REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 08/38696

DATE:13/12/2011

REPORTABLE

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

……………………… DATE
…………………………… SIGNATURE

In the matter between-

MOUSSA SYLLA	1ST APPLICANT
SYLLA DIAMOND INTERNATIONAL (PTY) LTD	2ND APPLICANT
AL SYLLA PROPERTIES CC	3RD APPLICANT

and

THE MINISTER OF THE DEPARTMENT OF FINANCE	1ST RESPONDENT
THE SOUTH AFRICAN RESERVE BANK	2ND RESPONDENT

JUDGMENT

BORUCHOWITZ J

[1] The applicants seek to review the decision of an official of the second respondent (the South African Reserve Bank (the "Reserve Bank")) in terms of which funds belonging to the applicants were made subject to a blocking order prohibiting the withdrawal of the funds from the accounts in which they were held. The blocking orders were issued in terms of Regulation 22A(1)(b) and Regulation 22C(2)(a) of the Exchange Control Regulations ("the regulations") promulgated in terms of s 9 of the Currency and Exchanges Act of 1933 (the Act). The applicants also sought an order to declare these and other regulations unconstitutional. The constitutional challenge has been abandoned and the only live issue that remains is the question of costs, an aspect that will be addressed later in the judgment.

[2] The first applicant, Mr Moussa Sylla, is the sole shareholder and director of the second applicant and the only member of the third applicant. He is also the sole member of Sylla Trading International CC (In Liquidation) ("Sylla Trading") and was at all material times the sole shareholder and director of Kilimanjaro Diamond Mining (Pty) Limited (In Liquidation) ("Kilimanjaro").

[3] The first respondent is the Minister of Finance, in his capacity as the executive head of the Department of Finance. The first respondent is also the relevant minister in control of the Treasury, being the authorised division of the Department of Finance referred to in the Exchange Control Regulations.

The second respondent is the South African Reserve Bank, Exchange Control Department ("the Department"), being the party which effected the attachment of the funds forming the subject matter of the review application.

[4] The Exchange Control 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. Regulation 22A(1)(a) makes provision for the attachment of money or goods with a view to their eventual forfeiture in terms of Regulation 22B.

[5] Regulation 22A(1)(b) permits the issuing by the Treasury of what are termed 'blocking orders' in terms of which persons are prohibited from withdrawing, or causing to be withdrawn, any money standing to the credit of the bank account of a person under investigation. Regulation 22A, in its relevant parts, reads as follows:

> "**22A Attachment of certain money and goods, and blocking of certain accounts**
>
> (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 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
>
> …

(b) if the Treasury on reasonable grounds suspects-that money referred to in paragraph (a) has been deposited in any account and if it has not been attached under the said paragraph (a), issue or make an order in such manner as it may deem fit in or by which any person is prohibited to withdraw or cause to be withdrawn, without the permission of the Treasury and in accordance with such conditions (if any) as may be imposed by the Treasury, any money in that account or not more than an amount determined by the Treasury, or to appropriate in any manner any credit or balance in that account, notwithstanding who may be the holder thereof"

[6] As is evident from the above-quoted extract, Regulation 22A(1)(b) permits the Treasury to issue or make an order prohibiting any person from withdrawing, or causing to be withdrawn, any moneys standing to the credit of a bank account under observation, where such functionary on reasonable grounds suspects that a contravention of the regulations has been committed.

[7] Regulation 22C(2)(a) involves the blocking of untainted, or what is termed "clean money", in an account. The regulation provides that, where money in respect of a contravention or suspected contravention of the regulations has been transferred abroad and such functionary on reasonable grounds suspects that it will in due course be necessary to recover any shortfall in respect of the amounts involved, such functionary may make an order in terms of Regulation 22C(2)(a). The purpose of this regulation is to enable the Treasury to recoup the difference between the amount attached under Regulation 22A and the amount actually involved or suspected to have been involved in the contravention or suspected contravention of the regulations (see *Francis George Hill Family Trust v South African Reserve*

Bank and Others 1990 (3) SA 704 (T) at 710I-711F and the reference therein to the dictum of Eloff DJP in the unreported judgment dated 1 July 1987 in the case of *Ferreira en Andere v Staatspresident en Andere*).

