



**THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA**

Case No: 416/07

ANNE ELIZABETH MARY PRATT

Appellant

and

FIRST RAND BANK LIMITED

Respondent

Neutral citation: *Pratt v First Rand Bank* (416/07) [2008] ZASCA 92 (12 SEPTEMBER 2008)

Coram: HARMS ADP, CLOETE, HEHER and JAFTA JJA and KGOMO AJA

Heard: 2 SEPTEMBER 2008

Delivered: 12 SEPTEMBER 2008

Corrected:

Summary: Currency – exchange control – rulings issued by Reserve Bank – admissibility of evidence to prove status and scope of such.

ORDER

On appeal from: High Court, Pretoria (Mokgoathheng AJ sitting as court of first instance).

The appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

HEHER JA (HARMS ADP, CLOETE, JAFTA JJA and KGOMO AJA concurring):

[1] The appellant, Mrs Anne Pratt, would appear to be an astute and successful businesswoman. In 2001 she owned thirty per cent of the shares in Anne Pratt and Associates (Pty) Ltd. The balance was held by the Fast Track Trust, registered in the Isle of Man, of which the appellant was, at least, a beneficiary and perhaps its controller. She wished to rearrange her affairs. For this purpose she consulted the respondent, a commercial bank and an ‘authorised dealer’¹ in foreign exchange.

[2] Eventually a series of agreements was concluded. For present purposes they were designed to bring about, first, the acquisition of the Trust’s interest in the company by a close corporation, Classy Living CC of which the appellant was to be the sole member, and, second, the payment for such acquisition. To this end the

¹ In s 1 of the Schedule to the Exchange Control Regulations contained in GNR1111 of 1 December 1961, as amended, ‘authorised dealer’ 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’.

respondent agreed to lend the appellant the sum of R25 million. At her request it transferred that amount to an account held by the Trust at a bank in Jersey in the Channel Islands.

[3] When the date for repayment of the loan fell due the appellant declined to honour the obligation. The respondent threatened proceedings to recover the debt but the appellant issued summons first. She claimed an order declaring that the agreements were null and void.

[4] Her case as pleaded was that the agreements or their implementation constituted a transaction² whereby capital or a right to capital was directly or indirectly exported

from the Republic of South Africa in contravention of Exchange Control Regulation 10(1)(c),³ because no exemption or permission to do so was granted by the Treasury or

² There was some debate between counsel as to whether the agreements in their cumulative effect constituted a single transaction for the purposes of Regulation 10(1)(c) or whether each agreement had to be examined according to its own terms. The appellant's counsel espoused the first approach and I shall assume for purposes of this judgment that he is correct.

³ '10 Restriction on export of capital

(1) No person shall, except with permission granted by the Treasury and in accordance with such conditions as the Treasury may impose—

...

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

The appellant's parallel reliance on regulation 3(1)(e) is no longer relevant in this appeal.

a person authorised by the Treasury, and the loan agreement, being part of that transaction, was illegal, null and void and unenforcible at the instance of the respondent.

[5] The respondent denied that the transaction embodied in the agreements fell within the ambit of regulation 10(1)(c) as relied on by the appellant. It pleaded in the alternative that, if it did so fall—

(a) in terms of Regulation 22E,⁴ the Minister of Finance may delegate to any person any power or function conferred upon the Treasury by any provision of the Regulations;

(b) pursuant to that power the said Minister delegated the powers and functions conferred upon the Treasury in respect of regulation 10(1)(c) to the Governor of the Reserve Bank or the South African Reserve Bank;

⁴ ‘22E Delegation of powers

(1) The Minister of Finance may delegate to any person any power or function conferred upon the Treasury by any provision of these regulations or assign to any such person a duty imposed thereunder to the Treasury.

(2) The Treasury shall not be divested of any power or function or duty delegated to any person under sub-regulation (1) and may at anytime withdraw or amend any decision taken by any such person in the exercise or performance of the power or function or duty in question.’

(c) the Reserve Bank, through its exchange control department, acting in pursuance of such delegation, issued exchange control rulings applicable to authorised dealers, including the respondent;

(d) in terms of exchange control ruling E.5(C)(a)⁵ the respondent was permitted, in relation to regulation 10(1)(c), to remit through normal banking channels the local sale

or redemption proceeds of non-resident owned assets in South Africa;

(e) the respondent was accordingly permitted to conclude and implement the transactions reflected in the agreements.

[6] The respondent counterclaimed for specific performance of the loan agreement in the form of payment.⁶ The appellant pleaded a defence substantially founded on the facts set up in support of the claim in convention.

