



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 66863/2020

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.
DATE: 18 JANUARY 2021

SIGNATURE

In the matter between:

OLIVE HEALTH CONSULTING (PTY) LTD

First Applicant

FABRICE MUBENGA KADIMA

Second Applicant

and

SOUTH AFRICAN RESERVE BANK

Respondent

J U D G M E N T

This matter has been heard in terms of the Directives of the Judge President of this Division dated 25 March 2020, 24 April 2020 and 11 May 2020. The judgment and order are published and distributed electronically in accordance with these Directives.

DAVIS, J**[1] Introduction**

This is the judgment in an urgent application in which a foreign owned South African company seeks to have a “block” which the South African Reserve Bank (the Reserve Bank) has placed on funds in the company’s bank account, uplifted. The blocking of funds was done in terms of Exchange Control Regulations.

[2] The parties

2.1 The first applicant is Olive Health Consulting (Pty) Ltd (the company). It is a South African company. Its sole shareholders and directors are Mr and Mrs Kadima.

2.2 Mr Kadima is the second applicant.

2.3 The sole respondent cited is the Reserve Bank.

2.4 The bank at which the company’s account relevant to this application is held, is First National Bank (FNB). It was not cited as a respondent and the Reserve Bank claimed that this amounted to a fatal non-joinder, having regard to the nature of the relief claimed. Prior to the hearing of the matter, FNB in writing indicated that they abided the decision of the court. In my view, no further joinder is required.

[3] The applicants’ case

3.1 Mr and Mrs Kadima are citizens of the Democratic Republic of Congo (the DRC). They are both permanently resident in South Africa.

3.2 Mr and Mrs Kadima operate a management and consulting business in the medical field. The business is conducted “through” the company.

- 3.3 Although the company is registered in South Africa, all of its operations are conducted in the DRC “and abroad”. It derives the bulk of its income from a contract it has with SNEL, which has been described as the DRC’s equivalent of Eskom.
- 3.4 Mr Kadima stated that he and his wife “thought it practical” for all funds derived by the company from the SNEL contract to be paid into a South African bank account, held by the company at FNB. Mr Kadima stated that “they” (presumably he, his wife and the company) also operate bank accounts in the DRC. From the proceeds of the contract paid to the company from the DRC (amounting to some R70 million p.a) into the FNB account, transfers are made to Mr and Mrs Kadima into accounts held by them at FNB and Standard Bank. Mr Kadima stated that he and his wife annually need some R 9 million to pay their “personal expenses”. They also “repatriate” funds back to the DRC to support their parents and other family members living in the DRC. Mr Kadima also operates a bank account in Portugal to which Mrs Kadima also has access. They also “support” a certain Ms Ellie Bwalya, another foreign citizen permanently resident in South Africa.
- 3.5 The “personal expenses” referred to above, include, according to Mr Kadima:
- 3.5.1 The purchase of a property in Dubai.
 - 3.5.2 The purchase of “Golden visas” for him and Mrs Kadima to the Dominican Commonwealth.
 - 3.5.3 Expenses for purposes of travel.
 - 3.5.4 The purchase of an antique table in Portugal.

3.5.5 The provision of financial support to their families in the DRC.

3.6 Much was made by the applicants of the fact that Mr and Mrs Kadima (and Ms Bwalya) each had a R1 million annual single discretionary foreign exchange allowance and that the company had a R10 million annual International Travel Allowance Facility. Mr Kadima also relied heavily on the fact that, upon becoming permanently resident in South Africa and implementing the arrangement of transfer of funds from the DRC to the company, the transfer of funds to the Kadimas and their then intended payments of expenses such as those mentioned in paragraph 3.5 above, they made enquiries at FNB, particularly regarding the use of their credit cards for purchases or transfers in foreign currency. They were in general terms, advised that the only limit on such transactions, were the amounts to their credit on the credit cards.

3.7 In July 2020 the Reserve Bank's Financial Surveillance Department advised Mr Kadima that it had reasonable grounds to believe that Mr Kadima had exceeded his discretionary allowance limit as well as his R50 000,00 limit per credit card transaction. Mr Kadima's case is that he had fully responded to the letters of enquiry directed to him by the Reserve Bank by furnishing particulars of foreign exchange transactions on oath. This response was prompted by a "block" which had been placed on Mr Kadima's personal Standard Bank account at the time.

