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

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
..... DATE	..... SIGNATURE

Case No: 56220/21

In the matter between:

YANLING INTERNATIONAL TRADE CC Applicant

and

SOUTH AFRICAN RESERVE BANK Respondent

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date for the handing down of the judgment shall be deemed to be 13 February 2023.

JUDGMENT

LG KILMARTIN, AJ:

INTRODUCTION

[1] This is an application by the Applicant, Yanling International Trade CC, for the review and setting aside of a decision taken by the Respondent, the

South African Reserve Bank, to forfeit an amount of R266 207.00 of the Applicant. The Respondent alleges that, based on investigations carried out by the Financial Surveillance Department ("FinSurv"), it had reasonable grounds to believe that the Applicant had committed and/or was a party to certain acts or omissions which constituted contraventions of the Exchange Control Regulations ("the Regulations"), promulgated in terms of section 9 of the Currency and Exchanges Act, 9 of 1933 ("the Currency Act").

[2] The Applicant denies that it contravened the Regulations and contends that an official document published by the Respondent titled "*Currency and Exchanges Manual for Authorised Dealers*" dated 8 July 2021 ("the SARB manual") makes provision for the transfer of funds for the purpose that the Applicant did, namely for obtaining cutting dies and moulds in an amount not exceeding R100 000.00.

THE RESPONDENT AND PURPOSE OF EXCHANGE CONTROL REGULATIONS

[3] By way of background, the Respondent is the central bank of South Africa and was established in terms of section 9 of the Currency and Banking Act, 31 of 1920. It is recognised in section 223 of the Constitution of the Republic of South Africa ("the Constitution") and is governed by the Constitution and South African Reserve Bank Act, 89 of 1990 ("the SARB Act").

[4] Section 3 of the SARB Act details the Respondent's legislative objectives, and it enjoins it to do the following:

> "*In the exercise of its powers and the performance of its duties the Bank shall pursue as its primary objectives monetary stability and balanced economic growth in the Republic, and in order to achieve those objectives the Bank shall influence the total monetary demand in the economy through the exercise of control over the money supply and over the availability of credit*".

[5] The primary object of the Respondent, which is set out in section 224(1) of the Constitution, "*is to protect the value of the currency in the interest of balanced and sustainable economic growth in the Republic*". Exchange controls are government-imposed limitations on the purchase and sale of foreign currencies. They are used to ensure the stability of an economy and prevent exchange rate volatility.

[6] Both parties referred the Court to the matter of *South African Reserve Bank and Another v Shuttleworth and Another*[1] where the Constitutional Court explained the purpose of exchange control in the following terms:

> "*Here we are dealing with exchange control legislation. Its avowed purpose was to curb or regulate the export of capital from the country. The very historic origins of the Act, in 1933, were in the midst of the 1929 Great Depression, pointing to a necessity to curb outflows of capital. The Regulations were then passed in the aftermath of the economic crises following the Sharpeville shootings in 1960. The domestic economy had to be shielded from capital flight. Regulation 10's very heading is "Restriction on Export of Capital". The measures were introduced and kept to shore up the country's balance of payments position. The plain dominant purpose of the measure was to regulate and discourage the export of capital and to protect the domestic economy.*

[1] 2015 (5) SA 146 (CC) at paras [53] to [54] at 169 F/G – 170 D.

> *... [T]he exchange control system is designed to regulate capital outflows from the country. The fickle nature of the international financial environment required the exchange control system to allow for swift responses to economic changes. Exchange control provided a framework for the repatriation of foreign currencies acquired by South African residents into the South African banking system. The controls protected the South African economy against the ebb and flow of capital. One of these controls, which we are here dealing with specifically, served to prohibit the export of capital from the Republic (unless certain conditions were complied with).”*

RELEVANT BACKGROUND FACTS

[7] The Applicant imports and exports commodities and, in 2016, entered into an agreement with a manufacturer called GNC Company Limited (“GNC”) in Hong Kong (“the agreement”). According to the Applicant, GNC agreed to design and produce wrapping boxes required by the Applicant based on precise specifications required by it.

[8] The Applicant alleges that, in order to produce the wrapping and paper boxes, GNC needed to acquire specific moulds and cutting dies.

[9] The Applicant further alleges that in terms of the agreement: (i) it would pay the costs of the design, moulds and the cutting dies upon receipt of the invoice issued by GNC; (ii) the cost of the design, moulds and cutting dies would be specified separately from the costs of the actual wrapping and paper boxes; and (iii) the purchase price for the designs, moulds and cutting dies would be denominated in United States dollars.

