

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 235/09

In the matter between:

THE SOUTH AFRICAN RESERVE BANK

Appellant

and

MZILIKAZI GODFREY KHUMALO

First

Respondent

**MAWENZI RESOURCES AND FINANCE
COMPANY (PTY) LTD**

Second

Respondent

Neutral citation: *The South African Reserve Bank v M G Khumalo*

(235/09) [2010] ZASCA 53 (31

March 2010)

Coram: HARMS DP, NUGENT, LEACH JJA, HURT and
MAJIEDT AJJA

Heard: 24 February 2010

Delivered: 31 March 2010

Summary: Exchange Control Regulations – Regulation 22C(1) is not invalid for failing to incorporate a time period not exceeding that laid down in s 9(2)(g) of the Currency and Exchanges Act 9 of 1933

ORDER

On appeal from: North Gauteng High Court (Pretoria) (B R Southwood, J R Murphy and T J Raulinga JJ sitting as a court of first instance).

1. The appeal succeeds with costs, including the costs of two counsel.
2. The order of the court a quo is set aside and is replaced by the following:
'The application is dismissed with costs, including the costs of two counsel.'

JUDGMENT

LEACH JA (HARMS DP, NUGENT JA, HURT et MAJIEDT AJJA concurring):

[1] This appeal concerns the validity of a notice of attachment issued by the appellant, the South African Reserve Bank, under r 22C(1) of the Exchange Control Regulations¹(‘the regulations’) promulgated under the Currency and Exchanges Act 9 of 1933

¹ Promulgated under section 9 of the Currency and Exchanges Act 9 of 1933 in Government Notice R 1111 of 1961 and amended up to Government Notice R 855 in Government Gazette no 20299 of 23 July 1999.

(‘the Act’). For purposes of this judgment it can be accepted that references to ‘the Treasury’ in both the Act and the regulations are to be construed as referring to the appellant.

[2] The first respondent is a businessman and a director of various companies, including the second respondent. From August 2002, the appellant held discussions with the two respondents in regard to whether various transactions had contravened the regulations. On 12 August 2008 the appellant, unpersuaded that the transactions in question did not amount to contraventions, issued the disputed notice purporting to attach various assets of the respondents which it alleged were ‘moneys or goods’ contemplated by r 22C.

[3] This led to the respondents seeking urgent interim relief, including orders declaring the notice to be invalid and interdicting the appellant from giving effect to the notice pending the outcome of a review application that was yet to be brought, in which additional relief would be sought. The application came before a full bench of the North Gauteng High Court (Southwood, Murphy and Raulinga JJ). One of the grounds upon which it was said by the respondents that the notice was invalid was that r 22C(1) under which the notice was issued was said itself to be invalid because it was not in conformity with the authorizing statute. In the course of argument in the court below counsel for both parties agreed that, if the court were to uphold the respondents’ contention in that respect, then a final order should be made that the notice was invalid. Having found in their favour the court below made an order accordingly and the prayer for interim relief became

superfluous. With the leave of that court that appellant now appeals against that order.

[4] An appeal lies against an order that is made by a court and not against its reasons for making the order. It follows that on appeal a respondent is entitled to support the order on any relevant ground and is not confined to supporting it only for the reasons given by the court below.²In this court, the respondent did not seek to support the order on any ground than that given by the court below, which was that the regulation under which it was made did not conform with the authorising statute and was thus invalid, subject to one subsidiary issue that I will come to. This means that the principal issue on which the appeal turns is whether the full bench was correct in its conclusion on the invalidity of r 22(C)(1) for the reasons that it gave. If the respondent fails on that issue, and on the subsidiary issue that I referred to, then the order that it made falls to be set aside, and the challenge to the validity of the order falls to be dismissed. The remainder of the notice of motion did no more than foreshadow a review application that was yet to be brought and need not concern us.

[5] The regulations were made under the powers extended to the Governor-General (later the State President and now the President) by s 9 of the Act which inter alia provides:

‘(1) The (President) may make regulations in regard to any matter directly or indirectly relating to or affecting or having any bearing upon currency, banking or

² Per Trollip JA in *Sentrale Kunsmis Korporasie (Edms) Bpk v N.K.P. Kunsmisverspreiders (Edms) Bpk* 1970 (3) SA 367 (A) at 395G-396A.

exchanges.

