**IN THE HIGH COURT OF SOUTH AFRICA**

**KWAZULU-NATAL LOCAL DIVISION : DURBAN**

CASE NO: D8203/2019

In the matter between:

**JOHNINE WINSOME ELISIE MADDOCKS N.O.** — **FIRST APPLICANT**

**AMERASAN PILLAY N.O.** — **SECOND APPLICANT**

and

**SOUTH AFRICAN RESERVE BANK** — **FIRST RESPONDENT**

**NATIONAL TREASURY** — **SECOND RESPONDENT**

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**ORDER**

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The following order is granted: -

**1. The following forfeiture orders are declared null and void:**

**(a) Notice 515 of 2018 which is annexure "JM6" annexed to the founding affidavit;**

**(b) Notice 527 of 2017 which is annexure "JM9" annexed to the founding affidavit;**

**(c) Notice 514 of 2018 which is annexure "JM11" annexed to the founding affidavit.**

**2. The second respondent is directed to pay the amounts set forth in the aforementioned forfeiture orders together with interest thereon into the applicants' banking account, particulars of which are as follows-**

| | |
|---|---|
| **Name of account:** | **First Financial Business Rescue and Insolvency Practitioners** |
| **Bank:** | **Nedbank** |
| **Branch Code:** | **164826** |
| **Account number:** | **[….].** |

**3. The costs of this application shall be paid by the respondents, jointly and severally, including the costs of two counsel where employed.**

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**JUDGMENT**

**Delivered on: Thursday, 01 April 2021**

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**OLSEN J**

[1] The applicants in this matter are the joint liquidators of two companies, Sun Candle Products (Pty) Limited and Xinming Mountain Textile (Pty) Limited. Winding-up orders in respect of these companies were made by this court, provisionally on 17 February 2017 and finally on 10 March 2017. The *concursus creditorum* in respect of

each company is taken to have been established on 13 February 2017 when the applications were lodged with this court. In each of those cases the orders were made under the Companies Act, 1973 on the application of a creditor, Pathema CC.

[2] On 10 September 2015 (ie well before the winding-up commenced) the South African Reserve Bank, which is the first respondent in these proceedings, issued "blocking orders" in respect of the amounts standing to the credit of each of the companies in various South African banks. (Where I use the words "bank" or "banks" I mean the commercial banks at which the accounts were held by the companies. The Reserve Bank will be referred to as such.) Such orders had the effect that "no person may withdraw or cause the withdrawal of funds together with interest thereon and/or accrual thereto in accounts held" at the banks. (I quote from the notifications sent to the banks.)

[3] By notices published in the Government Gazette under the hand of a deputy governor of the Reserve Bank, a Mr Naidoo, after the winding-up of the two companies had commenced, the Reserve Bank declared the monies in the bank accounts of the two companies which had been blocked to be forfeited, and directed that the monies should be disposed of (by the banks concerned) by deposit into the national revenue fund. For that reason, and because the liquidators want the money back, the National Treasury is cited as the second respondent in these proceedings.

[4] The applicants seek orders declaring the forfeiture orders made by the Reserve Bank null and void and directing the National Treasury to pay the amounts in question to the applicants in their capacities as joint liquidators of the companies.

[5] The contentions of the applicants are in relevant part summarised as follows in the founding affidavit.

'I submit:-

(a) that by virtue of the winding-up and the establishment of the *concursus creditorum* on 13 February 2017, the monies held in the bank accounts to the credit of Sun Candle and Xinming fall into the insolvent estates and are subject to the provisions of s 391 and s 342 of the (old) Companies Act;

(b) that the applicants in their capacity as liquidators are under a statutory duty to take possession of these assets;

(c) that the first respondent does not have any superior right to these funds in preference to the rights of proved creditors …;

(d) that the first respondent mistakenly believes that it is not bound by the aforementioned provisions [of] the Companies Act in that it can act in disregard of the statutory duties of the applicants.'

