

**IN THE HIGH COURT OF UTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

Case No:16344/21

REPORTABLE: No OF INTEREST TO OTHER JUDGES: No REVISED: N 27-07-23 <i>P. Molokwane</i>
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In the matter between:

**SAR INVESTMENTS (PTY) LTD
LIMITED & OTHERS**

Applicant

and

THE STANDARD BANK OF SOUTH AFRICA

Second Respondent

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on caselines electronic platform. The date for hand-down is deemed to be 27 July 2023.

Summary: The applicant is seeking an order for monetary judgment against the Standard Bank and the Reserve Bank. The applicant having concluded an agreement with a foreign company, based in Israel, instructed the Standard Bank to transfer instalment payment from its account into the foreign creditor's account. The Reserve Bank directed the Standard Bank not to transfer the payment to

the creditor pending an investigation into the transaction between the applicant and the foreign creditor.

The applicant contended that the funds in question may have been attached or blocked in terms of section 9(2) (b) (i) of the Currency and Exchanges Act of 1933 read with Section 22A of the Exchange Regulations of 1961.

The applicant failed to sufficiently specify and clarify its case in its founding papers. The principle that a party should set out its case in the found affidavit restated.

JUDGMENT

Molahlehi J

Introduction

[1] The applicant in this application seeks monetary judgment against the first and the second respondents in the sum of R944 085.00, including interest calculated from 19 March 2020. It further seeks an order setting aside the attachment allegedly made by the respondents in terms of section 9 (2) (b) (i) of the Currency Exchange Act,¹ read with section 22A of the Exchange Control Regulations of 1961. In the amended notice of motion, the applicant prays for the relief as follows:

- "1. Payment by the First and Second Respondents to the applicant, jointly and severally, the one paying the other to be absolved, in the sum of R944 085.00 (Nine Hundred and Forty-Four Thousand and Eighty- Five Rand);
2. Alternatively, to prayer 1 above, payment by the First Respondent to the applicant, in the sum of R944 085.00 (Nine Hundred and Forty-Four Thousand and Eighty-Five Rand);
3. Directing that such respondent as is ordered to make payment to the applicant, of the aforesaid sum, also be ordered to make payment of interest on the aforesaid sum, to the applicant, at the rate of 7,25% per annum, from 19 March 2020, to date of payment in full and, if both the First and Second Respondents are held liable,

¹ Act number 9 of 1933

- ordering the First and Second Respondents to pay such interest, jointly and severally, the one paying the other to be absolved;
4. That any attachment of the applicant's aforesaid funds which may have been made in terms of Section 9 (2)(b)(i) of the Currency and Exchanges Act 9 of 1933, as read with Section 22A of the Exchange Control Regulations 1961 is set aside;
 5. Conditional upon it be found that there was an administrative decision made by the Second Respondent in regard to the manner in which it instructed the First Respondent to deal with and retain the applicant's funds, reviewing and setting aside such decision;
 6. Directing the First and Second Respondents, together with the Third Respondent if he opposes, to pay the costs of this application jointly and severally, the one paying the other to be absolved."

The parties

[2] The applicant is SAR Investments (Pty) Ltd, a company duly registered and incorporated with limited liability according to the company laws of the Republic of South Africa, carrying on the business as an Investment Company.

[3] The first respondent is the Standard Bank of South Africa Limited (Standard Bank), a company duly registered and incorporated per the Company Laws of the Republic of South Africa, and carrying on business as a bank and, in particular, as an authorised dealer,² as contemplated in Section 1 of the Exchange Control Regulations 1961, ("the Regulations").

[4] The second respondent is the South African Reserve Bank (Reserve Bank), an organ of the State, as defined in section 223 of the Constitution of the Republic of South Africa, Act,³ and regulated amongst others by the South African Reserve Bank

² Exchange Control Regulations of 1961 (as promulgated by Government Notice R.1111 of 1 December 1961 and amended up to Government Notice No. R.445 in Government Gazette No. 35430 of 8 June 2012) defines "authorised dealer" as follows: "means, 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."