(2)(a) Such regulations may provide that the (President) 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 (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) . . .

(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 . . .

(ii) . . .

(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.

(e) . . .

(f) . . .

(g) The period referred to in paragraph (b) (i) shall be a period not exceeding 36 months or such longer period-

(i) as ends 12 months after the final judgment (including on appeal, if any) in every prosecution for any contravention of the regulations or any other law in relation to the money or goods concerned or in which such money or goods are relevant to any aspect of such prosecution; or

(ii) as may be determined by a competent court in relation to the money or goods concerned on good cause shown by the Treasury.'

[6] As appears from this, a distinction is drawn between money and goods involved or suspected of having been involved in any contravention of the regulations (sometimes referred to as 'tainted' money or goods) and other money and goods (which may be described as 'untainted'). The President is empowered by s 9(2)(b) (i) to make regulations relating to the attachment, freezing and forfeiture of tainted money and goods for a period referred to in s 9(2)(g) and by s 9(2)(b)(ii) to make regulations in general in respect of any matter which he 'deems necessary for fulfilment of

the objectives and purposes referred to' in s 9(2)(b)(i) including the attachment and freezing of untainted money and goods. Although no specific reference is made to 9(2)(g) in s 9(2)(b)(ii), the reference in that subparagraph to an attachment or freezing 'referred to in subparagraph (i)' leads to the reasonable conclusion that the legislature intended the prescribed time limit to also apply to the attachment and freezing of untainted money and goods.

[7] Regulations 22A, 22B and 22C of the regulations made by the President provide for the blocking of accounts, the attachment of money and goods, and the forfeiture and disposal of money or goods as envisaged by s 9(2)(b). In *South African Reserve Bank v Torwood Properties (Pty) Ltd*³Harms JA, after describing these regulations as being both 'lengthy and convoluted'⁴– a fitting description for s 9 as well – went on to explain their effect in broad terms as follows:⁵

'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 subpara (i) to (iv) of reg 22C(1).'

[8] For present purposes it suffices to record the following in regard to the regulations:

- Regulation r 22A deals with the tainted goods and money, with r 22A(1)(a) providing for the attachment of tainted

³ 1997(2) SA 169 (A).

⁴ At 176 C-D.

⁵ At 178C-D. A similar explanation is to be found in *Francis George Hill Family Trust v South African Reserve Bank & others* 1990 (3) SA 704 (T) at 711D-F.

money and goods and r 22A(1)(b) and (c) providing for the prohibition of withdrawals out of accounts into which tainted money is reasonably suspected of having been deposited and the prohibition of the use of tainted goods (this may loosely be described as the 'freezing' of such money and goods). Regulation 22A(3) provides that if attached tainted money and goods are not forfeited under r 22B within 'the period referred to in paragraph (g) of section 9(2) of the Act', they are to be returned.

- Regulation 22C, on the other hand, deals with untainted money and goods, with r 22C(1) providing for the attachment of untainted money and goods and r 22C(2) providing for the issue of an order freezing untainted money and goods. Importantly, while r 22C(3)(b) provides for the provisions of 22A(3) to apply mutatis mutandis to a freezing order under r 22C(2), no specific provision is made for a similar time period to apply to attachments under r 22C(1).
- Regulation 22B deals with the procedures necessary to obtain forfeiture of both tainted and untainted moneys and goods.

[9] The President's failure to provide a time limit on the duration of an attachment of untainted money and goods formed the cornerstone of the full bench's finding that r 22C(1) is invalid. It found that s 9(2) rendered it mandatory for the President to stipulate a time period not exceeding that prescribed by s 9(2)(g) for the attachment of such assets. It also held that the omission of a reference to r 22C(1) in r 22C(3)(b) had to be regarded as intentional and excluded the operation of a time limit. It therefore

concluded that an attachment for an unlimited period was intentionally envisaged by r 22C(1), a provision which is in conflict with the provisions of the Act and therefore invalid.⁶

[10] The first question to be considered is whether the legislature intended s 9(2) to prescribe the form in which the regulations were to be drawn (by directing that they had to state, or at least refer to, a period for which the attachment or freezing was to remain in force) or simply intended to prescribe a limit, as an objective matter of law, to the period for which such attachment or freezing could endure. In my view, all the indications in the section are in favour of the latter intention.