## THE ORIGIN OF THE RESERVE BANK'S POWERS

[6] The powers which the Reserve Bank exercised (or purported to exercise) are derived from the Currency and Exchanges Act 9 of 1933 and the regulations made thereunder. Little of any consequence of the original Act remains in force besides s 9 which is headed "Regulations regarding Currency, Banking or the Exchanges".

[7] In relevant part s 9 of the Act reads as follows.

'(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 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 such suspected offence against any regulation referred to in the 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 have 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 …

(ii) in general, any matter which the [President] deems necessary for the fulfilment of the objectives and purposes referred to in sub-paragraph (i), including the blocking, attachment, interdicting, forfeiture and disposal referred to in sub-paragraph (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 sub-paragraph (i), but which can for any reason not be so recovered.

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

…

(f) For the purposes of this sub-section “Treasury” means the Minister of Finance or an officer in the department of finance who, by virtue of the division of work in that department, deals with that matter on the authority of the Minister.

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

…

(3) The [President] may, by any such regulations, suspend in whole or in part this Act or any other Act of Parliament or any other law relating to or affecting or having any bearing

> upon currency, banking or exchanges, and any such act or law which is in conflict or inconsistent with any such regulation shall be deemed to be suspended in so far as it is in conflict or inconsistent with any such regulation.'

[8] A neat summary of the origins of the Currency and Exchanges Act is to be found in the majority judgment in *SA Reserve Bank v Shuttleworth* 2015 (5) SA 146 (CC). A perspective on the constitutionality of the Act (and for that matter, consequentially the regulations) is to be found in the minority judgment of Froneman J in *Shuttleworth* and in an article by Professor Cora Hoexter entltled "*South African Reserve Bank v Shuttleworth:* A Constitutional Lawyer's Nightmare" (2016 8 CCR 333). In the present matter there is no challenge to the constitutionality of the Act or the regulations. It is important to note, however, that there has not been an exercise of the power to make a regulation under s 9(3) of the Act suspending the statutory and other law of this country dealing with insolvency in general, and the insolvency of companies in particular.

[9] Regulation 22A permits, *inter alia*, the attachment of monies standing to the credit of any person "in respect of which a contravention of any provision of these regulations has being committed or in respect of which an act or omission has been committed which the Treasury on reasonable grounds suspects to constitute any such contravention, or, in the case of such money or any part thereof which has been deposited in any account, an equal amount of money which is kept in credit in that account". As an alternative to attachment, the Treasury may make a blocking order with respect to money standing to the credit of the person's account, such as was done in this case. A similar blocking order may be made in terms of Regulation 22C, with regard to any money at all of the person concerned, where, as I understand the regulation, the available money in respect of which a contravention of the regulations has been committed falls short of the total amount required to be blocked in order to compensate (I use the word "compensate" loosely) the State for the misconduct in question.

[10] Regulation 22B provides for the forfeiture and disposal of money attached, or money with respect to which blocking orders has been made. The Treasury is

empowered to “issue an order in writing in which it forfeits to the State” the money in question (including any money accrued therefrom). The regulation requires that money to be deposited into the National Revenue Fund.

[11] In terms of Rule 2 of the Orders and Rules under the Exchange Control Regulations published in GNR.1112 of 1 December 1961, the South African Reserve Bank is appointed by the Minister of Finance to carry out *inter alia* the powers and functions assigned to the Treasury under Regulations 22A, 22B and 22C.

[12] There is no challenge in this litigation to the proposition that the Reserve Bank had adequate grounds to issue the blocking orders relating to the accounts of the companies in question; or, the intervention of insolvency aside, adequate grounds for the making of forfeiture orders. As the liquidators point out in their papers, for want of knowledge there was no basis upon which they could challenge the existence of the requisite grounds for the exercise of those powers. Their case is that, liquidation having intervened, the Reserve Bank no longer had the power to make the forfeiture orders.

