenses, she has elected not to do so. A complete and frank disclosure by the applicant may have put the respondent in a better position to make a more informed and considered decision on whether to exercise its discretion to release any other portions of the blocked funds.
- [38] Significantly, in her replying affidavit, the applicant confirmed that she had in the interim period received the repayment of a loan she had made to her brother. These monies were not subject to any attachment or blocking order and were not insubstantial.[18]
- [39] In all the circumstances of the matter, the following order is granted, namely that:
1. The application is dismissed.
 2. The applicant shall be liable for the costs of and incidental to the application (including the fees of senior counsel, where so employed) on the scale between party and party, as taxed or agreed.

E. D. WILLE

(Cape Town)

- [1] Regulations 22A to 22C of the Exchange Control Regulations (the ‘regulations’).
- [2] *Berzack v Nedcor Bank Ltd*
- [2001] JOL 7718 (A) at para 3.
- [3] *South African Reserve Bank v Shuttleworth* 2015
- (5) SA 146 (CC) at paras 53 and 54.
- [4] *South African Reserve Bank v Leathern* NO 2021 (5) SA 543 (SCA) at para 28.
- [5] This is terms of section 27 of the Constitution of the Republic of South Africa, 1996.

- [6] This was on 30 April 2021.
- [7] One such request related to a 'tax invoice' for legal fees that was not sequentially numbered and did not show the percentage, nor the amount of value added tax charged nor to be charged.
- [8] Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd
- [2000] ZASCA 82; 2001 (2) SA 284 (SCA) at paras 16 to 19.
- [9] Metalmil (Pty) Ltd v AECI Explosives and Chemicals Ltd
- [1994] ZASCA 96; 1994 (3) SA 673 (A) at 684 J – 685 G
- [10] University of Johannesburg v Auckland Park Theological Seminary 2021 (6) SA 1 (CC) at para 65.
- [11] This was clearly confirmed by way of correspondence from the applicant's attorneys.
- [12] Highveld 7 Properties 9 (Pty) Ltd v Bailes 1999
- (4) SA 1307 (SCA) at para 20 - 30.
- [13] Highveld 7 Properties at para 30.
- [14] The Promotion of Administrative Justice Act NO. 3 of 2000 ("PAJA").
- [15] The Constitution of the Republic of South Africa, 1996.
- [16] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs
- [2004] ZACC 15; 2004 (4) SA 490 (CC) at para 95.
- [17] Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd 2023 JDR 1120 (CC) at para 236.
- [18] On or about 19 October 2021 in the sum of R1,432,965.85.

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