[10] As a result of the agreement, the Applicant entered into a series of foreign exchange transactions, in terms of which it engaged Standard Bank, in its capacity as an authorised dealer of the Respondent, with the purpose of having the necessary funds remitted to GNC in Hong Kong. The funds that were remitted to Hong Kong came from the Applicant's business account at Standard Bank.

[11] Regulation 1 defines an "*authorised dealer*" as *inter alia*, in respect of any transaction in respect of foreign exchange, a person authorised by the Treasury to deal in foreign exchange. Most commercial banks who have been authorised by FinSurv are authorised dealers.

[12] The authorised dealers administer exchange control transactions within the parameters provided for in the exchange control rulings (which are now contained in the SARB manual). The SARB manual contains the permissions and conditions applicable to transactions in foreign exchange that may be undertaken by authorised dealers and must be read in conjunction with the Regulations.

[13] The Applicant relies on p144 of the SARB manual where the following is stated under the heading "*B.14 Miscellaneous transfers"*:

> *"A(i) Authorised Dealers may approve applications by South African business entities and/or individuals for the remittance abroad of the payments mentioned below against the production of documentary evidence confirming the amounts involved.*

(W) Mould payments

(i). Payments in respect of the design and/or manufacturing of moulds not exceeding R100 000. A copy of the underlying agreement must be viewed and the Authorised Dealer should, prior to effecting the payment, be satisfied that:

(a) the mould is manufactured by the foreign supplier;

(b) it is only for a once-off design and manufacturing of the mould; and

(c) the mould is required to manufacture goods to be imported by the applicant."

[14] The Applicant entered into two transactions concerning the purchase of 14 000 USD on 18 December 2015 and 15 500 USD on 5 May 2016. Invoices from GNC reflecting the price paid for 3 moulds to a value of 11 400 USD and 4 moulds to the value of 14 000 USD were attached to the founding papers.

[15] After the Applicant entered into the foreign currency purchases set out above, the amounts were remitted to the Hong Kong account of GNC. The Applicant alleges that thereafter: (i) the boxes were designed; (ii) the moulds were acquired, and (iii) the wrapping boxes were made, and imported into South Africa.

[16] On 1 March 2019 the Respondent issued a blocking order in respect of the Applicant's account with FNB.

[17] On 19 March 2019, the Respondent instructed FNB to release an amount of R322 235.00.

[18] On 23 March 2019, the Respondent received an email from FNB confirming that the amount of R266 407.65 had been blocked in its SARB Suspense Blocked account number 9200148766.

[19] On 22 September 2020, the Respondent addressed correspondence to the Applicant querying discrepancies between export of capital and goods actually received.

[20] On 27 November 2020, the Applicant made written representations to the Respondent.

[21] On 24 March 2021, the Respondent delivered correspondence in which it summarised the basis for the Respondent's suspicion that there had been a contravention of the Regulations and invited the Applicant to make written representations as to why the forfeiture should not be made. The Respondent stated that the aforesaid representations must be submitted by no later than 23 April 2021.

[22] On 26 April 2021, after the deadline had come and gone, the Applicant requested an extension of the time to deliver its written representations.

[23] On 26 April 2021, the Respondent granted the Applicant's request for an extension until 29 April 2021, subject to the condition that no further extensions of time would be granted.

[24] On 5 May 2021, after the final deadline had passed, the Applicant delivered written representations to the Respondent, denying that it had contravened the Regulations.

[25] On 25 May 2021, the Respondent's officials recommended forfeiture to the Respondent's Deputy Governor in the amount of R266 407.00.

[26] On 4 June 2021, the Respondent published the forfeiture decision in the Government Gazette.

[27] The application for review was launched on 9 November 2021, over 5 months after the publication of the forfeiture decision.

ISSUES REQUIRING ADJUDICATION

[28] According to the Applicant:

[28.1] the Regulations were not contravened as the funds were transferred for purposes permitted by the SARB manual;

[28.2] the Respondent cannot explain how it quantified the amount forfeited, which renders the decision irrational, arbitrary and capricious; and

[28.3] the Respondent ignored the Applicant's representations (which it is common cause were submitted late) despite being in possession thereof.

[29] The Respondent disputes all of the above contentions and raised four preliminary points, namely:

[29.1] the application was brought outside of the 90-day deadline contained in the Currency Act, together with the relevant provisions of the Regulations, and no condonation for the delay can be sought;

[29.2] even if the 180-day period in PAJA applied, the Applicant unreasonably delayed commencing proceedings and has not applied for condonation, nor justified that it should be granted;

[29.3] the application did not comply with Rule 41A; and

[29.4] the Applicant admitted to contravening the Regulations as alleged by the Respondent, on its own version.