## JURISDICTION

[13] Both respondents have objected to the jurisdiction of this court. They have seized upon a contention made in reply by the applicants, that they can seek relief in these proceedings otherwise than under the Promotion of Administrative Justice Act, No 3 of 2000. The respondents have protested that the decisions in this case which are sought to be declared unlawful were made by a person or persons, and an organ of State, domiciled in Gauteng. I must confess to regarding this argument with some (legal) distaste. The remit of national government extends to the whole of the country, and may affect the rights and interests of a person anywhere in the country. I do not regard it as proper, in the light of ss 34 and 9(1) of the Constitution, that some should have to carry the burden, not shared by those who reside at the seat of government, of litigating against the state in a court other than the one where they reside. There is no need to say any more about that, or to consider it with reference to any authority which may have a

bearing on the matter. The problem is recognised in PAJA. In terms of s 1, a court will have jurisdiction if it is one "within whose area of jurisdiction the administrative action occurred or the administrator has his or her or its principal place of administration or the party whose rights have been affected is domiciled or ordinarily resident or the adverse effect of the administrative action was, is or will be experienced".

[14] The respondents have contended throughout that the making of a forfeiture order is administrative action, and therefore reviewable only under PAJA. As I understood the case for the applicants, it was originally contended that whilst the making of a forfeiture order is ordinarily administrative action, if the power ceases to exist, a purported exercise of it is no longer administrative action, but merely unlawful conduct. In my view there was no merit in this argument, and as I understood Mr *Moosa* SC, who appeared for the applicants, in the end he conceded this. In these proceedings the applicants contend that the administrative action taken is unlawful. That falls within the provisions of s 6(2)(f) and (i) of PAJA.

[15] It has also been argued on behalf of the second respondent that the forfeiture orders are valid until and unless they are set aside, and that in these proceedings the applicants do not claim to review the making of the forfeiture orders; with the result that there can be no claim to repayment of the monies in question. In my view there is no merit in this argument. Whatever amendments may have been made, or were intended to be made, to the order sought, the essence of the order originally sought in the notice of motion is that the forfeiture orders should be declared null and void and set aside. The absence of the word "review" in that order does not seem to me to be significant at all. A request for administrative action to be declared null and void on the basis of illegality and set aside is a request to review it, in the ordinary sense of that word.

[16] The above aside, the position is that these companies have been wound-up by orders of this court, and the winding-up is taking place under the auspices of the Master of this court. The forfeiture order, and the consequent transfer of the monies to the National Revenue Fund, constitute a considerable obstacle to the performance by the

applicants of their statutory duties as liquidators, upon the assumption that what was done was not done in accordance with law. I do not think that the jurisdiction of this court with regard to companies wound-up by this court is any different to that which would have existed if this had been a case of sequestration under the Insolvency Act, 1936. Counsel have referred me in this regard to *Goode, Durrant & Murray Ltd and Another v Lawrence* 1961 (4) SA 329 (W) at 331 A where the following appears.

'It follows, the moment that an order for sequestration is granted, that the Court granting the order is vested with jurisdiction in regard to everything that follows upon the order; all applications to Court and the Master's control of that estate is absolute and even rehabilitation must be in that forum.'

I have not been referred to authority going any other way.

[17] I am accordingly satisfied that this court has jurisdiction, and perhaps indeed also upon the basis that if it is shown that the removal of the monies from the bank accounts was a wrong, then it was committed here, where access to the money was put beyond the reach of the liquidators.

<u>THE PRINCIPAL ISSUE: DOES INSOLVENCY LAW APPLY AND WAS IT OFFENDED?</u>

[18] The argument advanced by Mr *Moosa* SC on behalf of the applicants is that the provisions of a statute trump the provisions of a regulation. Each counsel for the respondents has argued that this approach is wrong, that the provisions of insolvency law reside side by side with the currency regulations, that the two must be reconciled, with the inevitable result, it is argued, that the forfeiture orders in question are lawful. In the result, it is argued, the insolvent estates of the two companies must be dealt with on the footing that the companies have no claim to the monies which were subject to the blocking orders at the time of the establishment of the *concursus creditorum*.