³ Act number 108 of 1996.

Act,⁴ (the Reserve Bank Act). Its primary function in terms of section 2 of the Reserve Bank Act is, amongst others, to protect the value of the currency of the Republic in the interest of balanced and sustainable economic growth.

[5] The third respondent is the Minister of Finance, who is cited in his representative capacity as the Minister responsible for the conduct of the Department of National Treasury ("the Treasury"), being an organ of the State which oversees the conduct of the second respondent. The Minister is merely joined in these proceedings by virtue of such direct or substantial interest as he may have in the relief sought due to the oversight which Treasury has over the Reserve Bank.

[6] It is common cause that the funds of the applicant, which are the subject matter of these proceedings, were withdrawn by Standard Bank from the applicant's bank account and are being held on the Reserve Bank's behalf by the First Respondent; alternatively, they have been attached by the First Respondent on behalf of and at the behest of the Second Respondent, at Eastgate, Bedfordview, where the applicant's bank account is held."

Factual background

[7] The facts in this matter are fairly common cause. In October 2019, the applicant concluded a written agreement with a foreign company, Azimut Benetti Yachts IL ("Azimut"), based in Israel. The agreement relates to the purchase of a yacht by the applicant costing EUR300 000,00. (three hundred thousand Euros). The payment of the purchase price was to be made in instalments of EUR50 000,00. The first instalment was to be paid on the date of signature of the agreement and with subsequent instalments being payable on the 10th day of each month thereafter.

[8] The first and second instalments were paid during October 2019 and December 2019, respectively, in two separate payments of EUR50 000,00. These instalments were paid through a transfer of funds by Standard Bank from the account of the applicant. The instalment transfers were made to the account of Azimut in Israel by Standard Bank in its capacity as the Reserve Bank's dealer. The transfers were to be

⁴ Act number 90 of 1989.

made after the approval by the Reserve Bank in terms of the legislation and regulations.

[9] In December 2019, the applicant requested the Standard Bank to facilitate that a further and the third instalment, due in terms of the agreement, be transferred from its bank account to Azimut. In compliance with this instruction, the bank withdrew the amount due for the payment of the instalment from the applicant's account. It did not, however, comply fully with the instruction in that the amount withdrawn was not paid to Azimut.

[10] The initial explanation for not complying fully with the instruction was that the applicant was required to use a different balance of payment code when requesting a transfer of funds internationally. In the meantime, whilst waiting for the code and further information required by the Reserve Bank, the applicant requested that the EUR50 000,00 (fifty thousand Euros) be transferred back into its bank account.

[11] Following the receipt of the BOP code, the applicant requested that the Standard Bank should facilitate payment of the third instalment to Azimut. The transfer did not take place; instead, the Standard Bank advised the applicant that "the deal", being the agreement between the applicant and Azimut and the associated payments which the applicant needed to make to Azimut in compliance with the agreement, needed further "approval/authority" from the Reserve Bank. This was despite the previous approval of the agreement by the Reserve Bank, confirmed by the fact that the first two instalments had been transmitted to Azimut by the Standard Bank without any difficulty. The applicant was further required to confirm in writing the part payment made to Azimut towards the purchase price of the yacht in the sum of EUR100 000,00. The applicant complied with this requirement on 16 January 2020 by presenting to the Standard Bank a duly signed updated agreement with Azimut. This included a written confirmation of receipt of the aforesaid amount by Azimut.

[12] Following the above and on 11 February 2020, the Standard Bank's Exchange Control Manager advised the applicant in an email that the transaction had been approved by the Reserve Bank. Attached to that email was an email from the Reserve Bank dated 3 February 2020 confirming the approval of the applicant's application.

[13] The applicant, having received approval of the updated agreement between it and Azimut, including authorisation of the remaining payment of the transaction, requested the Standard Bank to transfer the third instalment to Azimut in the sum of EUR50 000,00. In line with this request, Standard Bank withdrew the said amount from the bank account of the applicant and paid it to Azimut.