[8] The relevant parts of Regulation 22C read:

" **22C Recovery of certain amounts by Treasury**

(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 realization 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 the 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 -

(a) 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;

(b) 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-regulations (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."

[9] The second respondent's case is that the first applicant, through Sylla Trading and Kilimanjaro, caused vast sums of foreign currency to be exported from South Africa for the importation of rough diamonds in contravention of the provisions of Regulation 3(1) of the Exchange Control Regulations. These contraventions are said to have taken place during the period April 2004 to May 2006.

[10] Regulation 3(1)(a) and (c) provides as follows:

> **"3 Restriction on the export of currency, gold, securities, etc, and the import of South African bank-notes**
>
> (1) Subject to any exemption which may be granted by the Treasury or a person authorised by the Treasury, no person shall, without permission granted by the Treasury or a person authorised by the Treasury and in accordance with such conditions as the Treasury or such authorised person may impose -
>
> (a) take or send out of the Republic any bank-notes, gold, securities or foreign currency, or transfer any securities from the Republic elsewhere; or
>
> **(b) …**
>
> (c) make any payment to, or in favour, or on behalf of a person resident outside the Republic, or place any sum to the credit of such person; …"

[11] The blocking orders were issued by Mr MMJ Basson, a senior manager in the Exchange Control Department of the second respondent, who acted in

terms of powers vesting in the Treasury delegated to him in this capacity. On 30 April 2008 Basson took a decision and instructed First Rand Bank Limited to block the accounts of the second applicant with Account No 621 3092 9469, the account of the third applicant with Account No 621 3092 7877, and the account of the first applicant with account number 621 3093 4260. At the date of the issue of the blocking orders the aggregate amount standing to the credit of the three accounts was approximately R10.3 million, whereas the amounts involved in the alleged contraventions are substantially more; on the second respondent's version at least tenfold more than the amounts standing to the credit of the blocked accounts.

[12] Basson issued the blocking orders on the basis of information contained in a report of investigations conducted by an Exchange Control officer, Hettie-Annette Nel (Nel) (Annexure MB2 to the Answering Affidavit); as also information recorded on the Department's database. Based on that information, he concluded that it would be necessary in due course to recover under Regulation 22C(1) from the applicants at least the amounts standing to the credit of the three accounts.

[13] The facts deposed to by Nel are not seriously disputed by the applicants. What is in contention are the legal conclusions to be drawn therefrom, and whether such facts give rise to the conclusion, or at least a reasonable suspicion, that contraventions of Regulation 3(1) had occurred.

[14] The following is, in broad terms, a summary of the information contained in Nel's supporting affidavit. During the period 2004 to 2006, Sylla Trading applied to the Treasury Department through an authorised dealer (Standard Bank of South Africa Limited) for permission to make advance payments for the importation of diamonds. The Department granted various permissions to Sylla Trading. On 5 May 2004, it granted permission to Sylla Trading for a period of one year, expiring on 4 May 2005, to import diamonds in an aggregate amount of US$6 million. On 24 May 2005, the Department granted another application to make further advance payments at an increased level of R50 million for a further twelve-month period, which expired on 23 May 2006. Sylla Trading had no permission to make advance payments in the period 5 May 2005 to 23 May 2005. On 6 October 2005, the Department again granted permission to make advance payments in an amount not exceeding $100 million. This permission was for the period 6 October 2005 to 23 May 2006.

[15] On 26 October 2005 Standard Bank sent a report to the Department in regard to apparent contraventions of the regulations and irregular foreign exchange transactions conducted by Sylla Trading. Among the facts which emerge from the reports are the following. In the period 7 April 2004 to 7 April 2005, Standard Bank provided foreign exchange to Sylla Trading, exceeding the limit of the US$6 million permission granted by an amount of US$6 533 400.00. In the period 8 June to 7 April 2005 funds were remitted abroad via telegraphic transfer in respect of advance payments for imports, which resulted in Sylla Trading exceeding the approved limit by

US$45 999 068.67 (the US$6 million limit already having been taken up). In the period 18 April 2005 to 21 April 2005, advance payments for imports were remitted abroad in an aggregate amount of US$5 384 470.00, which was in excess of the US$6 million limit which had been granted and already utilised.

