

SOUTH AFRICA / JUDGMENT

Tayob N.O and Another v Public Investment Corporation (PIC) and Another (61684/21) [2022] ZAGPPHC 753 (6 October 2022)

[2022] ZAGPPHC 753

COURT

North Gauteng High Court, Pretoria

BEFORE

Ndlovane

CASE / FILE NUMBER

61684/21

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

No: 61684/21

REPORTABLE:

NO

OF

INTEREST TO OTHERS JUDGES: NO

REVISED

6

October 2022

In

the matter between:

REHANA
SURTIE TAYOB N.O.
First
Plaintiff
(In
her capacity as executrix
In
the Estate Late ABDUL RAZAK
TAYOB
SURTIE)
EDWARD
JEFFREY KOORBANALLY
Second
Plaintiff
and
PUBLIC
INVESTMENT CORPORATION (PIC) First
Defendant
ABSA
GROUP
LIMITED Second
Defendant

JUDGMENT

NDLOKOVANE AJ

INTRODUCTION

[1.] This court is called upon to adjudicate an opposed exception taken by the First Defendant to the Plaintiffs' amended particulars of claim.

[2.] The litigation in this matter commenced in the Western Cape Division of the High Court of South Africa, Cape Town. However, the first defendant successfully raised an exception on grounds of jurisdiction. As a result, the matter was subsequently enrolled with this court.

THE PARTIES

[3.] The first plaintiff based in Lesotho, is the wife and executrix of the estate of the late Abdul Razak Tayob Surtie (the deceased). The second plaintiff is the agent of the first plaintiff and is based in Cape Town.

[4.] The Second Defendant is ABSA Group Limited, with principal place of business in Johannesburg, holding account [....].

BACKGROUND

FACTS

[5.] The Plaintiffs adduced amongst others the following facts in support of their claim in the main action:

5.1 The late ART Surtie (“the deceased”) is the beneficiary of offshore inheritance assets which were repatriated during 1984, after such repatriation was initiated by the Lesotho Branch of Barclays Bank Limited;

5.2 The source of those funds was from diamond mining claims and investments done with Share Certificate Portfolio 7315 (“the Share Certificate”) after having been involved in commercial trade as far back as 1896;

3.3 The Share Certificate with Portfolio Number 7315 is globally recognised as a financial trading instrument for precious metals and is commonly known as Trust Bonds paying dividends every 3 years;

3.4 The Share Certificate and the accompanying rights and obligations were transferred to the deceased during 1923 and that by operation of law the deceased became the beneficiary of the assets and funds held by the said certificate;

3.5 The Share Certificate was put on stock exchange trade with the London Stock Exchange which was managed by Barclays Bank International;

3.6 The Second Plaintiff established from the Second Defendant that assets relating to the Share Certificate (belonging to the deceased) in the amount of \$36 billion (Thirty-six Billion United States Dollars) was transferred into the account of the deceased on 10 December 1984;

3.7 The account of the deceased is held with the Second Defendant under account name A (MM) Surtie with account number [...];

3.8 On 7 June 1985, six months after the date of transfer of the said funds, it was converted to South African currency in the total amount of R87.84 billion;

3.9 The funds of the deceased were invested in government bonds RSA 150 and RSA 153 and that the amounts earned from the aforesaid investments equalled a total amount in the sum of R1.35 trillion;

3.10 The funds were deposited into a special restricted account [...] between 2 September 1985 and 31 March 1986 and that as per the Government Regulations the account was created in circumstances where payment was required to be made to foreign national and such payment was prohibited in terms of the apartheid laws and regulations;

3.11 As per its definition a special restricted account is an account opened with the First Defendant for payment of an amount in circumstances such as those of the deceased;

3.12 Those funds were subsequently invested by the First Defendant in South African Government Bonds which were underwritten by the South African Reserve Bank;

3.14 On or about 31 October 2001 the values of those bonds were respectively, R150 bonds R77.3 billion and the R153 bonds R91,9 billion; and

3.15 The Financial Services Board (now Financial Sector Conduct Authority) confirmed the said R150 and R153 bonds in USD denominations.