[7] The matter proceeded to trial. An order made in terms of rule 33(4) confined the initial hearing (to the extent presently relevant) to the following questions:

(a) whether the agreements constituted transactions falling within the ambit of regulation 10(1)(c);

(b) whether the respondent had permission to conclude such agreements and/or was exempted from the provisions of that regulation;

⁵ Chapter E of the Exchange Control Manual is headed 'GENERAL POLICY APPROACH TO EXCHANGE CONTROL'. Ruling 5(C)(a) provides 'The local sale or redemption proceeds of non-resident owned assets in South Africa may be regarded as remittable through normal banking channels. . .'

⁶ It claimed, in the alternative and conditionally, on the basis of unjustified enrichment (a case not relevant to this appeal).

(c) if the respondent did not have permission or exemption, were the agreements a contravention of that regulation;

(d) if they were a contravention, was the result a nullity?

[8] Only the respondent led evidence. The witness was Mr Andreas Ribbens, its official in charge of exchange control and the person with whom the General Manager, Exchange Control in that department of the Reserve Bank liaised in relation to any issue not dealt with through the normal day-to-day structures of their respective banks. I shall shortly consider the substance of his testimony.

[9] The trial judge, Mokgoatlheng AJ, answered the separated questions as follows:

(a) the agreements constituted transactions falling within the ambit of regulation 10(1)(c)⁷;

(b) the respondent had permission to conclude the agreements;

(c) the agreements did not contravene the aforementioned regulation and were not null and void.

[10] The learned judge dismissed the plaintiff's summons and ordered the appellant to pay the respondent's costs including those of two counsel. He granted leave to appeal to this Court.

[11] There was no dispute in the appeal that regulation 10(1)(c) was engaged by the agreements or certain of them.

[12] Before proceeding to the merits of the appeal it is necessary to remark on

⁷ And within regulation 3(1)(e).

the approach adopted by the learned judge and the parties to the onus of proof at the trial. All seem to have accepted that the defendant carried the burden of showing that it had permission from the Reserve Bank to remit the proceeds of the sale to Jersey. However, proof that such permission was necessary and that it was *not* obtained were essential elements of the plaintiff's case as pleaded — without such proof her claim lacked its *raison d'être*. Moreover, the illegality on which the plaintiff relied was not such as appeared *ex facie* the transaction. She was, therefore, required not only to plead it but also to adduce evidence of all necessary and relevant facts in its support: *Yannakou v Apollo Club* 1974 (1) SA 614 (A) at 623G-H; *F & I Advisors (Edms) Bpk v Eerste Nasionale Bank van SA Bpk* 1999 (1) SA 515 (SCA) at 525F-526C. This was clearly an instance where the plaintiff bore the onus of proving a negative: see Schmidt, *Bewysreg* 4ed 34-5; *Kriegler v Minitzer* 1949 (4) SA 821 (A) at 828.

[13] The incidence of the onus was of the greatest importance. The cardinal question in the first stage of the case was compliance (or not) with the requirements of regulation 10(1)(c). The failure of the appellant to adduce any evidence of absence of permission should have been fatal to the success of her claim. It was not her case, even on appeal, that the respondent's evidence discharged her onus. Her counsel contended only that such evidence was inadmissible, and, therefore, ineffective in discharging the onus which the respondent appeared to have accepted.

[14] Nevertheless, since evidence was placed before the court concerning the issue of permission it cannot be ignored and I shall briefly deal with its admissibility and substance.

[15] The respondent's purpose, in presenting the evidence, was principally to show that if the transactions were struck by regulation 10(1)(c) (which it disputed, but the learned judge, correctly, I think, found they did) then the export of capital or a right to capital took place 'with permission granted by the Treasury and in accordance with' such conditions as it had imposed.

[16] The respondent relied on the exchange control rulings to justify and explain the existence of permission. At the trial counsel for the appellant voiced a clear objection to any reference to such rulings unless their admissibility was established by the calling of evidence from the Reserve Bank to identify the source of such rulings and to bring them within the scope of the permission contemplated in regulation 10(1)(c). Nor, according to counsel, was evidence from Mr Ribbens admissible to interpret that regulation or any ruling which related to its application. I have no quarrel with the last-mentioned submission in so far as it relates to the regulation, but the same does not hold for rulings.