[16] It also appears from the Standard Bank report that the seller of the diamonds was Sylla Trading International (Guinea), an entity 100% owned by the first applicant. Although invoices were issued to Sylla Trading, all payments which Standard Bank made in respect of the invoices were effected from the account of Kilimanjaro Diamond Mining (Pty) Limited and not from funds held on behalf of Sylla Trading. Kilimanjaro at no time sought or obtained permission from the Department to engage in any foreign exchange transaction and did not seek or obtain permission to make advance payments for the importation of diamonds.

[17] On 24 January 2006, another authorised dealer, Rennies Bank Limited, furnished a report to the Department in regard to suspected irregularities. In this report Rennies expressed a concern that Sylla Trading had been making payments for diamond imports to third parties instead of to the actual suppliers by whom the invoices had been issued.

[18] Investigations by Nel also revealed that on 30 September 2006, foreign exchange in the sum of US$15 000.00 was provided to the first applicant by an authorised dealer and that during the 2006 calendar year the total of foreign exchange transactions conducted by the first applicant on his credit card amounted to R959 848.82. The total amount of foreign exchange

received and expended by the first applicant therefore amounted to R1 078 145.35. The foreign travel allowance which individuals were, in terms of the foreign exchange rulings, entitled to utilise without specific authority from the Department was only R160 000 in 2006, and the first applicant had therefore exceeded his foreign travel allowance by a sum of R918 145.35.

[19] The applications made to Standard Bank and Rennies bank for foreign currency for advance payments in the names of Sylla Trading and Kilimanjaro were made by the first applicant and were in most, if not all instances, signed by the first applicant. The first applicant was at all relevant times the sole director and shareholder of Kilimanjaro and the sole member and manager of Sylla Trading' accordingly, it is contended that the exchange control contraventions by one or both of these entities were contraventions perpetrated by the first applicant.

[20] Nel also states that the first applicant has, despite repeated requests from the Department, been unable to furnish a reconciliation between the advance payments made and the diamonds actually received into South Africa. The reasonable and probable inference under the circumstances is that funds were exported from South Africa ostensibly as payment for diamonds to be imported, but that diamonds with a value commensurate with the payments made were never received into South Africa.

[21] The principal ground of review is that Basson allegedly made an error of law in issuing the blocking orders in that he failed to appreciate that

Standard Bank was a person authorised to give permission to Kilimanjaro to export foreign currency, and had in fact given such permission. It is argued that the reference in Regulation 3(1) to "*a person authorised by the Treasury*" is a reference to an authorised dealer (in this instance, Standard Bank) and that permission for the making of advance payments abroad in foreign currency can thus be made either with the permission of the Reserve Bank or the authorised dealer. Accordingly, it is submitted that any advance payments in foreign currency consequent to the permission of the authorised dealer would have been legally made. These contentions are disputed by the second respondent.

[22] A further argument advanced on behalf of the applicants is that the fault is entirely that of Standard Bank, the authorised dealer. It is contended that Kilimanjaro's actions in remitting payments abroad without authority must be seen in the context of the following facts. On each occasion when diamonds were bought by Sylla Trading, it applied to Standard Bank, as the authorised dealer for the necessary advance payment for that transaction. Sylla Trading and Kilimanjaro each had a banking account with Standard Bank. To pay for the foreign currency in question the funds standing to the credit of Sylla Trading and Kilimanjaro were utilised. In each instance when remittances were made from the bank account of Kilimanjaro, Standard Bank relied on the overall authorisations that had been obtained on behalf of Sylla for the furnishing of advance payments.