4. The Plaintiffs accordingly seek payment of R1.35 trillion which they calculated at R87.84 billion plus interest over 25 years ending 2010 on an average of 5-6.5% per annum. Interest was calculated as from July 1985.

THE LEGAL PRINCIPLES APPLICABLE TO EXCEPTIONS

5. It is trite that a court when considering an exception on the basis that a pleading does not sustain a cause of action, will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.[1]
6. An excipient who alleges that summons does not disclose a cause of action must establish that upon any construction of the particulars of claim, no cause of action is disclosed.[2] A pleading must be read as a whole, and an exception cannot be taken to a paragraph or part of a pleading that is not self-contained.[3]
7. Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars.[4] It is also trite that when an exception is raised on the ground that a pleading lacks averments necessary to sustain a cause of action, the excipient is required to show that upon every interpretation that the pleading in question can reasonably bear, no cause of action is disclosed.[5]

THE FIRST DEFENDANT'S EXCEPTION: THE PARTIES' SUBMISSIONS

8. The parties' submissions regarding the First Defendant's exception are as follows:

First Ground of Exception: failure to seek an order declaring the Policy invalid, unconstitutional or reviewed and set aside

9. The First Defendant contended that the Plaintiffs failed to seek an order that the apartheid Government's Policy of precluding any person from paying monies over to a foreign creditor, citizen or country is declared unconstitutional and invalid or reviewed and set aside.
10. The Plaintiffs on the other hand submitted that the provisions of Regulation 2 of Currency and Exchanges Act 9 of 1933, promulgated in Government Notice R2016 in Government Gazette 15211 dated 22 October 1993, that prevented payment to the Plaintiffs' lapsed on 15 August 2001 and were not replaced by similar provisions.

11. The Plaintiffs further submitted that the lapse of Regulation 2 alluded to above placed them in a position that they are able to claim payment of the monies held for the benefit of the deceased's estate.
12. The Plaintiffs contended that the First Defendant's argument in respect of them having to pursue a declaration of constitutional invalidity is without merit as the regulation in question is non-existent. Accordingly, that, this ground of exception should be dismissed.
13. In contrast the First Defendant contended that although the Policy is no longer operable, the consequences of the Policy at the relevant time cannot be ignored. In amplification of its contention in this regard the First Defendant submitted that in terms of section 12(2)(b) of the Interpretation Act 33 of 1957, where a law repeals any other law, and unless the contrary intention appears, the repeal shall not "affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed".
14. The First Defendant further submitted that there is a presumption that legislation does not apply retrospectively or retroactively, unless a contrary intention is indicated either expressly or by clear implication.[6]
15. The First Defendant contended that the practical consequences of the Policy and/or the enabling legislation is that the Plaintiffs had no right to demand payment during 1985 and would continue to have no such a right until the consequence of the Policy and/or the enabling legislation ceased.
16. The First Defendant further contended that even if it were to be argued that the Policy does not constitute law as defined in the Interpretation Act, it cannot be disputed that the Policy was grounded upon enabling law that existed at the time, the consequence of which cannot be ignored.
17. In this regard the First Defendant cited the dictum in *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly*[7], where the Constitutional Court stated amongst others the following:

"No decision grounded [in] the Constitution or law may be disregarded without recourse to a court of law...No binding and constitutionally or statutorily sourced decision may be disregarded willy-nilly. It has legal consequences and must be complied with or acted upon. To achieve the opposite outcome lawfully, an order of court would have to be obtained".
18. The First Defendant relying in the dictum in *Oudekraal Estates (Pty) Ltd v City of Cape Town*[8] (commonly referred to as *Oudekraal 1*), also contended that the Policy existed as a fact and its consequences cannot simply be ignored. Further that although the Policy no longer exists, its repeal cannot result in an automatic entitlement that operates in the past, the Policy has legal consequences unless an order of court determining otherwise is obtained.

