

SOUTH AFRICA / JUDGMENT

Singh v South African Reserve Bank [2023] ZAGPPHC 112; 2020/35964 (20 February 2023)

[2023] ZAGPPHC 112

COURT

North Gauteng High Court, Pretoria

BEFORE

MNGQIBISA-THUSI

CASE / FILE NUMBER

2020/35964

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FLYNOTES:

RESERVE
BANK BLOCKING ORDER
BANKING
– Reserve bank – Blocking order – Suspicion of
exchange control contraventions – Reserve Bank
empowered to
put hold on untainted funds if it reasonably suspects that the
amount involved in contravention of regulations
might be higher –
Source of R80 million not plausibly explained – Application
to set aside blocking order dismissed
– Exchange Control
Regulations, regs 22A and C.
REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION, PRETORIA
Case
No: 2020/35964
(1)

REPORTABLE: NO
(2)
OF INTEREST TO OTHER JUDGES: NO
(3)
REVISED.

DATE: 20/02/23
In

the matter between: SURENDRA
SINGH
Applicant
and
SOUTH
AFRICAN RESERVE BANK
Respondent

JUDGMENT

MNGQIBISA-THUSI J

- [1] The applicant, Surendra Singh, seeks the review and setting aside of the decision of the respondent, the South African Reserve Bank (“the SARB”), made on 26 February 2020 to issue a blocking order in respect of an amount of R40, 000, 000.00 standing in credit in an account held in the name of the applicant at ABSA Bank number [...], and costs.
- [2] The applicant is a private individual who is an attorney and from what appears in the founding papers, a businessman involved in, inter alia, property development in Pietermaritzburg.
- [3] On 12 December 2019 the head office of Bidvest Bank (“Bidvest”) made a report to the Financial Surveillance Department (“FSD”) of the SARB concerning alleged transactions suspected to be in contravention of the Exchange Control Regulations (“the regulations”), involving the applicant’s current account held at ABSA Bank. According to the contents of the report, it appeared that several individuals were transferring money in amounts of R1 million into the applicant’s account at the Bank of Baroda in the United Kingdom. It appears that the individuals were remitting these funds using the single discretionary investment allowance as provided for in section B.4(A) of the Exchange Control Manual[1]. These funds were transferred from the applicant’s ABSA account to his Bidvest account and further transferred to his account in the United Kingdom.
- [4] In his founding affidavit, the applicant admits transferring a total amount of R17.5 million from his ABSA Bank account into his account held at the Bank of Baroda, UK.

- [5] As a result of the Bidvest report, Mr Ander Retief Malherbe (“Mr Malherbe”), a manager in the Compliance and Enforcement Division (“Compliance Division”) within the Financial Surveillance Department of the SARB and deponent to the SARB’s answering affidavit, requested Mr Eben Minnie, an investigator in the Compliance Division, to investigate the transactions in the applicant’s account.
- [6] On 13 December 2019 the SARB requested certain information from ABSA. On 20 December 2019, ABSA responded to the SARB’s request and informed the SARB about details of the applicant’s accounts, including a fixed deposit account in which an amount of approximately R20 million was held. This amount was transferred into the applicant’s account from the applicant’s account held at the State Bank of India on 27 August 2019. The applicant’s fixed deposit account also held an additional amount of R23,086,256.
- [7] On 26 February 2020, Mr Malherbe became aware of an email sent by Mr Lushendren Pather, head of the Prudential Authority to Mr Kuben Naidoo of the SARB which email reads as follows:

“The above matter relating to Surendra Singh and Associates refer.

As a result of the [Prudential Authority’s] investigation and enquiries, State Bank of India Johannesburg Branch (SBI) terminated its relationship with Surendra Singh and Associates (Singh) as it could not confirm the source of the funds. The funds of approximately R80m were moved to Singh’s ABSA Account.

Throughout the process ... was kept in the loop.

The ... just contacted me to advise that they have received reports that Singh is attempting to move funds offshore (to individual accounts) via Bidvest Bank. Bidvest has been co-operating with the as I understand..