[30] The questions arising for determination are:

[30.1] whether the 90-day deadline contained in the Currency Act and Regulations applies;

[30.2] if the 90-day deadline is applicable, whether the Currency Act and the Regulations allow for a delay that exceeds a 90-day time period to be condoned;

[30.3] if the 180-day time period under PAJA is applicable, whether the Applicant has brought its review application within a reasonable time, and if not, whether the Applicant's delay should be condoned;

[30.4] whether the Applicant complied with its obligations under Rule 41A and, if not, the consequences for such non-compliance; and

[30.5] lastly, whether or not the Respondent's forfeiture decision is invalid and unlawful, on the basis that:

[30.5.1] the impugned decision is irrational, arbitrary and capricious; and/or

[30.5.2] the Respondent unfairly ignored the Applicant's representations.

SECTION 9 OF THE CURRENCY ACT AND RELEVANT REGULATIONS

[31] Sections 9(1) and 9(2) of the Currency Act provides as follows:

"***9 Regulations regarding currency, banking or the exchanges***

(1) The Governor-General may make regulations in regard to any matter directly or indirectly relating to or affecting or having any bearing upon currency, banking or exchanges.

(2) (a) Such regulations may provide that the Governor-General may apply any sanctions therein set forth which he thinks fit to impose, whether civil or criminal.

(b) Any regulation contemplated in paragraph (a) may provide for-

(i) the blocking, attachment and obtaining of interdicts for a period referred to in paragraph (g) by the Treasury and the forfeiture and disposal by the Treasury of any money or goods referred to or defined in the regulations or determined in terms of the regulations or any money or goods into which such money or goods have been transformed by any person, and-

(aa) which are suspected by the Treasury on reasonable grounds to be involved in an offence or suspected offence against any regulation referred to in this section, or in respect of which such offence has been committed or so suspected to have been committed;

(bb) which are in the possession of the offender, suspected offender or any other person or have been obtained by any such

person or are due to any such person and which would not have been in such possession or so obtained or due if such offence or suspected offence had not been committed; or

(cc) by which the offender, suspected offender or any other person has been benefited or enriched as a result of such offence or suspected offence-

Provided that, in the case of any person other than the offender or suspected offender, no such money or goods shall be blocked, attached, interdicted, forfeited and disposed of if such money or goods were acquired by such person bona fide for reasonable consideration as a result of a transaction in the ordinary course of business and not in contravention of the regulations; and

(ii) in general, any matter which the State President deems necessary for the fulfilment of the objectives and purposes referred to in subparagraph (i), including the blocking, attachment, interdicting, forfeiture and disposal referred to in subparagraph (i) by the Treasury of any other money or goods belonging to the offender, suspected offender or any other person in order to recover an amount equal to the value of the money or goods, recoverable in terms of the regulations

referred to in subparagraph (i), but which can for any reason not be so recovered.

(c) Any regulation contemplated in paragraph (a) may authorize any person who is vested with any power or who shall fulfil any duty in terms of the regulation, to delegate such power or to assign such duty, as the case may be, to any other person.

(d) Any regulation contemplated in paragraph (a) shall provide-

(i) that any person who feels aggrieved by any decision made or action taken by any person in the exercise of his powers under a regulation referred to in paragraph (b) which has the effect of blocking, attaching or interdicting any money or goods, may lodge an application in a competent court for the revision of such decision or action or for any other relief, and the court shall not set aside such decision or action or grant such other relief unless it is satisfied-

(aa) that the person who made such decision or took such action did not act in accordance with the relevant provisions of the regulation; or

(bb) that such person did not have reasonable grounds to make such decision or to take such action; or

(cc) that such grounds for the making of such decision or the taking of such action no longer exist;

(ii) that the Treasury shall cause a notice to be published in the Gazette of any decision to forfeit and dispose of any money or goods blocked, attached or interdicted in terms of the regulations referred to in paragraph (b), and that a notice of such decision shall be sent simultaneously with publication thereof in the Gazette by registered mail to any person who is, according to the Treasury, affected by such decision or, if no address of such person is available, that such notice shall be so sent to the last known address of such person; and

(iii) that any person who feels aggrieved by any decision to forfeit and dispose of such money or goods may, within a period prescribed by the regulations, which shall not be less than 90 days after the date of the notice published in the Gazette and referred to in subparagraph (ii), institute legal proceedings in a competent court for the setting aside of such decision, and the court shall not set aside such decision unless it is satisfied-

(aa) that the person who made such decision did not act in accordance with the relevant provisions of the regulation; or

(bb) that such person did not have grounds to make such decision; or

(cc) that the grounds for the making of such decision no longer exist."