[14] On 19 March 2020, the applicant addressed an email requesting Standard Bank to facilitate the transfer of the next instalment of EUR50 000,00, the fourth instalment to be paid to Azimut.

[15] Similar to the transfer of the previous instalments, the Standard Bank withdrew from the applicant's account the sum of EUR50 000,00. However, unlike the previous instalments, the amount was not thereafter transmitted into the bank account of Azimut. The applicant inquired as to the cause of the delay in making the transfer and was advised that it was due to "the enhanced due diligence" process. Again on a further inquiry as to progress the applicant was informed on 1 April 2021 that "despite the transaction approval by (Reserve Bank), enhanced due diligence still needs to be undertaken".

[16] The applicant inquired again about progress on 21 April 2020 and was informed by Standard Bank that the matter "should be finalised" by 22 April 2020. As nothing happened on that day, the applicant telephonically contacted one of the officials of Standard Bank in May 2020. The applicant was advised during that telephone conversation that the applicant should deal directly with the Reserve Bank with regard to the progress in transferring the instalment payment to Azimut.

[17] On 12 May 2020, the applicant addressed emails to the Reserve Bank seeking an urgent response as to why the money transferred out of its bank account had not been paid over to Azimut. In addition, the applicant sought to have the money transferred back into its account pending the finalisation of the authorisation process of transferring the same to Azimut.

[18] The Reserve Bank responded with an email indicating its disapproval of the applicant dealing directly with it and not through the Standard Bank. In relation to the

transfer of the funds to Azimtu, it indicated that it would "establish the status of the relevant matter and revert via the appropriate channels in due course."

[19] After two weeks of no response from either the Standard Bank or the Reserve Bank, following the above promise, the applicant instructed its attorneys of record to issue a letter of demand against both banks. The letter of demand was then followed by the institution of these proceedings where in the notice of motion the applicant claimed payment of R944 085,00.

[20] Although the respondents did not provide a response to the applicant, the Reserve Bank requested additional information from the applicant through the Standard Bank.

[21] On 20 July 2020, the applicant sent a further letter of demand, demanding the transfer of the money in question to its bank account by no later than 21 July 2020. The Standard Bank's response was to request for more time to consult with the "relevant stakeholder" to be in "a position to meaningfully respond."

[22] The Reserve Bank, on the other hand, responded to the applicant's letter on 23 July 2020, suggesting that the delay in responding to the applicant's request was due to the applicant's failure to respond to the Standard Bank's letter dated 1 June 2020.

[23] On 24 July 2020, Standard Bank responded to the applicant's letter and advised as follows:

- "34.1. The First Respondent had consulted with the relevant stakeholders and would not be able to release the amount of EUR50 000.00 (Fifty Thousand Euros) as it "is being withheld at the behest of the South African Reserve Bank ("the SARB") pending the outcome of an investigation that it has launched into the relevant transaction";
- 34.2. The Second Respondent was unable to "progress its investigation" as it was waiting for further information and/or documentation from the applicant, which was set out in the letter."

[24] On 8 December 2020, the applicant's attorneys of record provided Standard Bank with the documentation and information requested.

[25] After an exchange of correspondence between the parties and on 5 February 2021 the Standard Bank addressed an email to the applicant (FA 21.6) advising that it had "followed up with SARB (the Reserve Bank) and obtained an undertaking that we will receive a response as the review of the documentation is complete." It was further stated that it "regrettably could not get SARB to agree on a timeline."