19. The First Defendant concluded in this regard by contending that to assert a claim for an amount and interest arising in 1985, the Plaintiffs cannot ignore the Policy and prevailing legislation, but must seek an order to declare the prevailing legislation invalid, unconstitutional, and/or to review the Policy and have it set aside.

Second Ground of Exception: failure to challenge Regulation 4(c) and/or decision by the Minister of Finance

20. The First Defendant highlighted that the Plaintiffs, relying on Regulation 4(c), alleged that the amount of R1.35 trillion is the debt due by the Public Investment Corporation (PIC) and ought to be paid by the PIC to the deceased's estate.

21. The provisions of Regulation 4(c) are as follows:

“(c) The sum standing to the credit of a special restricted account shall –

- (i) bear interest which shall be calculated and be payable in a manner, and at a rate, which shall be determined from time to time by the Minister of Finance or by a person designated by him;
- (ii) be a debt due by and be repaid by the Public Investment Commissioners in such a manner and in such instalments and on such conditions as may be determined from time to time by the Minister of Finance or by a person designated by him, to the foreign creditor in whose favour such sum has been paid into the special restricted account;
- (iii) until such time as it is repaid to the foreign creditor in terms of subparagraph (ii) or is paid to another person at the request of the foreign creditor-
- (aa) be held and retained by the Public Investment Commissioners on such terms and conditions as may be determined by the Minister of Finance or a person designated by him;
- (bb) be dealt with only in accordance with such condition as may be determined from time to time by the Minister of Finance or by a person designated by him.”

22. The First Defendant contended that upon proper construction of Regulation 4(c), there are several requirements that must be met before any credit standing in a special restricted account, together with interest are due and payable in terms of Regulation 4(c).

23. The First Defendant submitted that the Plaintiffs have to prove the following:

23.1 The Plaintiffs must allege and prove the interest rate determined by the Minister of Finance.

23.2 The Plaintiffs must allege and prove the manner of payment, instalments determined, and any applicable conditions for repayment as determined by the Minister of Finance, and that absent such determination no repayments could commence and thus no entitlement to repayment.

23.3 The Plaintiffs must allege that the funds paid into the special restricted account was paid into the special restricted account in favour of the deceased.

23.4 The PIC is not holding and/or dealing with the funds in accordance with the terms and conditions as determined by the Minister of Finance.

24. The First Defendant contended that having regard to the requirements of Regulation 4(c), the Plaintiffs did not plead the following:

24.1 that the deceased was the person in whose favour the sum allegedly standing to credit was paid into the restricted account.

24.2 to the extent that Regulation 4(c)(ii) entitles the Minister of Finance to deal with the sum standing to the credit of the special restricted account in such manner and in accordance with such conditions as may be determined by him from time to time, the non-payment is unconstitutional and invalid or ought to be reviewed and set aside.

No allegation that the deceased is the person in whose favour the sum in special restricted account was paid

25. The First Defendant averred that it is well established that money when deposited into a bank account ceases to be the principal's money. Further that it is then the money of the banker who is bound to return an equivalent by paying a similar amount to that deposited on demand and that in effect funds deposited into a bank account becomes the property of the bank.

26. The First Defendant also averred that the act of crediting a customer in a bank's books does not in itself create a liability, because the credit may have been wrongly entered and be subject to reversal. Relying on the principle emanating from *Rosseau NO v Standard Bank of SA Ltd*,^[9] the First Defendant contended that the general principles for the recovery of more standing to the credit of a bank account requires

establishing that the deceased was a creditor of the bank.

27. In *Rosseau NO v Standard Bank of SA Ltd*, Watermeyer J stated that:

"The legal relationship between a banker and a customer whose account is in credit is that of the debtor and creditor. The customer is a creditor who has a claim against the bank in the sense that he has a right to have it make payments to him, or to his order, on cheques drawn by him up to the amount by which his account is in credit."^[10]

28. The First Defendant observed that the Plaintiffs pleaded that Barclays PLC was the initial bank that transferred the funds from the United Kingdom to Barclays Bank International Limited (RSA).