[17] The exchange control rulings have no statutory force. Mr Ribbens explained that they are 'general authorities given to authorised dealers to do certain transactions'. They are not made available to the public. There is a rulings committee which is convened by the Reserve bank and on which representatives

of authorised dealers serve. At its meetings the content of rulings existing and proposed is discussed and the subject, if necessary, may be pursued at a liaison committee meeting between banks and the Reserve Bank. Out of the decisions taken at these meetings emerge the rulings which are issued by the Reserve Bank for the guidance of authorised dealers. It is clear that a ruling is nothing more or less than a communication between the Reserve Bank and dealers which is designed to facilitate the application of the regulatory system. Like any communication between businessmen falling short of a contract it is open to elucidation by either party. Mr Ribbens's evidence in this regard was part of an explanation of how authorised dealers conduct their day to day business in the practical environment created by the Reserve Bank for the oversight of foreign exchange dealings in order to implement the Foreign Exchange Regulations. There could be no valid objection to that evidence. Nor as Mr Puckrin conceded at the outset of his argument could he argue that the *fact* that rulings were issued to authorised dealers and exist in specific terms amounted to hearsay evidence. As a fact those rulings were the basis upon which the authorised dealers dealt with exchange control transactions and it was admissible for Mr Ribbens to explain the interrelation of the rulings and to testify, again as a fact, that the respondent understood and applied ruling E5(c)(a) as a blanket permission granted to remit off-shore the proceeds of the sale of securities owned by foreigners provided that that was effected through normal banking channels. Ribbens also located the

decision to grant such permission in the historical context of the slackening of exchange controls upon assets held by non-residents. The evidence of such an ongoing practice by authorised dealers at the behest of the Reserve Bank and in the environment described by Mr Ribbens was such as to give rise to a rebuttable inference of fact, *viz* that the practice had the approval of the Reserve Bank. But the appellant to whom it was open to challenge such evidence in cross-examination, did not do so, nor as I have said, did it adduce countervailing evidence.

[18] Mr Puckrin submitted, on behalf of the appellant, that ruling E.5(A)(i)(a) (which, as noted, permits remittal of proceeds of non-resident owned assets through normal banking channels) provides in specific terms for the ‘administrative procedures governing transactions in securities’. That ruling continues:

‘The attention of authorised dealers is also drawn to the provisions of, inter alia, Exchange Control Regulation 10(1)(c). In this regard it is essential that all securities related transactions, between a resident and a non-resident/immigrant whereby capital or any right to capital is directly or indirectly exported from the Republic, especially those which have cross-border cash flow implications, are carefully scrutinized and documentary evidence such as brokers’ notices/validated trade advices, sighted in order to ensure that such transactions are concluded at arms length and at market related prices. In the case of any doubt on the part of the Authorised Dealer concerned the proposed transaction is to be referred to the Exchange Control Department of the South African Reserve Bank.’

[19] Mr Ribbens testified as to the procedures followed by the respondent. But

Mr Puckrin submitted that the respondent had fallen short of the requirements by failing to scrutinise the transactions carefully and have sight of the documentary evidence in order to ensure that the agreements were concluded at arms length (which, he submitted, they were not) and at market-related prices (which he likewise submitted was not the case). I have referred to the evidence of the status of the rulings as ‘guidelines’ to dealers. That evidence does not of itself elevate their terms to ‘conditions’ for the purpose of the statutory prescriptions. If that was the contention of the appellant it was open to the appellant (assuming that the pleadings raised the issue) to call witnesses from the Reserve Bank to provide a basis but she did not. Nor, in any event, upon a fair reading of Ribbens’s evidence, can one conclude that the measure of the respondent’s scrutiny of or insight into documents fell short of what the Reserve Bank regarded as sufficient.

[20] The appellant also built an argument on the proposition that the exchange control department of the Reserve Bank had, in ruling E.5(C)(a), unlawfully delegated the exercise of its discretion to permit or refuse applications for the export of sale proceeds which had been conferred on it by the Treasury for the purposes of regulation 10(1)(c). But that is not so. The department did not delegate any power. It took a decision to grant a blanket permission and authorised its dealers to implement the decision through normal banking channels. The ruling as quoted above, does no more than recommend a thorough

investigation of applications and, in case of doubt, a referral to the department for a decision.

[21] In the result the appellant has failed to persuade me that the court *a quo* erred in finding that the evidence of Ribbens was admissible and that such evidence established that the respondent was authorised to remit the proceeds of the sale of the member's interest in Anne Pratt and Associates (Pty) Ltd as it did.

[22] Mr Puckrin contended that the learned judge erred in dismissing the claim in convention. He submitted that the answers to the rule 33(4) questions left open the possibility of amendment of the terms of that claim. I do not agree; its very foundation has, as I earlier discussed, been destroyed. Moreover a long time has passed since the order was made, nothing has been done to supplement the claim and counsel did not suggest what might still be done.

[23] The high court did not make any order in respect of the counterclaim. The respondent will accordingly be entitled to enrol the counterclaim for finalisation in that court in due course. It is accordingly unnecessary to provide for that in the order.

[24] In the result the following order is made:

The appeal is dismissed with costs including the costs of two counsel.

J A HEHER
JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANT: C E PUCKRIN SC
K W LÜDERITZ

FOR RESPONDENT: P F LOUW SC
M A CHOHAN

ATTORNEYS:

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