Reportable:	**YES** / NO
Circulate to Judges:	**YES** / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / **NO**

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division, Kimberley)

CASE NO:	**2568/2015**
DATE HEARD:	**09/11/2018**
DATE DELIVERED:	**16/11/2018**

In the matter between:

LOTLHARE, PULE EZECHIEL 1st Applicant

LOTLHARE, LERATO 2nd Applicant

REATSWELELA TRADERS CC 3rd Applicant

and

KRUGER NO, JOHANNES GEORGE Respondent

IN RE –

The ex parte application of

KRUGER NO, JOHANNES GEORGE Applicant

and

LOTLHARE, PULE EZECHIEL 1st Respondent

LOTLHARE, LERATO 2nd Respondent

REATSWELELA TRADERS CC 3rd Respondent

Coram: Olivier ADJP

JUDGMENT

Olivier ADJP:

[1.] On 18 March 2011 the respondent, Mr JG Kruger, was appointed in terms of section 11 (3) of the **South African Reserve Bank Act**[1] to inspect, inter alia, TVI Express Makers and/or TVI Express to establish "*whether 'the business of a bank' … was being conducted*" in contravention of the provisions of, inter alia, the **Banks Act**[2] (**"***the Act*").

[2.] On 28 January 2015 the Registrar of Banks, satisfied that the respondent's inspection had shown that the applicants, Mr P E Lotlhare (1st applicant), Ms L Lotlhare (2nd applicant) and Reatswelela Traders CC (3rd applicant), had obtained money by conducting the business of a bank without being registered as such or authorised to do so, appointed the respondent, in terms of section 83(1) of the Act, as the repayment administrator as envisaged in section 84 of the Act "*to repay all monies so obtained … from members and/or participants and/or 'investors' under 'the scheme' operated/conducted by (the applicants), ... including, if possible, any bank interest that may lawfully have accrued on such amounts*".

[3.] In terms of the appointment the respondent was to act in accordance with the contents of the schedule to the letter of appointment, which provided that the respondent was to act under the control of the Registrar of Banks, and was enjoined, inter alia, "*to take all reasonable steps (including the liquidation of assets into which money unlawfully obtained as contemplated in section 83(1) has been converted) which may serve to expedite and ensure the repayment of money*"[3].

[4.] A "*direction*" in terms of section 83(1) of the Act was issued by the Registrar of Banks, directing the applicants to repay all such money.

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[1] 90 of 1998
[2] 94 of 1990
[3] See also section 84(4)(b) of the Act

[5.] On 14 December 2015 the respondent approached this court in an urgent application for authorisation to take possession of all assets of the applicants in terms of section 84(1A)(b)(i) of the Act and for the registration of caveats over all the immovable property of the applicants.

[6.] A rule nisi to this effect was issued, calling upon the applicants to show cause, on 26 February 2016, why their assets should not remain in the possession of the respondent "*in pursuance of the provisions of sections 83 and 84 of the Banks Act*".

[7.] Those provisions are aimed at the repayment of moneys obtained in the unlawful conducting of the business of a bank, if necessary by the liquidation of assets.

[8.] On the return date, and after due notice to the applicants, who chose not to oppose that application, the rule nisi was made a final order.

[9.] On 15 and 16 December 2015 the applicants received a letter from the attorneys representing the respondent. It was stated that the inspection had revealed that the "*true amount of money unlawfully obtained*" was R1 535 400.00 and the applicants were afforded 10 days within which to pay the money into the trust account of the attorneys. The applicants were informed that a worksheet containing the calculation of this amount was available for inspection.

[10.] On 18 December 2015 the worksheet was provided to the applicants and on the same day they paid an amount of R535 400.00. On 28 December 2015 the balance was also paid into the trust account of the respondent's attorneys.

[11.] It is common cause that certain assets, including motor vehicles and furniture, were attached and that caveats were registered over immovable property belonging to the applicants.

[12.] As already mentioned, the final order authorised the respondent to retain possession of those assets "*in pursuance of the provisions of sections 83 and 84 of the Banks Act*".

[13.] In terms of section 84(7) of the Act the repayment administrator holds office until the direction has been complied with, in other words until the repayment process has been finalised. The "*pursuance*" of the provisions of sections 83 and 84 would endure until then. It follows then that, in terms of the court order, the assets of the applicants would also remain under attachment until the repayment process has been finalised and the respondent no longer holds office, and not until this should reasonably have been the case.

[14.] It is against this background that the applicants on 6 June 2018 brought the present application. The respondent opposes it and has filed an answering affidavit, to which the applicants have replied. For purposes of convenience the parties are referred to as they are cited in the present application.

[15.] In the notice of motion the following relief is claims:

> "*1. Reconsidering the Court order granted on 26 February 2016 …;*
>
> *2. Declaring that the above stated order had been complied with and that the applicants had settled the true amount fully and finally;*
>
> *3. Ordering the respondent to forthwith and unconditionally restore the applicants' respective possession of all and every asset(s) seized by the respondent and/or his representatives and remain so seized in spite of the settlement of the true amount;*
>
> *4. Ordering the respondent to forthwith repay the amount of R898 200.00 … to the applicants;*
>
> *5. Costs against the respondent on an attorney own client scale;*
>
> *6. Further and/or alternative relief."*

[16.] Somewhat confusingly the purpose of the application was described, in paragraph 13 of the founding affidavit, as to:

> "*(a) Seek an amendment of the final Court order granted on 26 February 2016 in the main application, to the extent as set out in the notice of motion;*
>
> *(b) Order the respondent to forthwith release the assets set out in the notice of motion to the applicants;*
>
> *(c) Order the respondent to recalculate the amount he determined to be owing …;*

(d) Costs against the respondent."