[19] It is argued on behalf of the applicants that the forfeiture orders had the unlawful effect of disturbing the *concursus creditorum*. Reference is made to the classic formulation of the rule by Lord De Villiers CJ in *Walker v Syfret* 1911 AD 141 at 160.

‘The effect of a winding-up order is to establish a *concursus creditorum*, and nothing can thereafter be allowed to be done by any of the creditors to alter the rights of the other creditors.’

With regard to this formulation of the effect of a *concursus creditorum*, and with regard to other provisions of the Companies Act which featured in argument, Mr *Maritz* SC, who appears for the Reserve Bank, has argued that the error perpetrated by the applicants is to regard the Reserve Bank as a creditor of the companies. Before dealing with the argument, I think it is important to note that the effect of a *concursus creditorum* is somewhat wider, and logically so; and that the words in the judgment just quoted were not intended, and should be not misinterpreted, to confine the protection afforded on insolvency to what might be called misconduct on the part of creditors.

[20] The following appears in the judgment of Innes J in *Walker v Syfret* at 167.

‘But these are not insolvency proceedings, and we have, therefore, to inquire whether the fact that this was a winding-up and not a sequestration makes any difference. The machinery provided for the liquidation of an insolvent company is necessarily more elaborate than that which suffices for the distribution of a bankrupt’s estate; and the positions of a liquidator and of a trustee are not in every respect identical. But the general scheme of the Statute proceeds in each case upon the same lines. The liquidator, although more directly under the orders of the Court, is, like a trustee, the only person who can deal with the assets; <u>any disposition of the property of the company, save with the sanction of the court, is null and void;</u> undue preferences may be set aside, <u>and the property of the company is to be devoted to paying the creditors in their legal order.</u>’
(My Emphasis)

I venture to suggest that the concept of "disposition" which Innes J had in mind would coincide with the definition of the word "disposition" as it subsequently appeared in the Insolvency Act, 1936.

'"**Disposition**" means <u>any transfer</u> or abandonment <u>of rights to property</u> and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor, but does not include a disposition in compliance with an order of the court'.
(My Emphasis)

Nothing measurably less than this would meet the purpose of the establishment and protection of a *concursus creditorum*, which is one of the foundations of insolvency law.

[21] Save for a somewhat loose use of the word "vesting" by the applicants, there was no dispute between the parties in argument that on winding-up (as opposed to sequestration) the property of the company remains vested in it. (Section 361(3) allows the court to order that all or any part of the property of the company shall vest in the liquidator, but that was not done here.) On winding-up, and prior to the appointment of a provisional liquidator, the property of the company does not vest in the Master. It is deemed to be "in the custody and under the control of the Master". (See s 361(1) of the Companies Act, 1973.) Once a liquidator is appointed the property continues to vest in the company. The liquidator's duties are to "proceed forthwith to recover and reduce into possession all the assets and property of the company" and the liquidator is obliged to "apply the same" in satisfaction of the costs of winding-up, the claims of creditors and so on. (Section 391 of the Companies Act, 1973.)

[22] As I understand Mr *Maritz's* argument, the Reserve Bank never became a creditor of the company, notwithstanding the forfeiture orders, because those orders generated claims against the bank, and not against the companies. In my view that approach is artificial and wrong. The forfeiture contemplated by Regulation 22(B) has two elements. The decision in favour of forfeiture creates a right. The mode of satisfaction of that right, which is "seizure", may be different from ordinary process, but it is nevertheless a mode

of delivery, or a mode of discharge of an obligation created by the decision that the money in question should be forfeited to the State.

