

IN THE SUPREME COURT OF SOUTH
AFRICA (APPELLATE DIVISION)

In the matter between:

SOUTH AFRICAN RESERVE BANK

APPELLANT

and

TORWOOD PROPERTIES (PTY) LTD

RESPONDENT

CORAM: HEFER, VIVIER, HARMS, MARAIS and PLEWMAN
JJA

HEARD: 3 SEPTEMBER 1996

DELIVERED: 25 SEPTEMBER 1996

JUDGMENT

HARMS JA/

HARMS JA

This appeal is concerned with an attachment by the appellant, the South African Reserve Bank (the "Reserve Bank"), of immovable property held by the respondent, Torwood Properties (Pty) Ltd ("Torwood"), under a deed of transfer dated 6 September 1968. The attachment occurred, nearly 21 years later, on 9 May 1989 and was effected pursuant to provisions of the Exchange Control Regulations ("the Regulations"). These were made under s 9 of the Currency and Exchanges Act 9 of 1933 ("the Act"). As far as this case is concerned, the Regulations permit the attachment and forfeiture of money and goods involved in exchange control contraventions and provide a mechanism for the recovery of certain shortfalls upon forfeiture.

Torwood, in due course, instituted review proceedings against the Reserve Bank in the Transvaal Provincial Division. After the filing of answering affidavits by the Reserve Bank, that application was

left

dormant. Much later, on 10 August 1993, Torwood launched another application (the "time lapse application") against the Reserve Bank in the same court. This time it applied for a declaratory order to the effect that the attachment had lapsed due to the effluxion of time. In this regard Torwood relied upon s 9(2) (g) of the Act - it provides that the period of an attachment shall not exceed 36 months. In opposing this application, the Reserve Bank in turn relied upon subpar (i) of s 9(2)(g) which prolongs the 36-month period until one year after the final judgment in criminal proceedings related to the exchange control contravention that gave rise to the attachment. As an alternative, and by way of a counter-application, the Reserve Bank applied for an extension of the 36-month period, something permitted by its subpar (ii) . For this purpose it had to show "good cause". These cases were by agreement consolidated and heard as such by Zulman J. He found that (a) the attachment had lapsed,

(b) the Reserve Bank was not entitled to an extension

and (c) in consequence of the first finding, it was unnecessary to decide the merits of the review application. He accordingly issued the declaratory order sought by Torwood and ordered the Reserve Bank to pay the costs of both applications. The matter is before us by reason of leave to appeal granted by Zulman J.

The fact that Zulman J did not decide the review application caused difficulties during the hearing on appeal. There was no "judgment or order" in that application against which an appeal could have been noted. Both parties invited us, depending of the outcome of the appeal on the time lapse application, to consider the merits of the review application and to make an order on it. It is arguable that what Zulman J in effect did by disposing of the issues in the manner set out, was to dismiss by implication the review application. This would be so because the time lapse application was based upon the assumption that the attachment had been

in order. On the other hand, without a judgment or
order, there was

nothing against which Torwood could cross-appeal. Something similar happened in Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another 1992 (4) SA 202 (A) 214A-G. But, as will be apparent, the validity of the attachment has to be decided as a material jurisdictional issue in the appeal on the time lapse application. This means that, if the attachment were invalid, Zulman J ought to have upheld the review or issued a declaratory order to the same effect in the time lapse application, something he could have done since the review papers were incorporated into and formed part of that application.

THE NOTICE OF ATTACHMENT:

The notice of attachment was signed by Dr J A Lombard in his capacity as Deputy Governor of the Reserve Bank, He acted in terms of powers vesting in the Treasury delegated to him in this capacity. References to the Treasury should therefore be taken to include a reference to the Reserve Bank and vice versa.

The attachment purportedly

took place pursuant to the provisions of regulations 22A and/or 22C. The cause for the attachment was that the Reserve Bank had reasonable grounds to suspect that, "inter alia", regulations 1, 2, 3, 6, 7, 10, 14, 14A and/or 22 had been contravened. In addition, the suspicion was that these contraventions were "in respect of" the property of Torwood; that the property had been "involved" therein; that the property had been obtained due to the contraventions, and/or that Torwood had "been benefited or enriched" as a result of these contraventions.

The regulations referred to in the notice restrict the purchase and sale of foreign currency (reg 2) and the export of currency (reg 3); require of residents to transfer their rights to foreign currency to the Treasury (reg 6) and to declare their foreign assets and liabilities (reg 7); restrict the export of capital (reg 10), dealings in securities belonging to non-residents (reg 14), and limit the purchase and sale of financial Rand (reg 14A) . Reg 1

contains definitions and reg 22 provides that a contravention of the Regulations is an offence punishable with a fine and/or a term of imprisonment. The Treasury may, under prescribed conditions, attach money and goods involved in any such contravention (reg 22A). The money or goods attached may be forfeited to the State (reg 22B) and the Treasury may recover certain "shortfalls" upon the realization of the money or goods forfeited (reg 22C).