[32] In terms of:

[32.1] Regulation 2(4)(a): "*No person other than an authorised dealer shall … use or apply any foreign currency or gold acquired from an authorised dealer for or to any purpose other than that stated in his application to be the purpose for which it was required*"; and

[32.2] Regulation 2(4)(b): "*No person other than an authorised dealer shall ... do any act calculated to lead to the use or application of such foreign currency or gold for or to any purpose other than that so stated*".

[33] Regulation 10(1)(c) under the heading "*RESTRICTION ON EXPORT OF CAPITAL"* and prohibits a person, except with permission granted by the National Treasury, to "*enter into any transaction whereby capital or any right to capital is directly or indirectly exported from the Republic*".

[34] Regulation 12(1) under the heading "*GOODS PURCHASED OUTSIDE THE REPUBLIC"* provides as follows:

"*Whenever a person in the Republic has purchased goods in any country outside the Republic and has paid for or made a payment on account of such goods, but the said goods have not been consigned to the Republic within four months from the date on which such*

payment was made, such person shall within fourteen days from the date of expiry of the said period of four months report in writing to the Treasury or to an authorised dealer that the goods have not been consigned to the Republic and the Treasury may thereupon order such person to assign to the Treasury or to a person authorised by the Treasury his right to the said goods".

[35] Regulation 22A is titled "*ATTACHMENT OF CERTAIN MONEY AND GOODS, AND BLOCKING OF CERTAIN ACCOUNTS*" and Regulation 22A(1)(a)(i) provides that:

> *"(1) Subject to the provisions of the proviso to subparagraph (i) of paragraph (b) of section 9(2) of the Act, the Treasury may in such manner as it may deem fit—*
>
> *(a) attach—*
>
> *(i) any money or goods, notwithstanding the person in whose possession it is, in respect of which a contravention of any provision of these Regulations has been committed or in respect of which an act or omission has been committed which the Treasury on reasonable grounds suspects to constitute any such contravention, or, in the case of such money or any part thereof which has been deposited in any account, an equal amount of money which is kept in credit in that account, and shall, in the case of money attached, deposit such money in an account opened by the Treasury with an authorised dealer for such purpose, and may, in the case of goods attached, leave such goods, subject to an order issued or made*

> *under paragraph (c), in the possession of the person in whose possession such goods have been found or shall otherwise keep or cause it to be kept in custody in such manner and at such place as it may deem fit…*"

[35] Regulation 22A permits the attachment and blocking of money in respect of which a suspected contravention of the Regulations has been committed. "*Blocking*" means that the financial institution at which the account is held is prohibited from letting the account holder deal with the money in the account.

[36] Regulation 22C under the heading "*RECOVERY OF CERTAIN AMOUNTS BY TREASURY*", permits the recovery of further money, apart from that which has been forfeited if there is a shortfall compared with the quantum involved in the contravention.

[37] The initial blocking order was based on Regulation 22A "*and/or*" Regulation 22C of the Exchange Control Regulations.

[36] The difference between the Regulation 22A and 22C was explained as follows by McCreath J in the matter of *Francis George Hill Family Trust v South African Reserve Bank and Others*:[2]

> "*It is apparent from the aforesaid provisions* [i.e. Regulation 22A] *that the person in whose possession moneys are found need not himself have committed any contravention of the regulation or have been*

---

[2] 1990 (3) SA 704 (T) at pp 710 E/G and 711.

involved, or be suspected of having been involved, in any such contravention.

It is the money which is to be attached in respect whereof a contravention of any provision of the regulations must have been committed, or in respect whereof some act or omission has been committed which is suspected to constitute such a contravention. Or it may be money which is suspected to have been involved in any such contravention, or suspected to have been involved in any act or omission which is suspected to constitute any such contravention. It is therefore the money which must be "tainted".