[23] The applicants argue that Standard Bank committed a cardinal mistake; instead of debiting the amounts in question to the banking account of Kilimanjaro, it required Kilimanjaro to apply for the sale of foreign currency but under cover of the authorisation granted in respect of Sylla Trading. In support of this contention the applicants refer to two applications purportedly made by Kilimanjaro to purchase foreign currency (Application Numbers 6798 and 17497). Attached to each application is an invoice issued by the supplier in the name of Sylla Trading. The applicants contend that the true factual position is that applications were made by Kilimanjaro to fund on behalf of Sylla Trading the payments to the beneficiaries listed in the pro-forma invoices in terms of the permissions granted in favour of Sylla Trading. The advance payments were funded by Kilimanjaro on behalf of Sylla Trading, which had the required permission from the second respondent. The true beneficiary of the foreign currency was Sylla Trading, which was perfectly entitled to receive the benefit. Consequently, neither Sylla Trading nor Kilimanjaro contravened the Exchange Control Regulations.

[24] The second respondent contends that no reliance can be placed on the alleged error perpetrated by Standard Bank. The fact that Standard Bank in some instances mistakenly debited the account of Kilimanjaro instead of Sylla Trading offers no justification for the transactions. The pivotal question is not whose account was debited but who applied for and was granted permission to make advance payments, and by whom the advance payments were made. Authority to make advance payments was only granted to Sylla Trading. Mr A Ellis, an assistant general manager in the employ of the second

respondent, in his affidavit, makes the point that Standard Bank at no time purported to grant permission to any one of the applicants to make exports of foreign currency; it purported to do no more than to administratively process foreign currency payments on behalf of Sylla Trading and Kilimanjaro on the assumption (which Standard Bank subsequently conceded was incorrect) that the authorisations which had been granted to Sylla Trading covered all the foreign currency exports, including those made by and in the name of Kilimanjaro.

[25] A further argument put forward on behalf of the applicants relates to the question whether or not, in the light of the provisions of Regulation 2, specific authority was required under Regulation 3(1) for Sylla Trading and/or Kilimanjaro to make payment of foreign currency to persons resident outside of the Republic.

[26] Regulation 2(1) and (2)(a) provide as follows:

> "(1) Except with permission granted by the Treasury, and in accordance with such conditions as the Treasury may impose, no person other than an authorised dealer shall buy or borrow any foreign currency or any gold from, or sell or lend any foreign currency or any gold to any person not being an authorised dealer.
>
> (2) (a) An authorised dealer shall not buy, borrow or receive or sell, lend or deliver any foreign currency or gold except for such purposes or on such conditions as the Treasury may determine."

[27] Regulation 2(1) stipulates, in effect, that an authorised dealer may buy or sell foreign currency to any person who is not an authorised dealer, but that

no person who is not an authorised dealer may do so unless that person has obtained permission from the Treasury.

[28] The applicants argue that as a local buyer can only acquire foreign currency by purchasing it from an authorised dealer, the permission in terms of Regulation 2 would be entirely self-defeating if it were not necessarily accompanied by permission in terms of Regulation 3(1) to take the foreign currency out of the country. The two permissions, so it was submitted, must of necessity form part of a single transaction. Accordingly, once foreign currency was sold by an authorised dealer through a purchaser such as the applicants this necessarily carried with it the authorisation provided for in Regulation 3(1).

[29] The second respondent concedes that if a person applies in the proper way to the proper authority to purchase foreign currency in order to make advance payment to import goods into the Republic, and such permission is granted, then that permission would entail both a permission to purchase the foreign currency (in terms of Regulation 2) and permission to take the foreign currency out of the Republic (Regulation 3(1)(a)) or to make payment to or transfer the foreign currency for the credit of a third person outside the Republic (Regulation 3(1)(c)).

[30] The second respondent points out, however, that the mere fact that an authorised dealer is entitled to sell foreign currency does not necessarily mean that the person to whom the dealer sells the currency is entitled to buy

same or transfer such currency to a third person outside the Republic. Permission under Regulation 3(1)(c) is still required. In the present market, Standard Bank was authorised by the Department to give Sylla Trading permission to make advance payments to third parties in Guinea in respect of the proposed importation of diamonds into the Republic, but this did not afford Kilimanjaro the required permission from the Treasury to export foreign currency as required in terms of Regulation 3(1)(c).

[31] The second respondent contends that Standard Bank was neither entitled to sell to, and nor was Kilimanjaro entitled to buy, foreign currency for the purpose of making advance imports unless the Treasury or a person authorised by the Treasury had granted permission; and even if the transaction fell within the ambit of Regulation 2, the foreign currency once purchased could only lawfully be taken out of the Republic (or transferred to Guinea for the credit of a third party) if permission had been granted to Kilimanjaro in terms of Regulation 3(1)(c).