TORWOOD AND ITS PROPERTY:

Torwood is a private property holding company with one asset, namely the fixed property mentioned, that is erf 778 situated in the township of Forest Town in Johannesburg. The property can be described as the family home of one Robert Oliver Hill ("Hill"). Hill is said to be the main perpetrator of the exchange control contraventions that gave rise to this attachment (and to many other attachments of money and, presumably, goods in the hands of parties other than Torwood).

The property belonged initially to Hill's father. Hill, acting as a trustee for a company to be formed, purchased the property from his father at the beginning of 1968. Torwood was then incorporated and took transfer, all in the same year. Alterations and additions were effected during the period 1967 to 1984 and these were mainly financed by way of loans by Syfrets Mortgage Nominees ("Syfrets") secured by way of participation mortgage bonds over the property. The arrangement between Hill and Torwood was that he and his family would occupy the home and be liable for its upkeep and expenses, including the bond payments due to Syfrets. Important to this case is the fact that a company, Phoenix Management Services (Pty) Ltd ("Phoenix") had, over the period December 1986 to February 1989, made the necessary bond repayments on behalf of the Hill family to Syfrets, totalling R116 087,90. Some of the payments were made from attached Phoenix funds released by the Reserve Bank for some or other purpose, but nothing turns on this.

The original directors and shareholders of Torwood were Hill and his wife. Their shares were transferred (respectively in 1982 and 1976) to R O Hill Holdings (Pty)

Ltd and from there (also in 1982) to four so-called children's trusts. Mrs Hill and one Mr Evans are the directors of Torwood. Hill and his wife are neither trustees

nor beneficiaries of any of these trusts. I may add that it

is not alleged that Evans, Mrs Hill or the Hill children were in any way involved in any illegalities committed by Hill.

More need not be said in this regard because the shares in Torwood have not, as far as we know, been attached and the propriety of the acquisition of the shares by the trusts

involved has not been raised as an
issue.

THE EXCHANGE CONTROL CONTRAVENTIONS:

For purposes of this matter it must be accepted that Hill had been involved in exchange control contraventions since about 1974 until approximately 1987. The detail is not now of any concern. A summary of some of

the allegations against him are to be found in Francis George Hill Family (Trust v South African Reserve Bank & Others 1990 (3) SA 704 (T)). Many allegations have no bearing at all on Torwood or its property. Relevant to this case is the allegation that during 1986 to 1987 Hill had made immense profits mainly through financial Rand round-tripping. In this process, it is said, he used forged Escom loan stock certificates. Most of the illegal dealings took place in the name of trusts or companies under his control. In particular, Advanced Farming Ventures SA (Pty) Ltd, later known as Securities Investments Corporation (Pty) Ltd, fraudulently dealt with financial Rand and manipulated its mechanism. In the financial year ending on 28 February 1986 it generated an income in excess of R9 million. A significant portion of this ill-gotten gain was transferred to Phoenix. (I have mentioned that Phoenix had made the payments in issue to Syfrets of Torwood's bond indebtedness towards Syfrets).

It has also to be assumed that Hill is a fugitive from the South African justice system. Although a declared insolvent, he lives in some opulence in London and New York. A warrant for his arrest on charges of fraud and the contravention of the Regulations was issued on 10 May 1989. An application for his extradition from the USA, based on this warrant, was unsuccessful and the warrant was subsequently withdrawn. Conscious of the fact that it was unlikely that a foreign country would extradite someone on charges of the contravention of the Regulations, the Attorney-General of the WLD withdrew all such charges and drew an indictment based solely on the common law crimes of forgery, uttering and fraud relating to the use of forged Escom loan stock certificates in the purchase and sale of financial Rands. A new application for extradition – now from the UK - was prepared. In it the Attorney-General undertook not to prosecute Hill for any contraventions of the Regulations. This new indictment was entered by the

Registrar in the case register of the WLD on 10 May 1991 and the Attorney-General on the same day took the first steps towards the extradition of Hill. When this case was heard in the court below, some three years later, the indictment had not yet been served on Hill. We have been informed from the bar that the extradition proceedings have not been finalized.