The case of the applicant

[26] In light of the above, the applicant summarised its case as follows:

- "46.1. The Respondents have never disputed that the Rand equivalent of the sum of EUR50 000.00 (Fifty Thousand Euros) was transferred out of the applicant's account on 19 March 2020 and that it was never transferred to Azimut or paid back to the applicant;
- 46.2. The First Respondent admitted, on 24th July 2020, that it was holding the said sum "at the behest of" the Second Respondent, pending the outcome of the Second Respondent's "investigation". No details of or basis for the alleged investigation have ever been disclosed;
- 46.3. As at the 8th of December 2020, the applicant had provided the First and Second Respondents with all of the information and documents which they had requested be provided for "the investigation", which documents the First Respondent clearly found to be in order and forwarded to the Second Respondent;
- 46.4. The Second Respondent has not, to date, given any indication as to when its investigation will be completed, or if it is completed, what the outcome of the said investigation is;
- 46.5. The Second Respondent has not, to date, given any indication whatsoever as to whether it is the Applicant or Azimut that is being investigated, or what offence the applicant is suspected of committing;
- 46.6. If the outcome of the investigation was that the Second Respondent had found the applicant to have contravened a provision of the Act or of the Regulations, the Second Respondent has failed to publish a Notice in terms of Section 9(2)(d)(ii) of the Act that it intends to forfeit or dispose of the money attached (or better put, unlawfully withheld without furnishing

reasons) and, therefore, the applicant has not, been given an opportunity to apply to the above Honourable Court, to set aside that decision (if there is one) as it is entitled to do, in terms of Section 9(2)(d)(i) of the Act;

- 46.7. After the Second Respondent had approved the transaction in February 2020, the First Respondent facilitated a further transfer of money from the applicant's bank account to Azimut, in respect of the third instalment, thereby confirming the approval of the transaction as contemplated in the updated agreement, only to later perform an about turn in regard to the fourth instalment, without giving reasons and without at least refunding the applicant's monies to it;
- 46.8. The Respondents have not acted in accordance with the provisions of the Act and have failed to point to any particular Regulation relied upon to do what they are persisting in doing;
- 46.9. Despite the Applicant having given the First and Second Respondents various indulgences, payment of the sum claimed or any portion thereof, has to date not been made and the applicant is being severely prejudiced by the failure of the Respondents to refund the amount claimed, by not being able to use the monies in its business or to remit same to Azimut in compliance with the updated agreement."

[27] The applicant contended that based on the above, it was entitled to an order for payment against the respondents, as claimed in the notice of motion and to the release of any attachment of the funds.

[28] The other aspect of the applicant's case appears from the replying affidavit and the heads of argument. In this respect, the applicant contends in the replying affidavit that Standard Bank owes it a "duty of transparency." It does not, however, state the source of the alleged duty.

[29] In the heads of argument, the applicant contends that the relief sought in the notice of motion is wide enough to encompass a review and the setting aside the decision made by the second respondent to effect the attachment of the funds in

question. In other words, the applicant contends that the alleged attachment or "blocking"⁵ of its account is reviewable and subject to be set aside for unlawfulness.

The Standard Bank's case

[30] Standard Bank does not dispute having retained or placed a hold on payment claimed by the applicant but contends that it did so at the instructions of the Reserve Bank and had to comply because this was a statutory instruction. It has also pointed out that, in principle, it has no objection to releasing the money if so directed by a court order. It has, however, opposed the application on the ground that the relief sought is incompetent. The objection to the relief sought is that the applicant seeks to impose a separate and independent payment obligation on both the Reserve Bank and the Standard Bank jointly and severally including payment of interest on the amount and costs.

The Reserve Banks case

[31] The Reserve Bank does not deny having instructed the Standard Bank as its authorised dealer, not to pay the foreign creditor, Azimut, or repay the money back to the applicant's bank account. Its position is that the money should not be paid to Azimut or back to the applicant's bank account pending the finalisation of its investigation into the transaction between Azimut and the applicant. The investigation,

⁵ Regulation 4 defines "blocked accounts" as follows:

"(1) In this regulation "blocked account" means an account opened with an authorised dealer for the purposes specified in the succeeding subregulations.

(2) Whenever a person in the Republic is under a legal obligation to make a payment to a person outside the Republic but is precluded from effecting the payment as a result of any restrictions imposed by or under these Regulations, the Treasury may order such person to make the payment to a blocked account.