…

It is apparent from the aforegoing provision [i.e. Regulation 22C] *that even money which is not involved or suspected of having been involved in a contravention of the relevant regulations may be attached, if it is required to enable the Treasury to recoup the difference between the amount attached under reg 22A and the amount actually involved or suspected to have been involved in the contravention or suspected contravention of the latter regulation….*"

[37] Regulation 22B is titled "*FORFEITURE AND DISPOSAL OF MONEY OR GOODS ATTACHED OR IN RESPECT OF WHICH ORDERS HAVE BEEN ISSUED OR MADE*". After the blocking of money, the Respondent must either return the money to the original possessor or forfeit it. Regulation 22B deals with the procedures necessary to obtain forfeiture. In this regard:

[37.1] the blocking order is a prerequisite to the forfeiture order;

[37.2] the forfeiture order deprives the erstwhile owner of property of such property;

[37.3] a blocking order requires reasonable suspicion that a contravention was committed in respect of the money sought to be blocked; and

[37.4] a forfeiture order requires the decision maker to be satisfied that reasonable grounds exist that the money was connected with or involved in the contravention.

[38] Regulation 22D provides a remedy for *inter alia* a person aggrieved by the attachment or forfeiture of money and reads as follows:

"*REVIEW OF, OR INSTITUTION OF ACTIONS IN CONNECTION WITH, ATTACHMENT AND FORFEITURE OF CERTAIN MONEY OR GOODS, AND OF CERTAIN ORDERS*

22D. Any person who feels himself aggrieved by the attachment of any money or goods under paragraph (a) of regulation 22A(1) or regulation 22D(1) or the issue or making of an order under the provisions of paragraph (b) or (c) of regulation 22A(1) or sub-regulation (2) of regulation 22C or any condition imposed thereunder may –

(a) in the case of an attachment under paragraph (a) of regulation 22A(1) or of regulation 22C(1) or the issue or making of an order under paragraph (b) or (c) of the said regulation 22A(1) or regulation 22C(2), bring an application

in a competent court for the review of any such attachment or order in which other appropriate relief is asked;

(b) in the case of a decision under regulation 22B(1) or 22B(1), read with regulation 22C(3), to forfeit to the state such money or goods, at any time but not later than 90 days after the date of publication of the said notice institute an action in a competent court for the setting aside of any such decision,

and any such court may set aside any such attachment or order or decision, as the case may be, on the grounds set out in the provisions of paragraph (d)(i) or (iii) of section 9(2) of the Act."

WHETHER THE APPLICATION IS GOVERNED BY THE CURRENCY ACT OR PAJA

[39] The first question which arises is whether the review application was filed timeously and, if not, whether condonation can and should be granted. This requires a finding on whether the application is subject to the 90-day period in Regulation 22D(b) under the Currency Act or the 180-day period under section 7 of PAJA.

[40] At the commencement of the hearing, I was referred to the judgment of Ceylon AJ in this Court in the matter of *Evergrand Trading (Pty) Ltd v South African Reserve Bank and Another*[3], dated 30 September 2022 ("the *Evergrand* judgment"), where this very issue was decided. Ceylon AJ found that an application to review a forfeiture decision is governed by the Currency Act, read

[3] (54068/2020) [2022] ZAGPPHC 739 (3 October 2022).

with the Regulations, and not PAJA. In this regard the following was stated in paragraph [63] of the *Evergrand* judgment:

> *"[63] In the view of this Court, it would still be necessary to ascertain which piece of legislation regulates the condonation in cases like the present. This Court is persuaded by the submission of the Reserve Bank in this regard, which* [has] *been denied, but not refuted by Evergrand. This Court agrees that the system applicable to instances where forfeiture orders are involved is regulated by the* [Currency] *Act read with the Regulations. Therefore, any review concerning forfeiture decisions must be instituted at any time but not later than the 90-day period. The said time limitation has been imposed by the legislature and is therefore applicable in this matter under the current circumstances, and which prevails over the 180-day period allowed for in PAJA."*

[41] This Court would only be justified in departing from the finding in *Evergrand* if it is clearly wrong.

[42] As the heads of argument filed before the hearing were prepared before the *Evergrand* judgment was handed down, the parties' counsel were provided with an opportunity to file supplementary heads of argument on the impact of the *Evergrand* judgment on the outcome of this matter. Such heads of argument were duly filed on 31 January 2023 as directed by the Court on 22 November 2022.

[43] The Respondent's counsel drew a distinction between "*ordinary*" administrative action (to which PAJA applies) and a forfeiture decision under the Regulations (which was described by him as *sui generis*) which he contended is subject to the provisions of the Currency Act and the Regulations promulgated thereunder, as was found to be the case in *Evergrand*.

[44] The Respondent's counsel submitted that the *Evergrand* judgment confirms that the Court is obliged to dismiss the application on a preliminary basis, without adjudicating upon the merits.