3.8 In his explanation provided to the Reserve Bank on 16 July 2020, Mr Kadma explained the method of the Dubai property payments referred to in paragraph 3.5.1 above as follows:

"I provide Ms Ellie Bwalya ... with funding for her living expenses and certain of the funds utilised by her were used to assist me in

paying the monthly instalments on a property which I purchased in Dubai". (He repeated these explanations in his founding affidavit). Mr Kadima also annexed two bank statements of Mr Bwalya in support of these explanations as proof of the "swift" foreign bank payments. These indicate that Ms Bwalya received a salary from the company as well as payments marked either "ohc" or "ohc doctor" and that certain petty cash payments from the company also flow through her account. The "outward swift" payments and the sources thereof were reflected in the statements as follows:

2019 Statement no 18

2 May 2019 FNB deposit "Fabrice" R 900 000.00

3 May 2019 Outward Swift "Fabrice" R 877 890.00

2020 Statement no 7

17 February 2020 Ohc deposit R 350 000.00

17 February 2020 Ohc deposit R 450 000.00

17 February 2020 Ohc doctor deposit R 7 800.00

17 February 2020 Outward Swift "Marina" R807 246.76

("Fabrice" is Mr Kadima's first name, the Dubai property is, according to Mr Kadima, situated at Marina Vista and "Ohc" appears to be an acronym for the company).

- 3.9 The explanations also include a reference to an amount loaned by Mrs Kadima to an erstwhile director of the company, Mrs Claire Opolot, which loan was repaid into the Kadima's bank account in Portugal.

- 3.10 On 9 November 2020, Mr Kadima's attorneys wrote to the Reserve Bank, complaining about the aforementioned block and stating that as a result thereof, the Kadimas were at risk of losing their property in Dubai as the block prevented them from making monthly payments. On 20 November 2020 the Reserve Bank telephonically advised Mr Kadima's attorneys that the issue of Foreign Exchange Control Regulation contraventions was still being investigated. The attorneys were advised that legislation provided the Reserve Bank with a 36 month period within which to complete its investigations.
- 3.11 On 26 November 2020 Mr Kadima's attorneys objected to the ongoing investigation and the envisaged period thereof and demanded finalization within 7 days.
- 3.12 On 28 December 2020 the attorneys in a letter to the Reserve Bank set out the company's position as follows: On that day, a block was placed on an amount of us \$ 400 000.00 which had been paid into the company's FNB account. The amount, representing some R 1, 3 million formed part of a 50% deposit explained in a further letter as being in respect of "*7 (seven) ambulances which were purchased from Olive Health Consulting (Pty) Ltd by a customer in the DRC The seven ambulances have been purchased by Olive Health Consulting (Pty) Ltd, on behalf of its aforesaid DRC customer from a South African Company and the full amount ... is required to be utilised towards payment of such deposit*".
- 3.13 The applicants accused the Reserve Bank's investigator of bias, alleged that there is no justification for the blocking of the funds and claim that the applicants have a real as well as a prima facie right to the following relief on an urgent basis:

- “2. *In the case of the first applicant, unblocking its Demand Deposit Bank Account held at First National Bank ... inter alia, in order to release the R 1 322 900,49 held therein, for it to fulfil its contractual obligations to supply 7 (seven) ambulances.*
3. *In the case of the second applicant, directing the Respondent to finalise its investigations in relation to any alleged foreign exchange contraventions ... within 30 days of the granting of this order”.*

3.14 As an alternative to paragraph 3 of the Notice of Motion quoted above, the applicants seek to interdict the Reserve Bank from blocking “... *any bank account operated by the second applicant, whether directly, or through the first applicant and/or preventing the second applicant, whether directly or through the first applicant, from concluding and giving effect to any foreign exchange transactions contemplated in the Currency and Exchanges Manual pending finalization of any investigations ...*”. Costs are also claimed.

[4] The relevant legislative framework

- 4.1 As will appear from the framework set out hereunder, the regulations applicable to foreign exchange transactions from South Africa, confer wide powers on the Reserve Bank and, in particular, the power to block funds in accounts where it is suspected that the holder of the account engaged in contraventions of these regulations.
- 4.2 The Exchange Control Regulations (the Excon Regulations) promulgated in terms of section 9 of the Currency and Exchanges Act, 9 of 1933, provide in Reg 10 (1)(c) that “*no person shall, except with permission granted by*

[the Minister] and in accordance with such conditions as [the Minister] may impose ... enter into any transaction whereby capital or any right to capital is directly or indirectly exported from the Republic”.