[23] I did not understand there to be any dispute in argument over the proposition that the banks owned the money placed in the blocked accounts by the companies. The assets of the companies were the claims against the bank, in each case. The seizure which in each case followed the forfeiture order did not affect the bank's patrimony. That is because the forfeiture appropriated not the banks ownership of any money, but the right of the companies in each case to claim what was standing to the credit of each account. (The moneys which had been deposited in the banks by the companies had long since lost their identities by mixing with the banks' funds.) All that could be forfeited was the claim of each of the companies against each of the banks on the accounts named in the forfeiture orders. The effect of the forfeiture orders was that the Reserve Bank became a creditor of each of the companies, its claim being to the contractual right each company had against each of the affected banks.

[24] It is arguable that the Reserve Bank was already a creditor at the time of commencement of the winding-up. The jurisdictional facts for forfeiture under Regulation 22B(1) are the same as those which justify an attachment, or the issue of blocking order, under either of Regulations 22A or 22C. Blocking orders were already in place. Whether the claims against the banks for the money in question would be lost to the companies depended on a condition, namely a decision by the Reserve Bank that the claim should be forfeited. It seems that on that reasoning the Reserve Bank qualified as a creditor with a conditional claim on the date of winding-up. Such conditional claims are dealt with in s 48 of the Insolvency Act. The section deals with the manner of proving such claims, and dealing with them upon fulfilment of the condition.

[25] It is clear that if, as the applicants' contend, insolvency law applies to the current factual matrix, the position of the Reserve Bank is quite different to the one it contends for: ie that sequestration or winding-up has no effect at all on its power not only to declare a forfeit, but also to acquire property of the insolvent person or company. If

insolvency law applies, the liquidators were entitled to take possession of and assert the companies' rights to claim the amounts standing to the credit of the various bank accounts in which the companies had made deposits, and to deal with the proceeds in discharge of their duties under s 391 of the Companies Act.

[26] It is the contention of the applicants that, because insolvency law must be applied, the forfeiture orders were invalid. I do not believe that I am called upon to endorse that proposition in full if I should find for the applicants. The actual appropriation of the money – the transfer of it to the National Treasury – would have been in conflict with our insolvency law. The issue as to whether, after the commencement of winding-up, the Reserve Bank could create a claim by declaring forfeiture, and thus participate in any distribution made by the liquidators, was not argued before me, and there appears to be no need to decide that issue, one way or the other. Indeed the original notice of motion contained a prayer for an order that the respondents' be directed to file any claim or claims they may have against the companies in winding-up within 20 days of the date of the grant of the principal relief sought in this application. Although that order is no longer sought, the implication is that there may be no dispute about the rights of the respondents to participate in the insolvent estates, although that is not clear.

[27] The question remains as to whether insolvency law must be applied. I do not think that the liquidators are correct in saying that the answer to that question is to be found in what they present as a simple proposition, that Acts of Parliament trump regulations. In my view one should start with the proposition that laws are to be regarded as a coherent whole, with the result that one does not too easily come to the conclusion that there is an irresolvable conflict between them which confronts the court with a stark choice. I agree with the submission made by counsel for both respondents that one should look for reconciliation when one considers apparent conflicts, but disagree that this approach gets the respondents to where they would like to be.

[28] In my view the issue in this case must be approached on the same basis as was done to resolve the dispute between the Commissioner, South African Revenue Services

and the liquidators of *Pela Plant (Pty) Ltd* (in liquidation). The judgment of the Supreme Court of Appeal in that case (*CSARS vs Van Der Merwe NO* 2017 (3) SA 34) endorsed the judgment of the court *a quo* in that case (this court, coram Annandale AJ). The following extract from the judgment of Annandale AJ appears in paragraph 9 of the judgment of the Supreme Court of Appeal.

'The fundamental principle of insolvency law is that all creditors are subject to its provisions, save in exceptional cases where statutes specifically provide otherwise. This fundamental principle is given effect to in two ways. Firstly by the creation of a *concursus creditorum* in terms of which the claims and rights of all creditors of an insolvent company are determined as at the date of insolvency, with the result that one creditor is not entitled to improve its position in relation to others after the date of the *concursus*. Secondly, by ensuring that every asset belonging to the insolvent company is properly realised by its liquidator so that the proceeds can be distributed amongst the company's creditors in the order of preference dictated by insolvency law and determined as at the *concursus*. So it is then that section 391 of the old Companies Act obliges a liquidator to recover *"all the assets and property"* of the insolvent company, *"all"* being a word of the widest possible import.