The ... have requested us to follow up this matter to see of (sic) there is any basis to hold back the fund transfer overseas given that the source of the funds have not been confirmed and it is extremely unlikely that a ‘one man attorney in Pietermaritzburg’ would have been able to make profits of R80 m from his attorney business.”

- [8] On 26 February 2020, Mr Malherbe decided to issue an order prohibiting any withdrawals from the applicant’s ABSA Bank account (“the impugned decision”)
- [9] On 4 March 2022 when the applicant tried to transfer an amount of R2 million from his ABSA Bank account, he discovered that there was a hold on the account. On the same day he had a discussion with Mr Minnie, the content of the subject-matter discussed is in dispute. According to Mr Malherbe, Mr Minnie had informed the applicant about the on-going investigation into his financial transactions. This is denied by the applicant.
- [10] On 19 March 2020, Mr Minnie sent Ms S Balray, the applicant’s legal representative, an urgent email seeking information relating to an amount of R80 million standing in credit at the applicant’s ABSA Bank account. Mr Minnie further sought that the information

requested should be contained in an affidavit deposed to by the applicant. On 29 April 2020, Ms Balray responded to Mr Minnie's request and informed him that the applicant was admitted to hospital and that the R80 million inquired about accrued to the applicant and his close corporation through various deals involving immovable property.

[11] On 29 May 2020, the applicant's attorneys, Christodoulou & Mavirikis Inc, wrote a letter to Mr Minnie inquiring about the reasons for the hold placed on the applicant's account at ABSA Bank. Further that it was their assumption that the SARB had exercised its powers under Regulation 22A of the Exchange Control Act Regulations.

[12] On not receiving a response from Mr Minnie after a further request for reasons, the applicant's attorneys wrote the Branch Manager of ABSA Bank seeking the following information:

12.1 the reasons why the applicant was denied access to his funds;

12.2 whether the funds are still in the applicant's account or have been transferred to another account;

12.3 details of the SARB's decision; and

12.4 whether the decision taken by ABSA Bank to deny the applicant access to his funds was done pursuant to the SARB's decision.

[13] On 9 June 2020 ABSA Bank responded and indicated that ABSA Bank acted on instruction of the SARB.

[14] On 8 June 2020 Mr Malherbe sent an email to the applicant's attorneys indicating that on 4 March 2020 and in a telephone conversation, Mr Minnie had informed the applicant about an investigation and that the administrative steps taken against him were in terms of Regulations 22A and 22C and that the applicant was also informed of the reasons for the decision taken. Further that, even though the applicant had undertaken to cooperate with the SARB's investigation and had on 19 March 2020 been requested to provide certain information in the form of an affidavit, the applicant had failed to provide such information.

[15] The SARB is responsible for the foreign exchange controls in the country. In turn, the Compliance Division is responsible for investigating alleged contraventions of the Exchange Control Regulations ("the regulations") and is vested with the power to recover capital exported illegally.

[16] It is common cause that in terms of regulation 22A and/or regulation 22C the SARB is empowered to issue what is known as a 'blocking order' in terms of which any person can be prohibited from withdrawing or causing to be withdrawn any funds standing to the credit of that individual's account. The decision to issue a blocking order is issued where there are reasonable grounds to suspect that a person may have contravened the regulations. Further, in terms of regulation 22B, the funds blocked may be forfeited to the State.