[45] The Applicant's counsel submitted that Regulation 22D provides a remedy for two different categories of conduct: The first remedy is provided for a person aggrieved by the attachment (or blocking) of either tainted or untainted money (which remedy is dealt with in Regulation 22D(a)) and the second remedy is provided for a person aggrieved by a decision to forfeit tainted or untainted money under Regulation 22B (which remedy is dealt with in regulation 22D(b)).

[46] According to the Applicant, the first remedy provided, i.e. that relating to the attachment (or blocking) of money, is that of an application for review and there is no time limit provided in the regulations for the bringing of such an application. However, the second remedy provided, relating to a notice to forfeit is to "*institute* ***an action***" (emphasis added) not later than 90 days after the date of publication of the notice of forfeiture.

[47] It was further contended on behalf of the Applicant that the clear wording of the Regulations demonstrates that drafter of the Regulations, deemed it necessary to draw a distinction between:

[47.1] motion proceedings and action proceedings;

[47.2] the remedy required to deal with an attachment and a remedy required to deal with a forfeiture; and

[47.3] remedies that had to be exercised within a given time period and those that did not.

[48] According to the Applicant, the notice in the Government Gazette stated that the money had been forfeited in terms of Regulation 22B and the Applicant then had a choice to either exercise its rights under Regulation 22D(b) (i.e. to "***institute an action***" within 90 days from the date of publication of the notice of forfeiture) or launch an "***application***" for review under PAJA which provided for a 180-day time limit. According to the Applicant, the provisions of Regulation 22D(b) and the 90-day time limit would only apply where action proceedings were brought.

[49] The question which arises is whether the Applicant's restrictive interpretation of the word "*action*" in Regulation 22D(b), which would exclude "*application proceedings*", is a correct and sensible interpretation, having regard to the context.

[50] In the matter of *Natal Joint Municipal Pension Fund v Endumeni Municipality*[4] the Supreme Court of Appeal ("the SCA") summarised the legal principles of interpretation as follows:

> "*[18] …Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.*"

---

[4] 2012 (4) SA 593 (SCA) at [18].

[51] Regulation 22D refers specifically to the fact that a court may set aside "*any such attachment or order or decision, as the case may be, on the grounds set out in the provisions of paragraph d(i) or (iii) or section 9(2) of the Currency Act*."

[52] Section 9(2)(d)(iii) of the Currency Act specifically provides that:

> "***any person who feels aggrieved by any decision to forfeit*** *and dispose of such* ***money*** *or goods* ***may****, within a period prescribed by the regulations, which shall not be less than 90 days after the date of the notice published in the Gazette and referred to in subparagraph (ii),* ***institute legal proceedings in a competent court for the setting aside of such decision****, and the court shall not set aside such decision unless it is satisfied-*
>
> *(aa) that the person who made such decision did not act in accordance with the relevant provisions of the regulation; or*
>
> *(bb) that such person did not have grounds to make such decision; or*
>
> *(cc) that the grounds for the making of such decision no longer exist.*"
>
> (Emphasis added)

[53] Regulation 22D(b) is the regulation referred to in section 9(2)(d)(iii) of the Currency Act and must be interpreted in the context thereof. It is significant that the section itself refers to "***legal proceedings***" (i.e. legal proceedings of any

nature which would include action and application proceedings) and is not limited to "*action proceedings*". It was therefore clearly not the intention of the legislator that a person be restricted to bringing action proceedings under the Currency Act when he/she feels aggrieved by a decision to forfeit money. The use of different terminology in Regulation 22D(b) cannot limit a person's rights described in the empowering section of the Currency Act.

[54] In *Rossouw & Another v FirstRand Bank Ltd*[5] the Court stated that it is generally impermissible to use regulations created by a Minister as an aid to interpret the intention of the Legislature in an Act of Parliament, notwithstanding that an Act may include the regulations.

[55] Having said that, read in the context of section 9(2)(d)(iii), the word "*action*" in Regulation 22D(b) is not used in the sense of distinguishing between action proceedings and application proceedings. If this was the case, Rule 22D(b) would leave a party no option but to proceed with the issuing of summons despite section 9(2)(d)(iii) referring to any legal proceedings. In my view, the use of the words should be understood in the context of section 9(2)(d)(iii) which refers to "*legal proceedings*", and therefore the use of the word "*action*" should be interpreted widely to include the taking of formal legal steps and instituting legal proceedings (which would include application and action proceedings). This, in my view, would be the most sensible interpretation.

[56] In paragraph 16 of the supplementary heads of argument of the Applicant, the following was stated (footnote summited):

---

[5] 2010 (6) SA 439 (SCA) at para [24].

