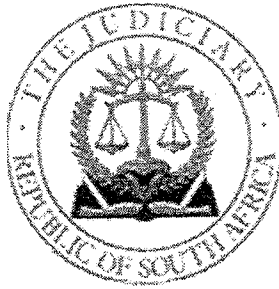


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 15637/2018

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

13.11.2018
Date:

E Schryff
Signature:

In the matter between:

OSPOORT BOERDERY CC
FERTILE FARM TRADING (PTY) LTD

FIRST APPLICANT
SECOND APPLICANT

and

FREYSON ATTORNEYS
THE FINANCIAL INTELLIGENCE CENTRE

FIRST RESPONDENT
SECOND RESPONDENT

J U D G M E N T

VAN DER SCHYFF, AJ

Introduction

[1] This application commenced as an interdict. The applicant sought a mandamus against the first respondent, and costs on an attorney and client scale. No relief was sought against the second respondent, nor costs in the

event of it not opposing the application. The second respondent was cited only because it might have an interest in the subject matter of the application.

- [2] The first respondent filed a notice to abide by the judgment of the court, subject to no costs order granted against it but seeks an order for costs on a punitive scale against the second respondent. The notice to abide is dated 25 May 2018 and was only delivered to the applicants' attorneys. The second respondent was not served with the notice to abide or the explanatory affidavit attached thereto. The second respondent duly performed, in accordance with the terms sought by the applicants, on 20 September 2018.
- [3] On 29 June 2018 the second respondent gave notice of its intention to abide by the judgment of the court, provided that no cost order be granted against it. On 19 July 2018 the second respondent filed an answering affidavit to the first respondent's explanatory affidavit.
- [4] The first respondent delivered a supplementary affidavit dated 5 October 2018 together with a condonation application to cure the late filing thereof. In view of the facts of this dispute as set out below, and the relevance of the content thereof, I granted condonation for the late filing of the supplementary affidavit as well as the late filing of the second respondent's heads of argument.
- [5] The applicants' mandamus eventually developed into a dispute as to the liability for costs. The applicants sought a costs order against the first respondent. The first respondent sought costs against the second respondent. The second respondent submitted that its opposition was necessitated by the first respondent's citing it as an interested party to this application.
- [6] I shall briefly refer to the salient facts of this matter prior to the launching of this application in order to determine the liability for costs.

The facts

- [7] The common cause facts preceding the institution of this application are the following:

- i. The first applicant, on behalf of the second applicant, paid a deposit of R500,000-00 into the trust account of the first respondent in regard to a sale agreement. The sale agreement was subsequently duly cancelled.
- ii. The applicants' interaction with the first respondent was through an employee of the first applicant, Mr G Krynauw, but the deposit was paid to the first respondent by the first applicant.
- iii. The first respondent was requested to repay the deposit to the first applicant, during November 2017. The first respondent informed the applicants that it would repay the deposit into the trust account of the applicants' attorney. On 23 November 2017, the first respondent was provided with the trust account details of a firm of attorneys acting on behalf of the second applicant. However, prior thereto and pursuant to the first applicant initially insisting on the money being repaid to it directly, the first respondent reported the transaction as a suspicious transaction to the second respondent, on 17 November 2018.
- iv. On 17 November 2018 the second respondent reverted to the first respondent and acknowledged receipt of the report.
- v. In a letter dated 21 May 2018, the second respondent informed the first respondent that its reliance on the Financial Intelligence Centre Act, 38 of 2011 (FICA) was 'misplaced and legally flawed'.
- vi. On 20 September 2018 the deposit was paid into the trust account of the applicants' current attorneys by the first respondent after having been informed on 23 August 2018 by one Captain Vermaak of the Hawks that the investigation against the applicants was complete and that no criminal activities had been detected. I pause to mention that it is not apparent from the affidavits filed of record on whose behest the investigation by the Hawks was initiated. The e-mail communication attached to the first respondent's supplementary affidavit only mentions a meeting between Captain Vermaak and the first respondent, wherein it was confirmed that the second respondent would be informed of the findings.