REGULATION 22A:

As mentioned, the attachment was based in part upon this regulation. According to its title, it deals with the "attachment of certain money and goods and also with the blocking of certain accounts." It is a lengthy and convoluted provision and abounds with alternatives but its essence, for present purposes, can be gleaned from this extract:

"22A (1) Subject to the provisions of the proviso to sub-paragraph (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 ... 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, ...;

(ii) any ... goods, notwithstanding the person in whose possession it is -

(aa) which the Treasury on reasonable grounds suspects to be involved in a contravention of any provision of these regulations ...;

(bb) which have been obtained by any person or are due to him, whether by virtue of any personal right or otherwise and which would not have been obtained by him or would not have been due to him if any such contravention or failure or any such act or omission had not been committed;

(cc) by which any person has been benefited or enriched as a result of any such contravention or failure or any such act or omission, ..."

The proviso referred to in the opening lines of reg 22A(1) reads as follows:

"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."

The proviso applies prima facie to Torwood because it is neither an offender nor a suspected offender. The question is then simply whether Torwood had acquired the attached immovable property bona fide for reasonable consideration as a result of a transaction in the ordinary course of business and not in contravention of the regulations. The answer is not in doubt and I did not understand counsel for the Reserve Bank to argue otherwise. The property had been acquired by Torwood many years before Hill committed any contravention of the Regulations. There is no suggestion in the voluminous papers filed on behalf of the Reserve Bank that Torwood's purchase of the property had not been bona fide, that the purchase price paid by Torwood

did not represent reasonable consideration or that the purchase did not take place in the ordinary course of business. Evidently, in issuing the notice of attachment, the Reserve Bank had completely overlooked this important proviso. This conclusion disposes of the attachment insofar as it was based upon reg 22A - it was clearly invalid.

REGULATION 22C:

The attachment was also based upon reg 22C. I am not bold enough to paraphrase it and have to quote it.

"RECOVERY OF CERTAIN AMOUNTS BY TREASURY

22C (1) When the Treasury has, under regulation 22B, forfeited to the State money or goods referred to in paragraph (a), (b) or (c) of regulation 22A(1) and such money and the proceeds of the realisation of such goods, if any, are less than an amount equal to an amount -

- (a) in respect of which a contravention or failure or act or omission referred to in sub-paragraph (i) of regulation 22A(1)(a) has been committed;
- (b) which was involved in a contravention or failure or act or omission referred to

in sub-paragraph (ii)(aa) of that regulation;

(c) which has been obtained by any person or is due to him as referred to in sub-paragraph (ii)(bb) of that regulation;

(d) by which any person has been benefited or enriched as referred to in sub-paragraph (ii)(cc) of that regulation,

or when no money or goods have been forfeited for the State under the said regulation 22B, the Treasury may recover an amount equal to the difference between the last-mentioned amount and the first-mentioned amount of money and proceeds or an amount equal to the last-mentioned amount, as the case may be -

(i) from the person who committed the contravention or failure or act or omission in question;

(ii) from the person who the Treasury on reasonable grounds suspects to have committed the contravention or failure or act or omission in question;

(iii) from the person benefited or enriched as a result of contravention or failure or act or omission in question;

(iv) if more persons have committed the contravention or failure or act or omission in question or if the Treasury on reasonable grounds suspects that more persons have committed any such

contravention or failure or act or omission or if more persons have been benefited or enriched as a result of the contravention or failure or act or omission in question, separately and jointly from those persons,

by attaching in such manner as it may deem fit any other money, including money in a blocked account referred to in regulation 4, or other goods of the person or persons concerned.

(2) The Treasury may, if it on reasonable grounds suspects that it will be necessary in due course to recover under sub-regulation (1) any amount from the person or persons concerned, at any time on or after the date on which money or goods referred to in paragraph (a) of regulation 22A(1) have or could have been attached, issue or make an order in such manner as it may deem fit in or by which any person is prohibited -

(e) to withdraw or cause to be withdrawn any money held in any account or not more than an amount of it determined in its discretion by the Treasury, with due regard to the amount which in the opinion of the Treasury will in due course be recovered, or to appropriate in any manner any credit or balance in that account;

(f) to deal in any manner as may be determined by the Treasury with any

goods as may be determined by the Treasury of the person or persons concerned,

without the permission of the Treasury and in accordance with such conditions (if any) as may be imposed by the Treasury.

(3) The provisions of -

(a) sub-regulation (1) and (3) of regulation

22B shall apply mutatis mutandis to any money or goods referred to in sub-

regulations (1) and (2) of this regulation as if such money or goods were money or goods referred to in regulation 22A;

(b) sub-regulation (3) of regulation 22A shall apply mutatis mutandis to an order issued or made under sub-regulation (2) of this regulation."