> "*16. In this instance, the first blocking order was issued on the 1st of March 2019. There was a further blocking order of sorts on the 19th of March 2019. The Applicant did not challenge any of the blocking orders. It did not exercise the remedy provided under Regulation 22D(a). Only once the Respondent took a decision to forfeit the funds,* ***did the Applicant institute legal action****.*"
>
> (Emphasis added)

[57] The word "*action*" used in paragraph 16 of the Applicant's heads of argument is also used in the wide sense (as it brought a review application and not action proceedings). This is illustrative of the fact that the word could be used in that sense in Regulation 22D(b).

[58] In light of the above, I do not agree with the Applicant's restrictive interpretation of the word "*action*" in Regulation 22 D and that the application would fall outside of the ambit of Regulation 22D(b) as it does not constitute action proceedings brought by way of summons.

[59] The Court in *Evergrand* also clearly considered the review application to fall within the ambit of section 9(2)(d)(iii) and Rule 22D(b) otherwise it would not have found that the application was subject to the 90-time limit in that Regulation.

[60] It was also pointed out by the Respondent's counsel that the Constitutional Court confirmed in the matter of *Mamadi and Another v Premier of Limpopo Province and Others*[6] that review proceedings can be brought by way

---

[6] (CCT176/21) [2022] ZACC 26 (6 July 2022).

of action proceedings. Hence, this is another basis upon which one can conclude that the reference to "*action*" would also not exclude review proceedings. There would, in my view, be no reason for the legislator to impose a 90-day limit on review proceedings brought by way of summons and not the same limit on review proceedings brought by way of application.

[61] In the Respondent's heads of argument, I was also referred to section 3(5) of PAJA which provides that "*[w]here an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure*". There was no challenge to the validity of section 3(5) of PAJA but this section justifies the procedure under the Currency Act and the 90-day deadline being applicable.

[62] The Respondent's counsel pointed out that, sensibly, and consistently with this 90-day statutory time period, the Regulations require the Reserve Bank to hold off on disposing of forfeited assets for that same 90-day period after a notice of forfeiture is published and, if a review application is instituted within that period, the Reserve Bank may not dispose of those assets until final judgment has been granted in that application.[7]

[63] The Respondent's counsel further argued that, because the legislature chose to design a 90-day time limitation, the specific time period in the Regulations will prevail over the general time period provided for in terms of PAJA. In this regard, the Court was referred to the matter of *Rustenburg*

---

[7] Regulation 22B(3).

Platinum Mines Ltd v Commission for Conciliation, Mediation and Arbitration[8] ("the *Rustenburg* case") where Cameron JA (as he then was) expressly recognised that the legislature may need to regulate time periods for the institution of review proceedings differently in relation to different fields because the type of prejudice that may arise is varied. The following was stated in this regard:[9]

> "…*PAJA requires that proceedings for judicial review be instituted without unreasonable delay and, in any event, not later than 180 days after exhaustion of internal remedies or after the person concerned became aware of the action challenged and the reasons for it (s 7(1). That is a longer period than the six weeks s 145(1) affords. However, as both the CC and this Court have emphasised, labour disputes require speedy resolution, and the Legislature gave clear effect to this special imperative in s 145(1) by requiring a labour disputant to act quickly.* ***The Constitution does not require that the legislation enacted to give effect to the right to administrative justice must embody any particular time periods. This is therefore a question on which the Legislature may be expected to legislate differently in different fields, taking into account particular needs***".
>
> (Emphasis added)

[64] The Applicant's counsel submitted that the *Rustenburg* case is of no assistance and pointed out that the decision in that case was overturned in the matter of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.[10] Although the decision of the SCA in *Rustenburg* that PAJA was appliable to

---

8 2007 (1) SA 576 (SCA) at para [27] at 588 D/E.
9 The *Rustenburg* case, para [27] at 588 E.
10 2008 (2) SA 24 (CC).

arbitration awards was overturned by the Constitutional Court, the bolded portion above was not stated to be incorrect.