(3) The Treasury may by notice in the *Gazette* direct, in respect of—

(a) persons resident in a particular country; or

(b) any particular person whom the Treasury has reasonable grounds to suspect of having contravened any provision of these Regulations relating to foreign exchange, that all sums due by any other persons to persons referred to in (a) or (b) (hereinafter referred to as a "creditor") shall be paid into a blocked account.

according to the deponent to the answering affidavit of the Reserve Bank, concerns whether the transaction between the applicant and Azimut is lawful and whether it meets the law regulating currency control exchange. The investigation apparently involves other companies associated with the deponent to the founding affidavit of the applicant's application, who is also a shareholder in those companies.

[32] Furthermore, the Reserve Bank does not dispute the delay in finalising the investigation but blames the applicant for it. In this regard, the Reserve Bank contends that the delay is caused by the applicant's failure to furnish it with the required statutory information. It submitted that because of the failure by the applicant to provide the outstanding information, it is unable to verify what the nature of the transaction between the applicant and Azimut is and what it purports to be. It is also for this reason that it has not been able to issue a final decision on whether to approve the transaction, issue a blocking order or attach the money.

[33] In its opposition to the application, the Reserve Bank has raised two preliminary points, namely; the case of the applicant is inadequately pleaded, and the applicant has failed to disclose a cause of action in its pleadings.

[34] The Reserve Bank further in the alternative, contends that the applicant's case stands to be dismissed on its merit.

Legislative framework

[35] The controversy in this matter mainly revolves around the exchange control and the powers of the Reserve Bank with regard thereto. There are various interrelated legislation and regulations governing exchange control in South Africa. The purpose of the exchange control legislation was explained by the Constitutional Court in the *South African Reserve Bank and another v Shuttleworth and Another*,⁶ as follows:

"[53] 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 historical 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

⁶ 2015 (5) SA146 (CC) at paragraphs 53 and 54.

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.

- [54] This dominant purpose may also be gleaned from the uncontested evidence of the then Director-General of Treasury, Mr Kganyago. He explained that the 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 currency 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)."

- [36] In the present matter, the issue between the parties revolves in the main around the provisions of section 9(1) of the Currency Exchange Act,⁷ read with section 22A of the Exchange Control Regulations Act of 1961.

- [37] There appears to be a consensus between the parties as to the legal framework governing the exchange control. The objectives of the legal framework dealing with exchange control are achieved through the exercise of the powers and duties set out in the various interconnected statutes and regulations.⁸ The primary control is set out in section 9(1) of the Act, read with the Regulations.

- [38] Whilst certain transactions are prohibited by the Regulations, others are permitted subject to certain conditions. Transactions that are permitted under the legal framework may only be concluded with the permission of the Treasury or a person so

⁷ Act number 9 of 1933.

⁸ See The Currency and Exchange Act, 9 of 1933, the Exchange Control Regulations, 1961 published in Government Notice R.1111 of 1 December 1961, Orders and Rules under the Exchange Control Regulations and, Exchange Manual for Authorised Dealers.

authorised. Treasury or the person so authorised may, in granting permission for a transaction or transactions, impose certain conditions. The conditions are set out in both Regulation 3(1) (c) and 10 (1) (c) of the Regulations.

[39] Regulation 3 (1) (c), which amongst others, deals with restrictions on the export of currency, gold, and securities, provides:

"(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—

...

(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."

[40] Regulation 10(1)(c) provides:

"No person shall, except with permission granted by the Treasury or by an authorised dealer and in accordance with such conditions as the Treasury or the authorised dealer may impose—

...

(c) enter into any transaction whereby capital or any right to capital is directly or indirectly exported from the Republic."

[41] As is apparent from the above discussion the Reserve Bank plays a central role in the exchange control. It was established in terms of the Currency and Banking Act,⁹ and was further recognised in terms of both section 223,¹⁰ and the South African Reserve Bank Act.¹¹ Its objectives are set out in section 244 (1) of the Constitution as follows:

"To protect the value of the currency in the interest of balanced and sustainable economic growth in the Republic."