[32] The applicants also seek to make out a case that Nel was mistaken in regard to the aggregate of the authorisations granted to Sylla Trading to make advance payments for diamonds, and that material errors were made in the calculation of the advance payments made.

[33] The final argument advanced on behalf of the applicants was that Basson's decision to block the funds standing to the credit of the accounts was irrational and constituted unfair administrative action.

[34] The aforegoing is a summary of the parties' opposing contentions, and I turn now to evaluate these contentions.

[35] It is expedient to at the outset deal with the applicants' contention that "*a person authorised by the Treasury*" as referred to in Exchange Control Regulation 3(1) means an "*authorised dealer*", and that therefore those banks who have been appointed as authorised dealers are persons authorised by the Treasury to grant permission as contemplated in Regulation 3(1). A finding against the applicants in regard to this question would be dispositive of their contention that Standard Bank had validly granted permission to Kilimanjaro to export foreign currency.

[36] The applicants' argument is, in my view, without merit. The legislative history giving rise to the current wording of Regulation 3(1) is instructive. When the regulations were first published on 1 December 1961 it was provided that permissions in terms of Regulations 8, 9, 10 and 13 could be granted by "*the Treasury or an authorised dealer, and in accordance with such conditions as the Treasury or authorised dealer may impose*". Regulation 3 from the outset limited the permission to a "*permission granted by the Treasury or a person authorised by the Treasury*", and contained no reference to an authorised dealer. Accordingly, counsel for the second respondent rightly points out that where it was intended that an authorised dealer could grant certain permissions, this was expressly stated in the relevant regulations.

[37] All references to the phrase "*an authorised dealer*" in Regulations 8, 9, 10 and 13 were removed in Government Notice R957 of 4 May 1987. By effecting such removal the Minister of Finance clearly intended to bring these regulations in line with other regulations such as Regulation 3 which provide that any permission could only be granted by the "*Treasury or a person authorised by the Treasury and not by an authorised dealer*".

[38] This interpretation is supported in the published work "*Suid-Afrikaanse Valutabeheerwetgewing*" by AN Oelofse, where the following is stated at page 15:

> "'n Aantal van die regulasies (naamlik reg 8(1), 9(1), 10(1) en 13(1)) het aanvanklik bepaal dat nie slegs die Tesourie nie, maar ook 'n gemagtigde handelaar, toestemming kon verleen om die handelinge to verrig wat deur daardie regulasies verbied word. Die oorspronklike bewoording het die indruk geskep dat 'n eie diskresie aan 'n gemagtigde handelaar verleen word om die betrokke toestemming te gee. Dit was natuurlik nie die bedoeling nie. Die bedoeling was dat die gemagtigde handelaars slegs binne die Tesourie (Reserwebank) se voorskrifte mag optree. Die verwysings na 'n gemagtigde handelaar in bogenoemde regulasies is gevolglok deur Regeringskennisgewing R957 van 4 Mei 1987 geskrap. Dit is nou duidelik dat 'n vergunning wat ingevolge genoemde regulasies namens die Tesourie deur 'n gemagtigde handelaar aan sy kliënt verleen word, geen geldige vergunning is indien dit in stryd met die voorskrifte aan gemagtigde handelaars is nie. Die handeling ingevolge so 'n 'vergunning' is dues 'n oortreding van die regulasies **…**"

[39] The following are further indications that approval which may be given by the Treasury or a person authorised by the Treasury cannot be given by an authorised dealer. On 1 December 1961 (the same date on which the Exchange Control Regulations were promulgated) the Minister of Finance published what is termed "Orders and Rules". In terms of paragraph 2 thereof the first respondent appointed the South African Reserve Bank to carry out all the powers and functions assigned to the Treasury under the regulations, with the exception of the powers and functions assigned to the Treasury by Regulations 3(5) and 8, 16, 20 and 22. It is accordingly apparent that wherever in the regulations the phrase "*the Treasury or a person authorised by the Treasury*", or the word "*Treasury*" appears (save in Regulation 3(5), 3(8), 16, 20 and 22), such power and function was assigned to the South African Reserve Bank which is therefore entitled to exercise that power and function.