The purpose of the Insolvency Act as recorded in the preamble thereto is *"to consolidate and amend the law relating to insolvent persons and to their estates"*. The aim of consolidation suggests that the Insolvency Act is intended to deal comprehensively with what will happen upon insolvency. It reflects and gives effect to the fundamental principle of insolvency law and contains an array of detailed provisions regarding the ranking of claims and how security claimed in respect of claims must be dealt with. [Footnotes omitted; emphasis original.]'

[29] The Commissioner sought to enforce an embargo against the liquidators with regard to certain goods, the property of the company, by virtue of the provisions of the Customs and Excise Act, 91 of 1964, in the absence of payment of duty due in respect of that property.

[30] In paragraphs 12 to 19 of the judgment Theron JA set out the provisions of the Customs and Excise Act which generated what might be called the claims, and the

security for the claims, asserted by SARS, and then continued as follows in paragraph 20.

'The important aspect of these provisions is that they are all addressed to the ordinary situation where goods are brought in to the country and attract liability to pay customs duty. They are directed at the obligation of the importer and others liable to pay duty, and do not address the special situation of insolvency. That is not surprising because that is dealt with in the Insolvency Act, a general statute intended to deal with all cases of insolvency. In brief, when one looks at the liability to pay customs duty in the ordinary course, one looks to the provisions of the Customs Act alone. When insolvency intervenes one turns to the Insolvency Act.'

[31] In my view, when one examines the provisions of the Currency and Exchanges Act, 1933, and more importantly the regulations promulgated thereunder, one sees that, like the provisions of the Customs and Excise Act referred to in *CSARS v Van Der Merwe NO*, they do not address the special situation of insolvency. In my view, as was done in *CSARS v Van Der Merwe NO*, in order to determine where, once winding-up intervened, the right resided to make claims to the amounts standing to the credit of the various bank accounts one must have regard to insolvency law.

[32] In paragraph 26 of the judgment in *CSARS v Van Der Merwe NO* it was held that "one final reason" to reject the claims by the Commissioner to what might be called immunity from the insolvency law, was the fact that his claims would feature in the order of preference specifically provided for in the Insolvency Act. The Insolvency Act makes no provision for a preference for claims which are the product of forfeiture orders under the regulations at issue in the matter at hand. In my view that distinguishing feature does not demand a different finding to the one made in *CSARS v Van Der Merwe NO*.

[33] My attention was drawn in argument to the fact that there are other statutes which contain provisions which exclude the application of insolvency law in particular circumstances. One of those is s 10 of the Admiralty Jurisdiction Regulation Act, 105 of 1983, referred to in paragraph 22 of the judgment in *CSARS v Van Der Merwe NO*. The applicants argue that it is significant that neither the Currency and Exchanges Act, 1933

nor the regulations under it, contain any such provision. The argument can in my view be developed a little further. For the sake of convenience, I restate s 9(3) of the Act again here.

'[The President] may, by any such regulations, suspend in whole or in part this Act or any other Act of Parliament or any other law relating to or affecting or having any bearing upon currency, banking or exchanges, and any such Act or law which is in conflict or inconsistent with any such regulation shall be deemed to be suspended insofar as it is in conflict or inconsistent with any such regulation.'

Properly construed, this provision means that where what is sought to be done by regulation under the Currency and Exchanges Act may come into conflict with, or be inconsistent with what is to be done under any other law (including any Act of Parliament), that other Act or law may be deemed to be suspended by regulation to the extent necessary to extinguish the conflict or inconsistency so that the regulations may prevail. The Currency and Exchanges Act recognises that regulations for the achievement of the objects contemplated by it may very well come into conflict with or be inconsistent with other law ordinarily applicable. The remedy for that was left (rightly or wrongly) to the President (originally the Governor General) who was empowered to declare by regulation that the other Act or law be suspended to the extent necessary. That could have been done here, as was done, for instance, in the Admiralty Jurisdiction Regulation Act. It was not done. The fact that it was not done supports the conclusion that in the circumstances we are confronted with in this case, the Currency and Exchanges Act, and its regulations, contemplate the application of insolvency law to determine the rights of the parties.