29. The First Defendant contended that there are no allegations to suggest that the deceased was a creditor of Barclays PLC (or any subsequent bank) either by alleging the following:

29.1 the deceased had an agreement with Barclays PLC in terms of which the deceased was the client i.e. account holder and Barclays the bank; or

29.2 that any person holding the account with Barclays PLC was doing so as an agent of the deceased; or

29.3 that any proceeds from the Share Certificate Portfolio was paid into a bank account held by Barclays PLC so as to establish a personal right of recovery; or

29.4 those funds were paid by Barclays PLC to Barclays Bank International Limited (RSA), the latter acting as an agent of the deceased or accepting it for the benefit of the deceased.

30. The First Defendant contended that in the absence of establishing an initial entitlement to the funds, any subsequent transfers of the funds had to be done expressly on the understanding that the funds were transferred and paid into the special restricted account in favour of the deceased.
31. In response to the First Defendant's averments in this regard, the Plaintiffs submitted that the allegations made in paragraphs 12 to 23, 25, 26, 27, 30, 31, 35, 37 to 44, 45, 46 and 49 of the particulars of claim trace the funds from the Share Certificate to the monies currently held by and on behalf of the First Defendant.
32. The Plaintiffs further submitted with reference to paragraphs 15, 22, 23, 25, 31, 37, 46 and 49 that the particulars of claim repeatedly in various forms alleged that the funds which emanate from the Share Certificate are those which are held in the Special Restricted account for the benefit of the deceased.
33. The Plaintiffs contended that where an exception is raised on the grounds that a pleading lacks averments necessary to sustain a cause of action, the excipient is required to show that upon every interpretation that the pleading in question can reasonably bear, no cause of action is disclosed. The Plaintiffs accordingly contended that this ground of exception lacks merit, and ought to be dismissed.

Minister of Finance's entitlement to deal with the funds

34. The First Defendant acknowledged that the Plaintiffs alleged in paragraph 49 of their particulars of claim that the former Minister of Finance, Mr Trevor Manuel in effect directed that the sum be held or invested in the Government Employees Pension Fund after 1996.
35. The First Defendant contended that the Plaintiffs failed to plead any compliance with the requirements of Regulation 4(c)(ii), which according to the First Defendant is a pre-condition of repayment. The First Defendant is adamant that there is thus no right of repayment.
36. The First Defendant averred that on the face of it the particulars of claim, the then Minister of Finance made a decision on how the funds in the special restricted account are to be dealt with in accordance with Regulation 4(c)(iii).

37. The First Defendant contended that Regulation 4(c)(iii) and the Minister's decision remain in full force and have legal consequences, cannot be ignored unless declared invalid and set aside and further that no such relief is sought by the Plaintiffs.
38. The Plaintiffs on the other hand acknowledged that in terms of Regulation 4(c)(iii), until the time the First Defendant repays the sum standing to the credit of the estate of the deceased, the First Defendant is obliged to hold it on such terms and conditions as may be determined by the Minister.
39. The Plaintiffs contended that the Minister's powers are limited to determining, from time to time the following:
 - 39.1 how the First Defendant is to hold the sum standing to the credit of the estate of the deceased until it is refunded.
 - 39.2 in which manner and in which instalments and on which conditions the First Defendant is to repay the sum standing to the credit of the estate of the deceased.
40. The Plaintiffs submitted that the Minister does not have the power to determine whether to repay the sum standing to the credit of the estate of the deceased upon the First Defendant being requested to do so.
41. The Plaintiffs contended that the use of the word "may" in Regulation 4(c)(ii) indicates that the Minister is not obliged to determine the terms upon which any sum standing to the credit of a foreign creditor is to be repaid.
42. The Plaintiffs averred that should the Minister wish to regulate the manner in which the sum standing to the credit of the estate of the deceased is to be repaid, the obligation is on him to make the necessary determinations.
43. The Plaintiffs further averred that in the absence of a determination by the Minister as to the manner in which the sum standing to the credit of the estate of the deceased is to be repaid, it is to be paid forthwith.
44. The Plaintiffs are adamant that it is unnecessary to have Regulation 4(c)(ii) declared unconstitutional, or to have Regulation 4(c)(ii) reviewed, or to have any decision made by the Minister in terms of Regulation 4(c)(ii) reviewed in order to secure the repayment of the funds the Plaintiffs claimed in the particulars of claim.
45. The Plaintiffs highlighted that on 17 October 2019, the First Defendant was duly requested to repay the sum standing to the credit of the estate of the deceased, with the result that the First Defendant is obliged to pay the amount forthwith.
46. The Plaintiffs accordingly submitted that this leg of the second ground of the exception falls to be dismissed.