[40] Paragraph 3(a) of the Orders and Rules provides that the banks therein specified have been appointed as authorised dealers for the purposes of the regulations. Among the list of banks are Standard Bank of South Africa Limited and Bidvest Bank Limited.

[41] Paragraph 3(b) of the Orders and Rules provides that "*[T]he Minister has, in terms of Regulation 19, also authorised the banks referred to in subparagraph (a) to order any person to furnish information required by them for the purposes of, and in connection with, their functions under the Regulations*".

[42] Regulation 19(1) reads as follows:

> "FURNISHING OF INFORMATION
>
> 19.(1) The Treasury, or any person authorised by the Treasury, may order any person to furnish any information at such person's disposal which the Treasury or such authorised person deems necessary for the purposes of these regulations and any person generally or specifically appointed by the Treasury for the purpose may enter the residential or business premises of a person so ordered and may inspect any books or documents belonging to, or under the control of such person."

[43] Counsel for the second respondent rightly makes the point that a bank which was appointed as an authorised dealer in terms of paragraph 3(a) of the Orders and Rules was not thereby also constituted as "*a person authorised by the Treasury*" for purposes of Regulation 19(1), otherwise the specific authorisation in paragraph 3(b) of the Orders and Rules would have been unnecessary.

[44] Paragraph 10(a) of the Orders and Rules also stipulates that persons who "*desire information or advice on exchange or currency matters governed by the Regulations or who require approval or permission in respect of exchange, currency or gold transactions so governed, should apply to the Exchange Control through their bankers in the Republic or, if they have no such bankers, through one of the banks referred to in paragraph 3 thereof*".

[45] Counsel for the second respondent rightly contends that it is clear from paragraph 10(a) of the Orders and Rules that approval or permission which is required in terms of any regulation and which may be given by "*the Treasury*" or by "*a person authorised by the Treasury*" cannot be given by a banker or by an authorised dealer, but must be sought on application to the Exchange Control Department of the Reserve Bank, which application must be submitted through a banker or an authorised dealer.

[46] It is also apparent from a reading of the regulations that the Treasury and authorised dealers have separate and distinct functions. The Treasury is defined in Regulation 1 to mean in relation to any matter contemplated in the Regulations, "*[T]he Minister of Finance or an officer in the Department of Finance who, by virtue of the division of work in that Department, deals with the matter on the authority of the Minister of Finance*". And, in Regulation 1, an authorised dealer is defined to mean "*in respect of any transaction in respect of gold, a person authorised by the Treasury to deal in gold, and in respect of any transaction in respect of foreign exchange, a person authorised by the Treasury to deal in foreign exchange*".

[47] My attention has further been drawn to the following extracts from the Exchange Control Manual, in which the functions of authorised dealers are set out.

" **D.4 Functions of authorised Dealers**

In terms of paragraph 3 of the Orders and Rules certain banks were appointed as Authorised Dealers in Foreign Exchange. Their function is to assist Exchange Control in administering exchange control. All applications to Exchange Control have to be made through an Authorised Dealer.

…

D.5 Applications to Exchange Control

Where an Authorised Dealer is not empowered to approve the purchase or sale of foreign currency in terms of the authorities set out in the Rulings, an application must be submitted to Exchange Control through the head office of the bank concerned. The norms applied by Exchange Control in deciding on applications with respect to different types of transactions are discussed in Chapter 5 of the Manual.

…"

The manual expressly provides that authorised dealers have no authority to grant permission to make advance payments for imports.

"**2.1.4 Matters to be referred to Exchange Control**

Advance payments for imports

The transfer of funds in anticipation of purchases in countries outside the Republic should be refused by Authorised Dealers since, in general, Exchange Control is not prepared to provide foreign exchange in payment of imports prior to the date of shipment or dispatch of the goods to South Africa. In deserving cases an application may be lodged with Exchange Control."