- 4.3 Exchange control has been relaxed from time to time and the practice has been developed whereby the Minister of Finance in his annual budget speech announces what conditions are being imposed in relation to the export of capital. These would then be reduced to circulars issued by the Reserve Bank.
- 4.4 The Financial Surveillance Department of the Reserve Bank has since 1990 issued the Currency and Exchanges Manual for Authorised Dealers (the Manual) wherein all interested persons and the public is informed of the purpose, scope and operation of the exchange control system, including the permissions, circulars, conditions and limits applicable to each transaction. This Manual is updated from time to time, is available on the Reserve Bank's website and forms part of the papers in this application. Its contents are not in dispute.
- 4.5 Acting in terms of Regulation 22E of the Excon Regulations, the Minister of Finance has delegated the functions in relation to the regulations relevant to this application, to the Reserve Bank and, in particular the Financial Surveillance Department thereof.
- 4.6 The regulations relating to the blocking of funds are provided for in aforementioned section 9 of the Currency and Exchanges Act, 9 of 1933 as follows:

“9(2)(a) Such regulations may provide [for] ... any sanctions therein set forth ... wether civil or criminal.

(b) *any regulation contemplated in paragraph (a) may provide for –*

(i) *the blocking, attachment and obtaining of interdicts ... and the forfeiture and disposal ... of any money ...*

(aa) *which are suspected ... on reasonable grounds to be involved in an offence or suspected offence against any regulation referred to in this section, or in respect of which such offence has been committed or so suspected to have been committed;*

(bb) *which are in the possession of the offender, suspected offender by any other person or have been obtained by 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 or suspected offender or any other person has been benefitted or enriched as a result of such offence or suspected offence ...*

(ii) *in general, any matter ... necessary for the fulfilment of the objectives and purposes ... including the blocking, attachment, interdicting, forfeiture and disposal referred to in subparagraph*

(i) *... of any money ... belonging to the offender or suspected offender or any other person in order to recover an amount equal to the value of the*

money ... recoverable in terms of the regulations ...” (my emphasis).

4.7 Leach JA, has explained the import of the above as follows in South African Reserve Bank v Khumalo and Another 2010 (5) SA 449 (SCA) at [6]: *“As appears from this, a distinction is drawn between money or goods involved or suspected of having been involved in any contravention of the regulations (sometimes referred to as ‘tainted’ money or goods) and other money or goods (which may be described as ‘untainted’)”.*

4.8 There are three regulations which deal with the situation at hand. They are Regulations 22A, 22B and 22C. In South African Reserve Bank v Torwood Properties (Pty) Ltd 1997 (2) SA 169 (A) Harms JA (as he then was) described these regulations as being “lengthy and convoluted”. Nevertheless, as Leach JA in Khumalo explained at paragraph [8], for present purposes the following summary will suffice:

- Regulation 22A deals with the blocking or attachment of “tainted” goods and money, that is goods and money whereby a contravention of the Exchange Control Regulations were perpetrated.
- Regulations 22C deals with the blocking or attachment of “untainted” money to the value of the contravention perpetrated by the exporting of “tainted” money.
- Regulation 22B deals with the procedures to be followed to obtain a forfeiture of either or both “tainted” and “untainted” money. Blocking, “freezing” or attachment of such money by

way of Regulations 22A or 22C usually precedes such forfeiture.

- 4.9 The period for a blocking order, as determined in Regulations 22A (3) and 22C (3) respectively, is 36 months “or such longer period as may be determined by a competent Court”.
- 4.10 The relevant limits or allowances of capital to be exported without separate prior permission are the discretionary R1 Million annual allowance and the R50 000.00 per credit card transaction allowance. These are catered for in the Manual as follows: Section B.4 (A)(i) of the Manual provides that residents of South Africa “*may be permitted to avail*” themselves of a single discretionary allowance “*with an overall limit of R1 million per individual per calendar year*”. Section B.16 (E)(i) of the Manual provides that residents or “local entities” in whose name bank credit or debit cards have been issued, may be permitted to make foreign currency payment for transactions, limited in terms of Section B.16 (E)(ii) of the Manual to R50 000.00 per transaction.