47. The First Defendant observed that on the face of it the particulars of claim, the special restricted account, alleged to be in the name of the deceased (allegedly linked to the special restricted account), is currently trading on a trading platform at the instance of a third party.
48. The First Defendant contended that apart from attaching what purports to be an affidavit by a person claiming to have endured torture by one Machsherry, the deponent does not confirm any link between the trading account and the account alleged to be in the name of the deceased.
49. In response the Plaintiffs contended that the First Defendant is limited to attempting to show that annexure E is so integral to the Plaintiffs' pleaded case, that without annexure E establishing the link between the trading account and that of the deceased, the particulars of claim lack the necessary allegations to sustain a cause of action against the First Defendant.
50. The Plaintiffs further contended that they do not claim that annexure E is a sine qua non for the success of the claim against the First Defendant. Further that to the extent necessary, they have already alleged the link between the trading account and the deceased's account as evidenced by the use of the words "the aforesaid link" in paragraph 33 of the particulars of claim.
51. The Plaintiffs also contended that the link referred to in paragraph 33 of the particulars of claim is also, independently established in paragraphs 13 to 32, 34, 37 to 46 and 49 thereof.
52. The Plaintiffs averred that the First Defendant cannot establish, as it is obliged to do in order to succeed with this ground, that upon every interpretation the particulars of claim can reasonably bear, no cause of action is disclosed for the reasons set out in the third ground of the exception.

EVALUATION OF THE FACTS

53. The evaluation of the facts herein is intended to assess the Parties'

submissions

in order to determine which party is favoured by the balance of probabilities.

54. It is common cause that the Policy precluding any person from paying monies over to a foreign creditor, citizen or country is no longer applicable.
55. Whereas the Plaintiffs contended that the lapse of Regulation 2 (the Policy) that precluded payment to them had lapsed, I tend to agree with the First Defendant's contention that its consequences at the relevant time cannot be ignored.
56. In terms of section 12(2)(b) of the Interpretation Act, 1957[11], where a law repeals any other law, and unless the contrary intention applies, the repeal shall not affect the previous operation of any law so repealed or anything done or suffered under the law so repealed.

57. In *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly*[12], the Constitutional Court held that no decision grounded on the Constitution or law may be disregarded without recourse to a court of law.
58. In *Oudekraal 1*[13], the Supreme Court of Appeal held that until an administrative action is set aside by a court in proceedings for judicial review it exist in fact and it has legal consequences that cannot simply be overlooked.
59. It then follows that it is incumbent on the Plaintiffs to have the legal consequences of the Policy either declared unconstitutional and invalid or reviewed and set aside in order for them to succeed with their claim against the First Defendant.
60. The First Defendant contended that the Plaintiffs failed to plead that the deceased was the person in whose favour the sum allegedly standing to credit was paid to the special restricted account.
61. I tend to disagree with the First Defendant in this regard in that the First Defendant did not challenge or rebut the Plaintiffs' allegations that the Second Plaintiff established from the Second Defendant that the assets relating to the Share Certificate (belonging to the deceased) in the amount of \$36 billion was transferred into the account of the deceased on 10 December 1984.
62. Similarly the First Defendant did not challenge the Plaintiffs' allegation that the special restricted account is held with the Second Defendant under account name A (MM) Surtie with account number [...]. The First Defendant also did not challenge the Plaintiffs' allegation that the funds of the deceased were invested in Government Bonds RSA 150 and RSA 153 and that the amounts earned from those investments equalled a total amount in the sum of R1.3 billion.
63. In relation to the First Defendant's contention that the Plaintiffs failed to plead any compliance with the requirements of Regulation 4(c)(ii), which is a precondition of repayment, I tend to disagree with the First Defendant in that it is not within the Plaintiffs' competence to comply with the requirements of Regulation 4(c)(ii) absent the Minister's determination in that regard.
64. However, I tend to agree with the First Defendant that once the Minister has made a determination in terms of Regulation 4(c)(iii), such a decision remains in full force and has legal consequences. It then follows that Regulation 4(c)(iii) and the Minister's decision cannot be ignored unless declared invalid and set aside.