[48] The second respondent states that the only persons authorised by the Treasury, as referred to in Regulation 3(1), are officials in the Exchange Control Department of the South African Reserve Bank, and not authorised dealers such as the Standard Bank. Mr GH Sommerville, the Head of the

Exchange Control Division within Standard Bank, avers, in a supporting affidavit, that the bank's appointment as an authorised dealer affords it the right to buy and sell foreign currency, but only under the conditions and within the limits prescribed by the Reserve Bank. He confirms that Standard Bank is not regarded as "*a person authorised by the Treasury*" for the purposes of Regulation 3(1), as alleged by the applicants, and that Standard Bank is not the agent of the Exchange Control Department of the Reserve Bank. He supports the second respondent's contention that Standard Bank is not and has never been entitled to deal with applications or grant permission to its clients for any foreign exchange transaction which falls outside the parameters as outlined in the Exchange Control Rulings. (According to Basson, the Department issues Exchange Control Rulings to authorised dealers which contain administrative measures as well as the permissions, conditions and limits applicable to transactions in foreign exchange which may be undertaken by authorised dealers.) None of these allegations is disputed or capable of dispute by the applicants.

[49] For these reasons I hold that Standard Bank was not "*a person authorised by the Treasury*" as contemplated in Regulation 3(1) and that it was incapable of giving permission to Kilimanjaro to export foreign currency. This contention is dispositive of the applicants' contrary contention and principal ground of review.

[50] The applicants' further contention that no contravention had been committed because Standard Bank had mistakenly debited the amounts

owing by Sylla Trading to the banking account of Kilimanjaro, under the cover of the authorisation granted in respect of Sylla Trading, is equally without merit. The second respondent rightly contends that no reliance can be placed on the alleged error, if an error at all was committed, by Standard Bank. It matters not whose account was debited but who applied for and was granted permission to make advance payments, and by whom the advance payments were made. On the common cause or undisputed evidence, only Sylla Trading had been granted permission in terms of Regulation 3(1)(c) to make payment to persons resident outside the Republic or to credit such person. Kilimanjaro had no authority to remit payments to persons resident outside the Republic.

[51] Sight cannot be lost of the fact that the first applicant is and was at all material times the sole member of Sylla Trading and sole shareholder and director of Kilimanjaro; he was the alter ego of these entities and managed their affairs. It is hardly likely that he would have been unaware that only Sylla Trading had been granted permissions from time to time to remit foreign currency to persons resident outside the Republic, and that Kilimanjaro had no authority or permission. It is also improbable that Standard Bank would have mistakenly debited the banking account of Kilimanjaro with vast sums and effected remittances to third parties outside of the Republic without the knowledge and concurrence of the first applicant. It is, in any event, clear from the papers that all applications made to Standard Bank to purchase foreign currency were made by and signed by the first applicant.

[52] The Standard Bank's report upon which Nel relies, as also the report received from Rennies Bank Limited, reveal that contraventions of the Exchange Control Regulations had taken place on a large scale. These contraventions involved officials of Standard Bank who, it appears, are no longer in the bank's employ. It is unlikely that these officials would have acted in the manner that they did without the concurrence, involvement and knowledge of the first applicant. I do not accept the first applicant's contention that there had been a mistake on the part of the officials of Standard Bank. In any event, if such mistake did occur, it cannot, for the reasons stated above, avail the applicants.

[53] On a proper conspectus of the relevant facts, both Kilimanjaro and Sylla Trading appear to have committed contraventions of Regulation 3(1)(c) of the Exchange Control Regulations. And the first applicant appears to have committed contraventions in his personal and representative capacities. He was the sole director and shareholder of Kilimanjaro and the sole member and manager of Sylla Trading and the contraventions perpetrated by one or both of these entities were contraventions which were perpetrated by the first applicant. The first applicant also committed a contravention of the regulations in regard to his travel allowance in 2006 in an aggregate amount of R918 145.35.