- [17] In terms of regulation 22A the SARB can issue a blocking order relating to tainted funds and in terms of regulation 22C untainted funds can be blocked.
- [18] Further, in terms of regulation 3(1)(a), subject to any exemption which may have been granted by the Treasury or a person authorised by the Treasury, no person may without the permission granted by the Treasury or a person authorised by the treasury and in accordance with such conditions as the Treasury may impose, take or send out of the country currency from the country to a foreign destination. Furthermore, regulation 10(1)(c) provides that no person except with the permission granted by the Treasury and in accordance with such conditions the Treasury may impose, enter into any transaction whereby capital or any right to capital is directly or indirectly exported from the country.
- [19] The applicant seeks the reviewing and setting aside of the decision of the 26 February 2020 on the following grounds:
- 19.1 that the impugned decision was not authorised by the empowering provision[2];
- 19.2 that the decision was not rationally connected to the information before the administrator[3];
- 19.3 that the SARB 's decision was materially influenced by an error in law[4];
- 19.4 that when the decision was taken, irrelevant considerations were considered and relevant considerations were not considered[5]; and
- 19.5 that the decision was arbitrary and capricious[6].
- [20] It is the applicant's contention that the impugned decision taken by the SARB is unlawful. It was submitted on behalf of the applicant that the decision by the SARB to block the applicant's funds to the tune of R40 million was irrational in that the amount which the SARB was concerned with were funds deposited into the applicant's account held at the Bank of Baroda between July 2018 to November 2019, which amounts totalled the sum of R17.5 million.
- [21] It was further submitted on behalf of the applicant that the applicant did not contravene the exchange control regulations as all foreign transaction he performed were done with the express approval of Bidvest, through its employees. It is the applicant's contention that no contravention of the regulations had been committed as Bidvest Bank was Treasury's authorised dealer[7] whose function, inter alia, is to assist clients to transfer currency abroad on behalf of its clients.
- [22] It is further the applicant's contention that, in issuing the order putting a hold on the applicant's funds, Mr Malherbe acted on the unlawful dictates of a third party, namely, either the Financial Services Centre or the Prudential Authority. In this regard it was submitted on behalf of the applicant that Mr Malherbe's decision to block the applicant's funds was prompted by the email Mr Pather of the Prudential Authority sent to Mr Naidoo

which Mr Malherbe became aware of on 26 February 2020. It is the applicant's contention that in view of the fact that the SARB failed to take any steps against the applicant since December 2019 when it received the reports from Bidvest Bank and ABSA Bank but only made the decision to put a hold on the applicant's funds after Mr Malherbe became aware of Mr Pather's email, is indicative of the fact that, in taking the impugned decision, Mr Malherbe was dictated to by the FIC or the Prudential authority.

- [23] On behalf of the SARB the following submissions were made. It was submitted that a hold was placed on the applicant's funds as there was cogent evidence which created a reasonable suspicion that the applicant may have been involved in the contravention of the regulations. Further, it was submitted on behalf of the SARB that the applicant had contravened the regulations in that he had used other individuals' discretionary allowances to export funds to the UK. Reliance in this regard is placed on section B.4(A)(Xii) of the manual which provides that the authority conveyed in section B.4(A) may not be used to disguise transfers for other purposes for which foreign currency would be refused under the appropriate sections of the Manual.
- [24] The SARB alleges that during March 2019 an amount of R80 million was transferred from the applicant's account held at the State Bank of India, Johannesburg, into the applicant's various ABSA Bank accounts. On 27 March 2019 an amount of R40 million of these funds was transferred into the applicant's current account held at ABSA Bank, and a further transferred into his fixed deposit account held at ABSA Bank. Further transfers were made into various other accounts, including at a Bidvest Bank suspense account. The balance of the R80 million was transferred into the applicant's attorney's trust account which amount was further transferred into various accounts of the applicant. It was further submitted that an amount of R20,002,416.40 was transferred to the Bank of Baroda between August 2018 and November 2019. It is the SARB's contention that the transfer of this amount was in contravention of the regulations as the applicant had used the discretionary allowances of other individuals in contravention of section B.4(A).
- [25] With regard to reliance by the applicant on the alleged approval by Bidvest Bank, as an authorised dealer, of the suspicious transactions, is misplaced. It is the SARB's contention that in terms of the regulations, the export of funds has to occur with the permission of the Treasury or a person authorised by the Treasury. It is the SARB's contention that Bidvest Bank is not an authorised person as or an agent of the SARB as contemplated in regulation 3(1). In this regard reliance is placed on the decision in *Sylla v Minister of Department of Finance* where the court held that Standard Bank[8], as an authorised dealer, was an authorised person by Treasury under regulation 3(1).
- [26] It is further the SARB's contention that in taking the decision to block the applicant's account it did not act on the instructions of either the FIC or the Prudential Authority. In its answering affidavit, the SARB avers that Mr Malherbe took the impugned decision after considering the report of Bidvest, the two reports from ABSA Bank and Mr Minnie's preliminary investigation into the flow of funds in the applicant's bank accounts. It was

further contended that as the applicant could not give a plausible explanation on the source of the R80 million, Mr Malherbe had a reasonable suspicion that the contravention of the regulations might have exceeded the R20 million of which the SARB already had information about.