What is contemplated by the regulation, in very general terms, seems (by way of an example) to be this: A contravention of the regulations is committed. The amount involved is Rx. That amount may be recovered by the Treasury. It may recover by attaching and declaring forfeit, for example, the money "involved" in the contravention. If that Rx cannot be found, the

shortfall may be recovered by

the attachment of "other" (untainted) money or goods from the persons mentioned in subpar (i) to (iv) of reg 22C(1). Turning then from the general to the specific: Torwood is not a person defined in either subpar (i) or (iv). That is common cause. Counsel for the Reserve Bank, rather faintly I thought, argued that subpar (ii) might apply. The submission was that the court had to lift the corporate veil shrouding Torwood and would find Hill lurking beneath it. I reject the argument. The provision is clear. A claim may be made against a person suspected of having committed the contravention. Torwood is not such a person. Torwood is also not, on the evidence, a front for Hill. The money paid on behalf of Torwood to Syfrets was money to which Torwood entitled. Fraud is not alleged in relation to any aspect the business of Torwood, nor has a case of the misuse of its separate legal personality been suggested in the affidavits (cf *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd & Others* 1995 (4) SA 790 (A) 802H-

804E). That leaves for consideration subpar (iii): Is Torwood a person who "benefited or [was] enriched as a result of [a] contravention ... in question"? The wording of this provision stands in contrast to that of subpar (ii) and (iv). In those two cases the Reserve Bank is entitled to act on a suspicion based on reasonable grounds. In the category under consideration (and under (i)) a suspicion is not enough. The shortfall can only be recovered if, as a fact, Torwood has benefited or been enriched as a result of a contravention. That was not the basis of the attachment notice. It merely recorded, in this context, that "the Bank on reasonable grounds suspects" the property to be "goods ... by which [Torwood] has been benefited or enriched as a result of any such contravention ...". The affidavits also say no more. In fact, the reason why nothing attached as a result of Hill's activities has yet been declared forfeited, is because of the desire of the Reserve Bank to obtain more information at the

criminal trial. It was said during argument that

without that additional information it cannot make a responsible decision.

In any event, it seems to me that the attachment of untainted goods in terms of reg 22C(1) was premature. This subregulation presupposes that the shortfall is actual and not merely suspected. If a shortfall is suspected, albeit on reasonable grounds, the remedy is to be found in subreg (2). It permits of a type of interim interdict. This means that, in the special circumstances of this case, the Reserve Bank misconceived its remedy. The appropriate "order" may have been one made under subreg (2) - but that was not issued.

In conclusion on this part of the case, I do not accept that it can be said that Torwood "benefited" or was "enriched" as a result of any contravention of the Regulations. To recall some facts mentioned earlier with some additions: Phoenix received tainted funds. It also had untainted income. It paid Torwood's bond obligations to

Syfrets. The money so used may or may not have been tainted. It made these payments on behalf of Mrs Hill. She was entitled to director's fees from Phoenix. She (and/or Hill) was contractually obliged towards Torwood to make these payments. Syfrets and (indirectly) Torwood received nothing to which they were not legally entitled. In the light of all this it seems to me that there is no real link between Hill's contraventions and the reduction of Torwood's bond obligations, i e the benefit or enrichment was not the "result of" ("as gevolg van") the contravention (cf s 9(2)(b)(i)(cc) of the Act, the enabling provision of this regulation). Any other interpretation would mean that if an offender under the Regulations rents, say, an apartment from a third and innocent party and he pays his rental with tainted money, all the landlord's assets can be forfeited in order for the Reserve Bank to recover any shortfall (expected in this case to be approximately R40 million) under reg 22C. This bizarre result could

never have been intended by any

relevant lawgiver, and, if intended, it should have been stated unequivocally. The laws of Draco were severe, but at least, the citizens of Athens had no doubts about their meaning.

CONCLUSION:

It follows from the foregoing that I am satisfied that the Deputy Governor of the Reserve Bank, in authorising the attachment of the immovable property of Torwood, did not act in accordance with the relevant provisions of the Regulations and that he did not have reasonable grounds for taking that action (s 9(2) (d)(i) of the Act). This means that Torwood was entitled to an order to that effect, either in the review or the time lapse application. It does not matter which. This result requires an amendment of the

order

of the court below. The position of the Reserve Bank is

not

affected thereby. The conclusion makes it unnecessary

and

inadvisable to express any views in relation to the

respective merits of the many issues raised in the time

lapse

application. The costs of the appeal, in consequence, fall to be paid by the Reserve Bank.

The following order is made:

1. The appeal is dismissed with costs, including the costs of two counsel.

2. Par 1 of the order of the court below is amended to read:

"It is declared that the attachment order dated 9 May 1989 made by the South African Reserve Bank of the immovable property of the applicant was null and void and of no legal effect."

L T C HARMS
JUDGE OF
APPEAL

HEFER JA)
VIVIER JA) AGREE
MARAIS JA)

PLEWMAN JA)