[34] The second respondent (the National Treasury) initially argued that it was not lawful for the court to order the payment of monies to the liquidators out of the National Revenue Fund. That argument was correctly abandoned.

[35] I find for the applicants, but I should make it clear that I do not do so upon the basis that the intervention of the winding-up of the companies rendered any forfeiture

order at all unlawful. I do so upon the basis that it rendered unlawful the issue of forfeiture orders which made it mandatory for the banks to ignore the companies' claims, and pay the amounts in question into the National Revenue Fund. The question as to whether there is room for a creditor's claim generated by a forfeiture order made post-liquidation does not need to be decided.

I grant the following order, in the amended form requested by the applicants during argument.

**1. The following forfeiture orders are declared null and void:**

**(a) Notice 515 of 2018 which is annexure "JM6" annexed to the founding affidavit;**

**(b) Notice 527 of 2017 which is annexure "JM9" annexed to the founding affidavit;**

**(c) Notice 514 of 2018 which is annexure "JM11" annexed to the founding affidavit.**

**2. The second respondent is directed to pay the amounts set forth in the aforementioned forfeiture orders together with interest thereon into the applicants' banking account, particulars of which are as follows-**

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| **Bank:** | **Nedbank** |
| **Branch Code:** | **164826** |
| **Account number:** | **1062293010.** |

**3. The costs of this application shall be paid by the respondents, jointly and severally, including the costs of two counsel where employed.**

OLSEN J

**APPEARANCES**

| | |
|---|---|
| Date of Hearing: | Tuesday, 01 December 2020 |
| Date of Judgment: | Thursday, 01 April 2021 |
| Applicants' Counsel: | Mr OA Moosa SC with Ms D Dheoduth) |
| Instructed by: | Maistry and Motsime<br>Applicants' Attorneys<br>Suite 102, 1st Floor<br>Excel House<br>423 Anton Lembede Street<br>Durban…KZN<br>(Ref: RM/mg/M461/MAD1/0002)<br>(Tel: 031 - 3055059)<br>(Email: ???) |
| First Respondent's Counsel: | Mr NGD Maritz SC |
| Instructed by: | Gildenhuys Malatji Inc.<br>First Respondent's Attorneys<br>Katherine & West Building<br>114 West Street<br>Sandton<br>(Ref.: A Mahomed / A Du Toit/01891626)<br>(Tel: 012 – 428 8835)<br>(Email: adutoit@gminc.co.za)<br>**c/o Woodhead Bigby Incorporated**<br>92 Armstrong Avenue<br>La Lucia…Durban…KZN<br>(Ref: RCM/AL.MAT18456)<br>(Tel: 031 – 360 9776 / 360 9700)<br>(Email: russellm@woodhead.co.za) |
| Second Respondent's Counsel: | Mr M Stubbs |
| Instructed by: | State Attorney (Pretoria)<br>Second Respondent's Attorneys<br>Salu Building<br>316 Thabo Sehume Street<br>Pretoria<br>(Ref: G268/19/Z32 – Enquiries: Ms Z Zenani)<br>(Tel: 012 – 309 1575)<br>(Email: TNhlanzi@justice.gov.za<br>Zingisa.Zenani@treasury.gov.za<br>**c/o State Attorney (Durban)**<br>6th Floor, Metropolitan Life Building<br>391 Anton Lembede Street<br>Durban…KZN<br>(Ref: Zingisa Zenani / 237/194/19/M/P39)<br>(Tel: 031 – 365 2513)<br>(Email: pnthekgei@justice.gov.za) |