[42] It is in line with the above objective that the Minister of Finance delegated functions relating to the regulations of the exchange control to the Reserve Bank. The

⁹ Act number 51 of 1920.

¹⁰ Section 223 provides: "The South African Reserve Bank is the central bank of the Republic and is regulated in terms of an Act of Parliament."

¹¹ Act number 89 of 1990.

underlying rationale for the exchange and control measures is concerned with the capacity to "influence total monetary demand" in the economy.

[43] Regarding the regulatory scheme, the Reserve Bank has certain powers which it may exercise through its functionaries. The powers include blocking orders. These orders are generally made following an investigation process, making it a "final" decision.

[44] The investigative powers of the Reserve Bank are expected to be invoked in general where there is reasonable suspicion of infringement of the exchange control. The authority to investigate is designated in terms of Regulation 19 to the Financial Surveillance Department (Finsurv). The power to investigate includes the authority to direct any person to submit relevant information at his or her disposal. An investigator of Finsurv may, on reasonable suspicion of contravention of the exchange control, issue in terms of Regulations 22A or 22C an attachment of money or assets and a "blocking order" in respect of the bank account in which money is held. The timeframe for completing an investigation for a suspected contravention of the exchange control by the Reserve Bank is, in terms of section 9 (2) (b) of the Exchange Currency Act, thirty-six months. In the present matter there is no dispute that the period had not expired as at the point the applicant complained about the delay.

[45] Regulation 22A, which deals with the attachment of certain money and goods and the blocking of certain accounts, provides:

"(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 infringement, 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 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."

....

- (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 from withdrawing or causing 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."

The preliminary points

[46] As indicated earlier, the Reserve Bank has raised two preliminary points against the applicant's case, namely inadequacy of the pleadings and failure of the pleadings to disclose a cause of action. The latter point can, if sustainable, be a stand-alone point that could be fatal to the application. In my view, the main point that disposes off this matter concerns the failure to disclose the cause of action.

[47] A cause of action is disclosed when an applicant has demonstrated in his or her founding papers that he or she has a right which has been infringed or may potentially be infringed by the respondent and that the respondent is liable for the consequent damages or can be compelled to comply with the law in the form, for instance of vindication or restitution.

[48] In our law, the requirement that the applicant must disclose his or her case in the founding affidavit in detail and with specificity is underscored by the requirement that it be made clear to the respondent what case he or she has to meet. This was set out in *Minister of Co-operative Governance and Traditional Affairs v De Beer (Council*

for the Advancement of the Constitution and Hola Bon Renaissance Foundation Amicus Curiae),¹² as follows:

"(it is) fundamental that the applicant must set out with sufficient specificity and supporting evidence so that the functionary or repository of power knows the case that had to be met."

[49] In *Van der Merwe and Another v Taylor and Allied Transport Workers Union and Others*,¹³ the Constitutional Court in holding that an applicant needs to set out his or her case in the founding affidavit and the purpose thereof, said that the applicant, "must stand or fall" by the "factual averments in their affidavits which is intended to support the cause of action on which the relief sought is based."

[50] In *Betlane v Shelly Court CC*,¹⁴ the Constitutional Court said:

"29. It is trite that one ought to stand or fall by one's notice of motion and the averments made in one's founding affidavit. A case cannot be made out in the replying affidavit for the first time. It was for this reason that some of the allegations made in the replying affidavit, such as the unlawfulness of the writ of execution, were challenged. The applicant's situation is special though. He is a lay person, who until recently did not have the benefit of legal assistance. When he approached this Court, he did so on his own. Consequently, his notice of motion and founding affidavit did not properly set out all the relevant issues. It was as a result of the legal advice that was not previously available to him that he became aware of the need to attack frontally, the lawfulness of the writ of execution that was issued and executed, while his application for leave to appeal was pending." (footnotes omitted).

[51] In the present matter, examination of the notice of motion and the founding affidavit of the applicant falls seriously short of the requirements of the rules relating to pleading. There are no averments in the affidavit which support the cause of action

¹² 2021 JDR 1415 (SCA) at para 100.