[8] The first respondent contended that it was entitled to retain the deposit pending a directive issued by the second respondent authorising payment. It

is common cause that the only communication between the first and second respondent pursuant to the second respondent acknowledging receipt of the report, is a letter dated 17 January 2018, wherein the second respondent requested the first respondent to provide additional documentation. Additional documentation was sent to the second respondent on 31 January 2018.

- [9] The first respondent contends that it is the second respondent's failure to provide them with a directive, or instruction to pay out the money, and that its failure 'to drive the matter to finality' constituted the sole cause for the non-payment to the applicants.
- [10] The second respondent contended that the first respondent has misconstrued the relevant provisions of FICA and that accordingly it is not empowered by FICA to issue any directive authorising payment. Further, and in terms of s 33 of FICA, there was no obligation on the first respondent not to proceed with the transaction in the absence of a directive not to proceed, and first respondent accordingly, unjustifiably shifts the blame for non-payment on the second respondent.

FICA

- [11] It is clear from the long title of FICA that it aims at establishing a FIC in order to combat money laundering activities and to impose certain duties on institutions and other persons that may be used for money laundering purposes.
- [12] The FIC issued Guidance Note 4 on Suspicious Transaction Reporting in GN 301 of 14 March 2008 in *Government Gazette* No. 30873. The note explains who must report suspicious transactions, what gives rise to the obligation to report, what the nature of a suspicion is, what the implications of making a suspicious transaction report are, and the process required to report suspicious transactions.

[13] The issue as to costs does not relate to the fact that the transaction was reported as a suspicious transaction, but to the undue delay pertaining to the repayment of the deposit in light of the time having lapsed since the reporting of the transaction and the actual repayment of the money. The question as to whether it was reasonable for the first respondent to refuse to repay the money must be viewed in view of sections 33 and 34 of the FICA, and Part 5 of Guidance Note 4.

[14] Section 33 of the FICA provides:

'An accountable institution, reporting institution or person required to make a report to the Centre in terms of sections 28 or 29, may continue with or carry out the transaction in respect of which the report is required to be made unless the Centre directs the accountable institution, reporting institution or person in terms of section 34 not to proceed with the transaction.'

[15] Section 34 of the FICA reads:

'(1) If the Centre, after consulting an accountable institution, a reporting institution or a person required to make a report in terms of section 28, 28A or 29, has reasonable grounds to suspect that a transaction or a proposed transaction may-

(a) involve-

- (i) the proceeds of unlawful activities or property which is connected to an offence relating to the financing of terrorist or related activities; or
- (ii) property owned or controlled by or on behalf of, or at the direction of a person or entity identified pursuant to a resolution of the Security Council of the United Nations contemplated in a notice referred to in section 26A (1); or

(b) constitute-

- (i) money laundering; or
- (ii) a transaction contemplated in section 29 (1) (b),

It may direct the accountable institution, reporting institution or person in writing not to proceed with the carrying out of that transaction or proposed transaction or any other transaction in respect of the funds

affected by the transaction or proposed transaction for a period of no longer than 10 days as determined by the Centre, in order to allow the Centre to make the necessary inquiries concerning the transaction and, if the Centre considers it appropriate, to inform and advise an investigating authority or the National Director of Prosecutions.'

[16] In Part 5 of Guidance Note 4 it is stated unequivocally that:

'Section 33 of the FIC Act provides that a reporter may continue with and carry out a transaction in respect of which a report is required to be made unless the Centre directs the reporter not to proceed with the transaction in terms of section 34.'

(my emphasis)

[17] In paragraph 5.3 of Part 5 of the guidance note it is explained that:

'One of the main purposes of an intervention order is to prevent the dissipation of funds or property which may be the proceeds of unlawful activity. A typical example of where this may be the case is where funds or assets are due to be transferred from one location to another or from one person to another, especially where the transfer will have the effect of moving the funds or assets out of South Africa. Reporters are encouraged to indicate to the Centre at the time of making a report under section 29 if they believe that the funds or assets involved in a transaction or series of transactions may be dissipated. The same also applies if a report has been filed with the Centre and the reporter subsequently becomes aware that the suspected proceeds may be dissipated. In such cases the reporter may contact the Centre quoting their reference number and informing the Centre of the activities within such account.'