Third Ground of Exception: failure to establish link between accounts

65. As alluded to above First Defendant did not challenge or rebut the Plaintiffs' allegations that the Second Plaintiff established from the Second Defendant that the assets relating to the Share Certificate (belonging to the deceased) in the amount of \$36 billion was transferred into the account of the deceased on 10 December 1984.

66. I also reiterate that First Defendant did not challenge the Plaintiffs' allegation that the special restricted account is held with the Second Defendant under account name A (MM) Surtie with account number [...]. The First Defendant also did not challenge the Plaintiffs' allegation that the funds of the deceased were invested in Government Bonds RSA 150 and RSA 153 and that the amounts earned from those investments equalled a total amount in the sum of R1.3 billion.
67. It then follows that the First Defendant's contention in this regard cannot be sustained.

APPLICATION OF THE LAW

68. On the face of it the particulars of claim do disclose a cause of action based on the recovery of a debt due by the First Defendant in terms of Regulation 4(c)(ii).
69. However, the cause of action is one that cannot be enforced in the circumstances of this case owing to the impediments in Regulation 4(c). Therefore, the particulars of claims are in the circumstances excipiable.

CONCLUSION

70. Therefore the First Defendant's exception is upheld with costs.

N NDLOKOVANE AJ

ACTING JUDGE OF THE HIGH COURT

Delivered: this judgment was prepared and authored by the judge whose name is reflected and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for handing down is deemed to be 06 October 2022.

APPEARANCES:

FOR THE APPLICANT:

ADV. H LOOTS SC

ADV. M FILTON

FOR THE FIRST RESPONDENTS: ADV. NH MAENETJE SC

ADV. A VORSTER

HEARD ON:

12 AUGUST 2022

DATE OF JUDGMENT:

06 OCTOBER 2022

- [1] Merb (Pty) Ltd v Mathews JDR 2889 (GJ) (Merb); Ocean Consolidated Co Limited v The Government 1907 TS 786 at 788.
- [2] See Merb n17 above.
- [3] See Merb n17 above; see also Jowell v Bramwell-Jones & Others 1998
- (1) SA 836 (W) at 902 – 903 (Jowell).
- [4] Same as above.
- [5] See Merb n17 above.
- [6] First Defendant's Heads of Argument para 40.1; citing S and Another v Acting Regional Magistrate, Boksburg and Another 2011
- (2) SACR 274 (CC) at paras 16 & 17 p283.
- [7] 2016 (3) SA 580 (CC) at para 74.
- [8]
- [2004] ZASCA 48; [2004] 3 All SA 1 (SCA) para 26.
- [9] 1976 (4) SA 104 CPD at 106 B-D.
- [10] Rosseau NO v Standard Bank of SA Ltd 1976
- (4) SA 104 CPD at 106 B-D.
- [11] Act 33 of 1957.
- [12] 2016 (3) SA 580 (CC) para 74.
- [13] Oudekraal Estates (Pty) Ltd v City of Cape Town [2004] ZASCA 48; [2004] 3 All SA 1 (SCA) para 26.

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