[65] In the *Evergrand* judgment, the Court held that "*any review concerning forfeiture decisions must be instituted at any time but not later than the 90-day period*" referred to in the Exchanges Act and Regulations[11] and that the effective date upon which the 90-day period commences is the date of publication of the forfeiture notice.[12]

[66] The court in the *Evergrand* judgment reasoned that the 90-day time limit "*has been imposed by the legislature and is therefore applicable … and … prevails over the 180-day period allowed for in PAJA*"[13] and that an application for review of a forfeiture order is regulated by the Currency Act and the Regulations promulgated thereunder and no by PAJA.[14]

[67] Having regard to the relevant authorities and the recognition by the SCA in the *Rustenburg* judgment that the legislator may need to regulate the time periods for the institution of review proceedings differently in relation to different fields, I am of the view that the *Evergrand* decision on the applicability of the 90-day time period in the Currency Act and the Regulations, as opposed to the 180-day time period in PAJA, is correct.

CAN CONDONATION BE GRANTED UNDER THE CURRENCY ACT?

---

11 The *Evergrand* judgment, para [63].
12 The *Evergrand* judgment, para [64].
13 The *Evergrand* case, para [63].
14 The *Evergrand* case, para [83](a).

[68] Our appellate courts have recognised that the question of whether condonation for a delay will be availing will depend on the nature and type of decision concerned. The Respondent's counsel referred to the matter of *Gqwetha v Transkei Development Corporation Ltd and Others*[15] where the SCA found that a delay in bringing a review of the respondent's dismissal of an employee ought not to be condoned. The following was stated in this regard:[16]

> "*[24] Whether there has been undue delay entails a factual enquiry upon which a value judgment is called for in the light of all the relevant circumstances including any explanation that is offered for the delay. A material fact to be taken into account in making that value judgment – bearing in mind the rationale for the rule – is the nature of the challenged decision.* ***Not all decisions have the same potential for prejudice to result from their being set aside.***
>
> *[25] The challenged decision in the present case was a decision to dismiss the appellant for complicity in financial irregularities. A decision of that kind will necessarily have immediate consequences for the ordinary administration of the organisation, and for other employees who will be called upon to perform the functions of the dismissed employee or even replace her.* ***Moreover, personnel decisions that are susceptible to review are no doubt made by any large organisation on a regular and ongoing basis, and some measure of prompt certainty as to their validity is required. The very nature of such decisions speaks of the potential for prejudice if they were all to be capable of being set aside on review after the lapse of any considerable time****."*
>
> (Emphasis added)

---

15 2006 (2) SA 603 (SCA).

16 The *Gqwetha* judgment at paras [24] to [25] at 613 A/B to 613 E.

[69] It was argued by the Respondent's counsel that forfeiture decisions, by their very nature, require a degree of promptness in finalisation and certainty and that their late review instantiates a unique type of prejudice, being prejudice to the national fiscus. I agree with this reasoning. The wording of section 9(2)(d)(iii) and Regulation 22D(b) are peremptory and proceedings, hence, must be instituted within the 90-day time period.

[70] In the matter of *Mohlomi v Minister of Defence*[17] the Constitutional Court confirmed that a court has no inherent power to grant condonation to a litigant beyond the statutory time period. Hence, unless there is a provision in the statute concerned expressly conferring a discretion on the Court to condone non-compliance, it cannot do so.[18] There is no provision in the Currency Act or the Regulations providing the Court with a discretion to condone non-compliance with the 90-day time period to institute proceedings.

[71] It is common cause that:

[71.1] the forfeiture notice was published on 4 June 2021;

[71.2] the 90-day time limit prescribed by the Regulations therefore expired on 3 September 2021;

[71.3] the review application was only launched on 9 November 2021 (i.e. over 2 months later).

---

[17] 1997 (1) SA 124 (CC) at para 11, at 129 C – 130 B/E, and para 17, at 132 E/F to 133 D.

[18] *M v MEC for Health: Mpumalanga* [2021] ZAMPMBHC 21 at para [20].

[71] Absent authority being conferred on the Court to grant condonation for non-compliance with the 90-day time period, it cannot do so.

[72] Where a review application is filed out of time and a Court has no power to grant condonation, the Court cannot entertain the merits of the application. In this regard, I was referred to the matter of *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality.*[19]

[72] In the circumstances, the application falls to be dismissed. As far as costs are concerned, they must follow the result.

ORDER:

In the circumstances, I grant an order in the following terms:

1. The application is dismissed; and

2. The Applicant is ordered to pay the costs of the application.

_____

LG KILMARTIN

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

PRETORIA

Hearing date:	22 November 2022
Judgment date:	13 February 2023
Counsel for the Applicant:	Adv R Mastenbroek

[19] *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* 2017 (6) 360 (SCA), para [12] at 366 B to H.

Applicant’s Attorneys:	KWP Attorneys
Counsel for the Respondent:	Adv M Stubbs
Respondent’s Attorneys:	Bowman Gilfillan