[18] Although the first respondent explains in detail why it deemed it necessary to report the transaction, it does not state that there was any reason to fear that the funds involved in the transaction may be dissipated or moved outside the Republic.

[19] Neither the applicants nor the second respondent contended that the first respondent acted with an ulterior motive, and I accept that it was merely overzealous in its attempt to prevent what it regarded a suspicious channelling of funds. However, before continuing any further, I am constrained to remark

that some doubt exists as to the reasonableness of the first applicant's contention that it was attempting to prevent a suspicious transaction. It is stated paragraph 5 of the first respondent's supplementary affidavit:

'In this regard I annex hereto the urgent application as "FF1" and refer the Court more specifically to paragraph 22 thereof and ask that the same be incorporated herein with reference. It is of the utmost importance to note that the 1st respondent had no dealings with the 1st Applicant prior to having been notified to make payment of the R500 000.00 to the 1st Applicant.' [Paragraph 22 reads: 'Evident from the aforementioned email was that I required the deposit to be refunded to the Applicant and elected the bank account of the Os Poort Boerdery CC ... wherein the refund should be made. Os Poort provided the applicant with a loan to pay the deposit to the First Respondent and it, under the circumstances, would have been convenient for the repayment of the deposit to occur directly to Os Poort'].

[20] Annexure FA22 to the applicants' founding affidavit however indicates clearly that the payment of R500 000-00 that was made into the first respondent's bank account on 15 November 2017, was made by Os Poort Boerdery CC, and an investigation by the first respondent as to the source of the deposit would immediately have revealed the identity of the depositor.

[21] Even if it is accepted that the first respondent was reasonable in suspecting that it was confronted with a suspicious transaction due to the fact that neither the applicants nor the second respondent questioned the reasonableness of the suspicion, the question still remains whether the first respondent was entitled to retain the money until it was convinced that there was nothing untoward the request to repay the deposit to the applicants. This question needs to be addressed in view of the fact that by the end of November 2017, the applicants had furnished the first respondent with the details of their attorney's trust account, and furthermore, the second respondent stated in no uncertain terms by the end of May 2018 that the first respondent's reliance on the FICA was misplaced.

[22] The judgment of Sutherland J, in *South African Petroleum Energy Guild (NPC) v RMB Private Bank* (2014/27890) [2014] ZAGPJHC 368 (5 December 2014)

provides some guidance on this aspect. The learned judge dealt with a bank resisting release of funds on the grounds that it was a tacit or implied term of the agreement between the client and the bank, that in the event of the bank suspecting on reasonable grounds that money in a client's bank account is the proceeds of illegal activity or money laundering, the bank was entitled to freeze the operation of the account until having been satisfied to the contrary by its client.

- [23] Sutherland J posed the question what would happen if a bank makes a report in terms of s 29 of the FICA, to the FIC. In regard hereto the learned judge held (para 27):

'It seems to me that the obligations of a bank to initiate action about money laundering are wholly regulated by statute. There is no space, and indeed no need that is discernible in this regard, to imply additional duties on the bank ... The respondent's role in combatting money laundering is already spelt out in the legislation: in essence to be vigilant about possible unlawful activity and report it when it is noticed and if lawfully instructed to put a hold on funds, to do so. There is no scope to develop a role for what would be a cousin of the Lex Commissoria to add to the battalions arrayed against rich crooks.'

- [24] In the present matter, I am of the view that the first respondent surpassed any obligation it might have incurred pursuant to the terms of FICA. In addition, the retention of the applicants' funds from November 2017 until September 2018 far exceeded the FICA's authorisation that the second respondent may in appropriate circumstances issue a directive not to carry out any transaction in respect of suspected funds '*for a period not longer than 10 days*'. (my emphasis)

- [25] A further question that needs to be addressed, is whether the second respondent contributed to the dilemma faced by the applicants because it refrained from directing the first respondent to continue with the transaction. The second respondent crisply and decisively dealt with this issue: it is not empowered by the FICA to authorise the continuation of transactions. It can merely issue a directive in the circumstances provided for in s 34 of FICA.