[5] The Reserve Bank’s position:

- 5.1 Since about March 2020, Standard Bank had placed Mr Kadima’s personal account under surveillance at the instance of the Reserve Bank and been told to block the account if the balance exceeded R50 000.00. This was due to the Reserve Bank having become aware of “various suspicious transactions” being conducted through the account.
- 5.2 The account was indeed blocked on 6 July 2020 and the Reserve Bank found Mr Kadima’s explanations, referred to in paragraph 3 above, unsatisfactory. The Reserve Bank indicated as much to Mr Kadima in an email dated 13 July 2020. Having regard to the limits referred to in

paragraph 4.10 above, the email indicated that Mr Kadima had, in operating the account:

- 5.2.1 In 2019 effected outward foreign currency transactions in excess of R2, 9 million;
 - 5.2.2 Also in 2019 effected credit card transactions above R50 000.00 in favour of two non-resident companies to a total value of R3, 72 million;
 - 5.2.3 In 2020 effected foreign currency transactions in excess of R2, 1 million; and
 - 5.2.4 Also in 2020 effected credit card transactions above R50 000.000 in favour of a non-resident company in excess of 2.1 million.
- 5.3 The above determinations by the Reserve Bank were not contradicted by an explanatory affidavit furnished by Mr Kadima on 16 July 2020 in response to the said email.
- 5.4 As a result of the Reserve Banks's investigations of Mr Kadima's accounts (as part of the large volume of investigations conducted by the Surveillance Department), FNB was requested on 17 November 2020 to place two accounts operated by the company under surveillance together with an instruction to block the accounts, should the balance exceed R500 000.00. This was, again, done due to suspicions of activity in contravention of the Exchange Control Regulations referred to above.
- 5.5 In similar fashion as with Mr Kadima personally, the Reserve Bank sent a letter to Mr Kadima via his attorneys, not only explaining the findings of its investigations to that date regarding Mr Kadima's accounts, but also

listed apparent contraventions of the Exchange Control Regulations committed by the Company. Full explanations and disclosure, supported by documents were requested in respect of outward foreign currency transactions.

- 5.6 Mr Kadima's response to the above letter and the request for disclosure contained therein, in broad terms, corresponded with the Reserve Bank's factual findings pertaining to the outward flow of foreign currency. The explanations furnished accord with those contained in the founding affidavit and which have been referred to in paragraph 3 above. The result is that Mr Kadima in effect confirmed that the transactions "flagged" by the Reserve Bank in its letter of 10 December 2020 in respect of the company's outgoing foreign transactions, contravened the limits imposed in terms of the Excon Regulations. His explanations that he did not know about the limits and were not told thereof by his bankers do not detract from this fact. There were various other features of Mr Kadima's explanations regarding how he, his wife, Ms Bwalya (and the company) dealt with outgoing foreign currency transactions which the Reserve Bank found wholly unsatisfactory, but which are not relevant to this urgent application.
- 5.7 The result of the above was that, once the balance of the company's account held at FNB exceeded R500 000. 000, which it did after the deposit therein of the amount mentioned in paragraph 3.12 above, it was blocked on 28 December 2020.
- 5.8 The Reserve Bank's position is that the company appears to have contravened the R50 000.00 per credit card transaction limit in 2019 in the amount of R 3 182 459, 71 and has again done so in 2020 in the amount in

the amount of R 467 744,85 and that the Reserve Bank was therefore entitled to block “untainted” money up to the total of these amounts.

[6] Evaluation

- 6.1 On behalf of the company and Mr Kadima it was argued, both orally and in the written heads of argument (and supplementary heads of arguments) that the blocking of the company’s funds held in its FNB account “has no basis in fact and in law”.
- 6.2 Firstly, in addition to what has already been summarised above, Mr Kadima had the following to say in his founding affidavit to the urgent application, in respect of the factual position of the company: *“As regards the Company, I was unaware of the fact that provisions of Section 16 (E)(ii) of the Currency and Exchange Rates Manual allows for R50 000.00 per transaction. In this instance, the actual amounts disbursed were R 3 182 459,71 in the 2019 Financial year and R 467 744.85 in the 2020 Financial year”*. This statement expressly confirms the facts suspected by the Reserve Bank as set out in paragraph 5.6 and 5.8 above.
- 6.3 Once this factual basis has been established, the legal basis is that the Reserve Bank’s jurisdictional entitlement to invoke Regulation 22C in relation to the blocking of ‘untainted’ funds has been established.
- 6.4 Once the jurisdictional basis for the blocking of the funds has been established and the funds have in actual fact been blocked, the block may remain in place for 36 months whilst the Reserve Bank concludes its investigations, which may in turn lead to the forfeiture provisions contemplated in Regulation 22B.