- [27] With regard to the R20 million the applicant exported to the Bank of Baroda using the discretionary allowances of other individuals, it is the applicant's contention that he did so on the express approval of Bidvest Bank as an authorised dealer. However, as correctly pointed out by the SARB, the use of other person's discretionary allowances would be contrary to the provisions of regulation 3(1). Further, the applicant could not rely on the alleged approval by Bidvest Bank as the SARB has shown, based on the Sylla decision (above), that Bidvest Bank was not a person authorised by the Treasury to give permission to such export of currency. By using other individuals' discretionary allowances, the applicant unlawfully circumvented the provisions of section B.4(A) read with regulation 3(1).
- [28] The fact that the blocking order relates to an amount of R40 million is of no moment. In terms of regulation 22C the SARB is empowered to put a hold on untainted funds if it reasonably suspects that the amount involved in the contravention of the regulations might be higher. According to Mr Malherbe, the applicant was unable to give a plausible explanation as to the source of the R80 million transferred from his account held at the State Bank of India into several of his other accounts. Moreover, according to Mr Malherbe, the source of the R80 million is still being investigated by the SARB. Should the investigation reveal a further contravention of the regulations, the SARB would be entitled to recoup the funds in excess to those already blocked. I therefore do not regard as sinister the fact that the SARB put a hold on funds in excess to those already tainted by the fact that they were exported in contravention of the regulations.
- [29] With regard to the alleged unlawful dictation by the FIC or the Prudential Authority to Mr Malherbe to place a hold on the applicant's bank account, Mr Malherbe has stated that he took the decision independently without being influenced by any one after considering the reports from Bidvest Bank and ABSA Bank, including the information Mr Minnie obtained from ABSA Bank after the email was seen. The applicant has not shown any evidence that there was any unlawful instruction by either the FOC or the Prudential Authority, bearing in mind that State functionaries are enjoined by the Constitution to cooperate with each other. Moreover, the allegation that Mr Malherbe acted on instructions of the FIC or the Prudential Authority on the basis of the email is not the only inference to be drawn. As Mr Malherbe explained, he was prompted into action by the email but took the decision solely on the basis of the information before him.
- [30] I am satisfied, taking into account the evidence before me and submissions made by counsel that Mr Malherbe had reasonable grounds to suspect not only that the applicant had contravened the exchange control regulations, but also that the amounts involved might be far more than the amount related to the actual contravention of the regulations.

[31] I am therefore of the view that the applicant has not shown cause why the decision of the SARB should be reviewed and set aside.

[32] In the result the following order is made:

‘The application is dismissed with costs’.

N P MNGQIBISA-THUSI J

JUDGE OF THE HIGH COURT

Date of hearing: 07 March 2022

Date of judgment: 20 February 2023

Appearances:

Counsel for Applicant: Adv R Mastenbroek

(instructed by Christodoulou & Mavrikis Inc)

Counsel for the SARB: Adv E Muller

(instructed by MacRobert Inc)

[1] In terms of section B.4(A) a natural person over the age of 18 years are permitted to avail themselves of a single discretionary

allowance of R1 million per individual per calendar year. In terms of this section, no tax clearance certificate is required.

[2] Section 6(2)(a)(i) of the Promotion of Administrative Justice Act (“PAJA”)

[3] Section 6(2)(f)(ii)(cc) of PAJA.

[4] Section 6(2)(d) of PAJA.

[5] Section 6(2)(e)(iii) of PAJA.

[6] Section 6(e)(vi) of PAJA.

[7] In terms of regulation 1 an ‘authorised dealer’ in respect of foreign transactions is a person authorised by the Treasury to deal in foreign exchange.

[8] 2011 JDR 1818 (GSD) at para [49].

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