[26] The first respondent, it must be remembered, is a firm of attorneys. It accordingly had access the FICA as well as the Guidance Notes issued. Guidance note 4 clearly indicates the main purposes of an intervention order issued in terms of s 34, which is to prevent dissipation of funds. No facts were placed before this court to indicate that the first respondent could on reasonable grounds have been of the view that the applicants intended moving funds out of South Africa or to otherwise dissipate the funds. It is accordingly my finding that the first respondent's belief that it was entitled to retain the money pending a directive by the second respondent, was misplaced and legally untenable.

[27] In view of the fact that the first respondent only repaid the applicants' money on 20 September 2018 the question as to what would constitute a reasonable time to await a directive from the FIC, need not be addressed and was in any event not addressed by the parties. It is however of interest to quote Sutherland J's remark in *South African Petroleum Energy Guild* (para 30):

'The languid, if not moribund response from the authorities in response to the report by the respondent of a possible crime is lamentable. But the harsh reality is that a bank is not the sheriff in a frontier town.'

Costs

[28] As to the question of costs, Sutherland J held in *South African Petroleum Energy Guild* (para 31):

'Both parties sought penal costs including that of two counsel. As I have found the conduct of the respondent to be without any foundation, the costs must follow that result. As regards, the penal aspect, it is not avoidable that the respondent is not a disinterested person in this controversy; i.e. a bank merely acting in the public interest alone, albeit in error about its powers in law. Its material interest derives from the litigation with Sasol, and the prospect of holding the applicants to account for the insolvency of the defaulting debtor and the linked alleged fraudulent guarantees. That factor, together with the harshness of the burden the respondent's conduct placed on the applicants, as yet unconvicted crooks as they might be, warrant attorney and client costs.'

[29] Both applicants and the second respondent sought punitive costs against the first respondent. The first respondent in turn sought a punitive costs order against the second respondent. As I have found, the first respondent's conduct was unreasonable and without legal foundation. The ordinary rule of costs following the result must follow. The applicants, in my view, are entitled to costs on an attorney and client scale against the first respondent. The first respondent refrained to repay a deposit paid by the first applicant to the first applicant after the sale agreement was duly cancelled. A simple investigation as to the identity of the party who made the payment would have identified the first applicant as the depositor. In addition, I take into consideration that the second respondent did inform the first respondent as I have referred to, that its reliance on FICA was misplaced. The first respondent however, stubbornly persisted in its view. There is accordingly no reason why either the applicants or the second respondent should be out of pocket in regard to the costs of this application.

[30] As between the first and second respondent I take into consideration that the FICA does not contain any provision empowering the second respondent to authorise any transactions. The FICA prescribes the process that follows on a suspicious transaction being reported. In view of the fact that FICA authorises the FIC to issue an intervention order to restrict transactions for a maximum period of 10 days, it was unreasonable for the first respondent to accept that it was entitled to retain the money for an extended period of time. The first respondent's silence and the non-issue of a directive was an answer in itself. The first respondent's decision to withhold the repayment of the deposit for the extended period as I have held, cannot be attributed to the second respondent's silence or non-response. The second respondent was obliged to take part in the court proceedings because the first applicant requested a costs order against it.

ORDER

In the result the following order is made:

1. The first respondent is ordered to pay the applicants' and the second respondent's costs of the application on the scale as between attorney and client.



E VAN DER SCHYFF
ACTING JUDGE OF THE HIGH COURT

Counsel for the applicants:

Adv H van der Vyfer

Applicants' attorneys:

Ayoob Kaka Attorneys

Counsel for 1st respondent:

Adv

1st Respondent's attorneys:

Freysen Attorneys

Counsel for 2nd respondent:

Adv YF Saloojee

2nd Respondent's attorneys:

Ntanga Nkuhlu Inc

Date of hearing:

10 October 2018

Date of judgment:

2018