[11] The provisions of s 9(2)(g) contemplate three different situations. The first is the basic situation where an attachment or freezing is to be effected – it may remain in force for a period of at most 36 months. The second is where there is a prosecution for an offence in which the affected assets have been involved or are owned by a person contemplated in ss 9(2)(b)(ii) – the attachment or freezing will be effective until the expiry of 12 months after a final judgment. The third contemplates an application to court for an extension of the period on good cause shown by the Treasury. In my view, if the legislature had intended that this comparatively complicated formulation had to be spelt out in the regulations, it would have said so. It follows that the more reasonable conclusion is that the intention behind s 9(2)(g) was to set a statutory time limit for the duration of an attachment or freezing of money or goods and was not intended to prescribe the content of the

⁶ That r 22C(1) was invalid for this reason is also the view expressed by Prof A N Oelofse *Suid-Afrikaanse Valutabeheer-wetgewing* at 109 (quoted with the approval by the full bench.).

regulations and to require the President to determine a time limit in the regulations. All it means is that these orders may not last longer than the prescribed limit.

[12] The next question is whether the regulation, by omitting any reference to a time limit, means that the President sought to give a power to the Treasury that is not limited in time. I think not. The regulations are not to be read in isolation. Where possible, they are to be construed consistently with the empowering Act under which they were made.⁷No matter how clear and unequivocal regulations may appear to be, 'their interpretation and validity are dependent upon the empowering provisions which authorise them.'⁸The regulations must therefore be read in the light of the provisions of s 9(2) and its purpose and objectives – including that the attachment of money and goods may not be for a period longer than that prescribed in the Act. It therefore cannot be argued that merely because no mention of the time limitation contained in s 9(2)(g) is made in the regulations, it does not apply to an attachment made under the regulations.

[13] In my view, the full bench therefore erred in its conclusion that s 9 required the President to stipulate a time period in the regulations for the attachment and freezing of untainted money and goods. The plain meaning of s 9(2) is that while the President is empowered to make regulations under which money and goods may be attached and frozen, no such attachment or freezing is to last for longer than the prescribed period. The section does not require that period to be reiterated in the regulations. In addition,

⁷ *Minister of Health v New Clicks SA (Pty) Ltd* 2006 (2) SA 311 (CC) at para 211.

⁸ Per Smalberger J in *Singapi & others v Maku & others* 1982 (2) SA 515 (S) at 517C-D.

the fact that no such time limit is specified in the regulation does not mean that an attachment under r 22C(1) can last indefinitely. It can only endure as long as the maximum period prescribed by s 9(2)(g). The fact that the President unnecessarily referred to the period in s 9(2)(g) in certain other regulations does not mean that his failure to also do so in respect of attached untainted goods and money renders r 22C(1) invalid.

[14] The subsidiary issue that next arises is whether the notice was invalid because it did not contain a time limit. In my view it was not required of Treasury to set a time limit in the notice. If it omits to do so, as it did in this case, the default position is regulated by statute and the notice lapses after three years.

[15] The full bench consequently erred in concluding that r 22C(1) was invalid and in setting aside the warrants. The appeal must therefore succeed. The parties were correctly agreed that costs should follow the event and that the employment of two counsel was justified.

[16] In the result I order as follows:

1. The appeal succeeds with costs, including the costs of two counsel;
2. The order of the full bench is set aside and is replaced with the following:
'The application is dismissed with costs, including the costs of two counsel.'

L E LEACH
JUDGE OF APPEAL

APPEARANCES

APPELLANT: P G Ginsburg SC (with him K W Lüderitz)
Instructed by Newtons Inc, Pretoria
Symington & De Kok, Bloemfontein

RESPONDENTS: A Bhana SC
Instructed by Cliffe Dekker Hofmeyr Inc, Sandown
Matsepes Inc, Bloemfontein