- 6.5 Insofar as Mr Kadima in effect pleaded an absence of *mens rea* in respect of the admitted contraventions, this only means that “the relevant parties may not be punished criminally” for their failures to comply with the Exchange Control Regulations. This much has been found in Oilwell v Protec International 2011 (4) SA 394 (SCA) at [16] by Harms DP.
- 6.6 There can be no doubt that the Reserve Bank has a statutory duty to investigate transactions which give rise to suspicions of contraventions of the Excon Regulations. Ancillary to this duty, is the power to block funds utilised in such transactions as well as the power to block “untainted” funds equal to the amount of the contraventions, which amount may later be forfeited, the nett result being that amounts exported “without permission” are then repatriated. The relief sought by the applicants, namely the upliftment of the blocking of funds (which are currently still far less than the admitted contraventions of the regulations by the company), the limitation of the period of investigations conducted by the Reserve Bank to 30 days and the abrogation of the Reserve Bank’s powers under Regulation 22A and 22C, will all result in an impermissible suspension of the Reserve Bank’s duties and powers. Such limitation would even encroach on the protection of the Reserve Bank’s powers and functions afforded by section 225 of the Constitution.
- 6.7 Apart from the admitted contraventions by the company, it is further clear that the other transactions in respect of which Mr Kadima had furnished his explanations but without answering or disclosing the particulars sought by the Reserve Bank’s investigators, justify, not only the blocking orders, but further and ongoing investigations. There are no time limits placed by the statutory regime on these investigations. The only time limit is the 36 month period placed on the validity period of a blocking order (after which consent of a court is necessary).

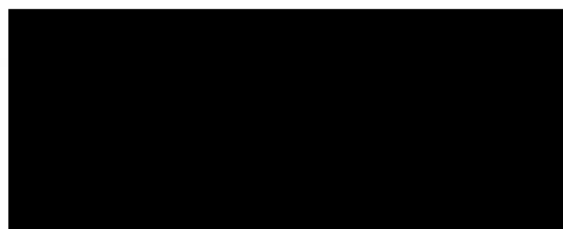
- 6.8 In heads of argument submitted on behalf of Mr Kadima and the company, it has been suggested that the Reserve Bank's investigator in its Financial Surveillance Department, is biased, took irrelevant considerations into account, appears to have acted capriciously and/or arbitrarily and/or in bad faith and that her actions were not rationally connected to the purpose for which they were taken. These accusations can only pertain to the investigations referred to above as well as the blocking order of the company's FNB account which form the subject matter of this urgent application. As illustrated in paragraphs 5.8 and 6.2 above, these accusations are without foundation.
- 6.9 Insofar as there may be urgency in relation to the relief claimed, such urgency has clearly been self-created by the contraventions of the Excon Regulations, committed by the company and as directed by Mr Kadima.
- 6.10 The company and Mr Kadima appear to labour under the incorrect perception that, firstly, their explanations were sufficient and amounted to a "full disclosure" and, secondly, once such disclosure had been made, the steps taken under Regulation 22C should automatically fall away and the block/s should be uplifted, irrespective of the Excon Regulation contraventions. Both these perceptions are factually and legally incorrect.
- 6.11 Lastly, Mr Kadima and the company argued that "key issues" were not addressed by the answering affidavit delivered on behalf of the Reserve Bank. One of these issues, was the R10 million annual international travel allowance facility of the company. Having regard to the credit card transactional limit transgressions referred to above, this allowance has no bearing on this case. One can hardly argue that, because of an overall allowance, one is now entitled to breach the R50 000.00 maximum credit card payment transactional limit without consent. The explanations also

fall short of bringing the nature of payments within the ambit of travel expenses contemplated by the allowance. The second “key issue” was that of the advice allegedly received from Mr Kadima and the company’s bankers. As already pointed out, even if the bankers had furnished incorrect advice this is legally irrelevant in respect of the blocking issue.

6.12 In the premises, I find that the applicants have not established a basis on which any of the relief claimed should be granted. I also find no reasons why costs should not follow the event.

[7] Order

The application is dismissed with costs.



N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 13 January 2021

Judgment delivered: 18 January 2021

APPEARANCES:

For the Applicants: Adv. M Nowitz

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