[54] The blocking orders were issued in terms of Regulation 22A(1)(b) and Regulation 22C(2)(a). It is a necessary jurisdictional fact which must exist before the powers conferred in these regulations may be invoked that exist

reasonable grounds to suspect that the applicants were persons as contemplated in Regulation 22C(1), and from whom the second respondent would be entitled to recoup the amounts involved in the alleged foreign exchange contraventions. The regulations do not require that Basson have proof that the contraventions had been committed and that the applicants were persons contemplated in Regulation 22C(1); all that was required was a suspicion based on reasonable grounds. The question as to whether the grounds for the suspicion are reasonable or not must be objectively assessed (see *Minister of Law and Order & Others v Hurley and Another* 1986 (3) SA 568 (A) at 580C, which was referred to with approval by McCreath J in *Francis George Hill Family Trust* (*supra*) at 711G-H. McCreath J also referred to the following dictum of Lord Devlin in *Shaaban Bin Hussien & Others v Chong Fook Kam and Another* [1969] 3 *All ER* 1626 (PC) at 1630, and approved in *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 819I:

> "Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; "I suspect, but I cannot prove". Suspicion arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof is the end."

[55] Basson, in my view, would have had reasonable grounds to suspect that first applicant, Kilimanjaro and Sylla Trading had committed contraventions of Regulation 3(1)(c) and that all three applicants are persons as contemplated in Regulation 22C(1). He issued the blocking orders on 2 November 2007, after having given due consideration to the information which

had been obtained through the investigation conducted by Nel and the information contained on the Department's database. Basson was continuously kept informed of the investigations by Nel. It is clear that Basson carefully and properly applied his mind to all relevant information. In the circumstances I am of the view that he was justified in issuing the blocking orders.

[56] As to Nel's alleged errors, the error which Nel made was to state that the authorisation granted up to a limit of US$15 million was increased to US$100 million, to a total of US$150 million. The errors are immaterial as the essential complaint upon which Basson relied related to the exportation by Kilimanjaro without permission of funds in excess of those that had been blocked.

[57] Finally, I turn to consider the argument that Basson's decision to block the funds was irrational and constituted unfair administrative action. It is a constitutional requirement that the exercise of public power by the executive and other functionaries should not be arbitrary and that decisions must be rationally related to the purpose for which the power was given (see *Pharmaceutical Manufacturers Association of SA and Another: In re ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at paras 85 and 86).

[58] The applicants' contentions as to irrationality are in my view without merit. The purpose of Regulation 22C is to enable the Treasury to recoup the

difference between the amount attached under Regulation 22A (which in the present case is nil) and the amount actually involved or suspected to have been involved in the contravention or suspected contravention of the regulations. Basson was fully aware of the amounts involved in the alleged exchange control contraventions and of the amounts standing to the credit of the accounts which had been blocked. There was accordingly a rational basis for his decision to block the funds standing to the credit of the accounts in question as the aggregate of those funds is but a small fraction of the amount allegedly involved or suspected to have been involved in the contravention of the regulations.

[59] For these reasons the review application cannot succeed, and falls to be dismissed.

[60] What remains is the question of costs. The award of costs is a matter which falls within the discretion of the Court, a discretion that must be exercised judicially, having regard to all relevant considerations. Save in cases where constitutional litigation is involved, the unsuccessful litigant should ordinarily be ordered to pay the costs. The applicants mounted a constitutional challenge but elected to abandon it. The reason for the abandonment was that the State President had not, as is required, been joined as a party to the application. Counsel for the applicants argued that the point of non-joinder should have been taken by the respondents at the outset. The point was never raised on the papers; nor was it raised in argument on behalf of the first respondent but only emerged for the first time during the

submissions made on behalf of the second respondent. In the circumstances the submission is that it would be just and equitable, as between the applicants and the first respondent, that no order as to costs be made. I do not agree. The application could have been postponed to enable the applicants to join the State President but the applicants chose not to do so and abandoned the constitutional challenge. In the circumstances, it is, in my view, proper that the applicants be ordered to pay the first respondent's costs, including the costs of two counsel. As the second respondent has succeed in its opposition, it is entitled to its costs.

[61] The following order is made:

(a) The application is dismissed.

(b) The costs of the application (including the costs of the first and second respondents) are to be paid by the applicants jointly and severally, the one paying, the other to be absolved. These costs are to include the costs consequent upon the employment of two counsel.

P BORUCHOWITZ
JUDGE OF THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

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JUDGMENT DATE : 13TH DECEMBER 2011