¹³ 2008 (1) SA 83 (CC) at paras 114.

¹⁴ (CCT 14/10) [2010] ZACC 23

on which the relief sought is based. This means that the pleadings are inadequate to provide the court with the basis upon which it justifiably grant the relief sought.

[52] The defect in the applicant's pleadings carries serious consequences in as far as the question of whether of the application is sustainable and this include the case against the Standard Bank. It is not a mere formality or technicality which can be wished away or ignored. This basic principle was stated as follows in *South African Transport and Allied Workers Union v Garvas*:¹⁵

“Holding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty which is an element of the rule of law, one of the values on which our Constitution is founded. Every party contemplating a constitutional challenge should know the requirements it needs to satisfy and every other party likely to be affected by the relief sought must know precisely the case it is expected to meet.”

[53] In light of the above, the applicant's application stands to fail. The application would stand to fail even if the above approach was not adopted. In this respect, the applicant has not disputed the legislative powers of the Reserve Bank and the role of the Standard Bank as the authorised dealer.

[54] It is clear from the reading of the notice of motion that the applicant seeks monetary payment including interest. During argument the applicant's Counsel indicated that the application was not based on *mandamus* or delict or interdict. This approach is correct because the applicant has not in its papers claimed any clear right nor injury actually committed or reasonable apprehension of injury. It has also not shown that it could not obtain similar protection by another remedy. Similarly, a vindictory action would not be sustainable for the payment retained by Standard Bank as an authorised dealer of the Reserve Bank. In this respect the Standard Bank was merely an intermediary whose limited authority in dealing with issues of exchange control is subject to the strict mandate of the Reserve Bank. The applicant has not made out case that the Standard Bank in performing its function as an authorised dealer acted outside its mandate.

¹⁵ 2013 (1) Sa 83 (CC) para 114.

[55] Another point raised by the Reserve Bank in its heads of argument is that the application is premature because no final decision has been made. A final decision would be made upon the conclusion of the investigation which it alleges has been frustrated by the applicant in not providing the necessary documents to assist with the investigation.

[56] Accordingly, in essence the applicant is seeking the intervention of the court in an incomplete and pending process. This means that the applicant's challenge is brought *medias res*. It is trite that the courts are extremely reluctant to intervene in a yet to be completed process. It is only in exceptional circumstances that the court will intervene in an incomplete process.¹⁶

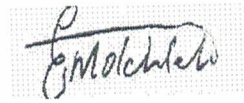
47 The applicant did not, in argument, pursue the issue of the review. This, again, was a correct approach in that it cannot, on the facts before this court, be said that the respondents have taken a decision to block or attach the applicant's account. The applicant has not challenged the authority of the Reserve Bank to conduct the investigation before making the decision whether to attach the account or block it. The complaint is that there has been a delay in finalising the investigation. There is no evidence that the period within which the investigation is to be conducted has expired.

48 In light of the above the applicant's application against both the first and second respondents stands to fail.

¹⁶ See *Wahlhouse and others v Additional Magistrate Johannesburg* 1959 (3) SA 113 (A) at 119 H – 120 H, *E and S v Western Areas Limited and others* 2005 (5) SA 214 and, *Take and Save Trading CC and others v Standard Bank of SA Limited* 2004 (4) SA 705 (CC) at para 4 and 5.

Order

49 In the circumstances the applicant's application is dismissed with costs.

A handwritten signature in black ink, appearing to read 'E Molahlehi', is placed over a light grey grid background.

E Molahlehi
Judge of The High Court
of South Africa, Gauteng
Division, Johannesburg

Representation:

For the applicant: Mr CLP Bollo

Instructed by: Biccari, Bollo and Mariano Inc.

For the first respondent: Adv KD Iles.

Instructed by: Macroberts Inc.

For the second respondent: Adv M Stubbs

Instructed by: Van Hulsteyns Attorneys

Heard on: 6 February 2023

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