[17.] The relief claimed, on either of these two versions, concerns the exercise by the respondent of his duties as repayment administrator. In terms of section 84(3) of the Act the repayment administrator "*shall act under the control of the Authority*", and in terms of section 84(6) the repayment administrator is remunerated by the Authority.

[18.] In terms of section 1 of the Act the "*Authority*" is the "*Prudential Authority established in terms of section 32 of the Financial Sector Regulation Act*". It has since 1 April 2018 been the successor of the erstwhile Registrar of Banks[4].

[19.] In terms of section 32(2) of the **Financial Sector Regulation Act**[5] the Prudential Authority is a juristic person.

[20.] The rule nisi provided for it and the original application to be served on the Registrar of Banks. According to a note on the notice of motion the application was indeed then received by the Registrar of Banks on 17 December 2015, and therefore well in advance of the return date. I think it can safely be assumed that the same would go for the order.

[21.] The point is therefore that, by the time that the confirmation of the rule nisi was sought, the Registrar of Banks had been made aware of that application.

[22.] The applicants have however not given notice to the Authority of the present application. When I took this up with Mr Jagga, counsel for the applicants, his response was that, because the applicants are not challenging the appointment of the respondent or his statutory powers, it was not necessary to do so.

[23.] I disagree. In my view the Authority has a clear interest in the relief claimed and should, at the very least, have been given notice of this application; all the more so where it is essentially the applicants' case that the repayment administrator is not executing his duties properly and in accordance with the Act and his mandate.

[24.] The Authority surely must have a direct interest in whether it should be declared that a process, which takes place under his or her supervision, has been finalised.

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[4] See section 290 of Act 9 of 2017

[5] 9 of 2017

The same would go for an order that assets that are held under the Authority's control should be released, and also for an order that money that has been collected as part of a process that is supervised by the Authority, should be paid back to the applicants. On this ground alone the present application cannot succeed.

[25.] It appears from the notice of motion and the founding affidavit that, as far as the assets of the applicants are concerned, the applicants in essence seek the deletion or amendment of the part of the order that authorises the possession of all of the assets of the applicants, and that this relief is sought on the ground, inter alia, that the Act only provides for the attachment of the assets set out in the direction, and not all assets as ordered.

[26.] As already pointed out the applicants, in prayer 1 of the notice of motion, sought the reconsideration of the original order, apparently at least to this extent. Uniform Rule 6(12)(c) provides for such a reconsideration and reads as follows:

> *"A person against whom an order was granted in such person's* ***absence*** *in an* ***urgent*** *application may by notice set down the matter for reconsideration of the order."* (My emphasis).

[27.] The applicants had not been given notice when the respondent initially approached the court on an urgent basis and the rule nisi was therefore indeed granted on an urgent basis and in the absence of the applicants. However, the order that is the subject of the present application is the final order, and this order was not obtained on an urgent basis. It was granted after the applicants had been given proper notice of the rule nisi and of the return date, and chose not to oppose. It cannot then be said, in my view, to have been granted in their absence, as envisaged in the Rule, because "T*he dominant purpose of the rule seems relatively plain. It affords an aggrieved party a mechanism designed to redress imbalances in, and injustices and oppression flowing from, an order granted as a matter of urgency in his absence. In circumstances of urgency where an affected person is not present, factors which might conceivably impact on the* *content and form of an order may not be known to either the applicant for urgent relief, or the Judge required to determine it.*"[6]

[28.] That the order must have been granted in urgent proceedings and in the absence of the affected party are jurisdictional requirements for the purposes of Rule 6(12)(c)[7]. Mr Jagga argued that the court's powers in this regard are not limited to those provided by the Rule. Not surprisingly he did not refer me to any authority for the proposition that a court could, outside the ambit of that Rule, and other than on the basis of an appeal or review, reconsider an order made by another court. He also did not attempt to rely on the provisions of Uniform Rule 42. To the extent that the original order would have to be reconsidered for the relief sought by the applicants to be granted, this application can therefore in any event not succeed.

[29.] Mr Jagga argued that the respondent never needed to approach the court in the first place, that he in any event had all of those powers in terms of the Act and that the court order is therefore really superfluous. In **Kruger v Bailey and Others**[8] this practice was, however, approved in the following terms in paragraph 6 of the judgment:

> *"The Act does not in terms contemplate that the manager needs to come to court in order to carry out his function under section 84(1A) of taking all the assets of the affected person into possession. Mr Kruger in this instance applied for the court's sanction for reasons I can understand. A person affected by the appointment of a manager might be reluctant or recalcitrant in complying. It may on the face of it appear a draconian power which the manager has; the affected party may thus need to be heard on the threshold requirements as to whether a directive under section 83(1) has been issued and whether the manager has in fact been appointed as such."*

[30.] In any event, the existence of a court order cannot simply be thought away.

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[6] **ISDN Solutions (Pty) Ltd v CSDN Solutions CC and others 2** 1996 (4) SA 484 (W) at 486H - B

[7] See **Sheriff Pretoria North-East v Flink and another** [2005] 3 All SA 492 (T) at 499; **National Director of Public Prosecutions v Braun and Another** 2007 (1) SA 189 (C) at 193 – 194; **Oosthuizen v Mijs** 2009 (6) SA 266 (W)

[8] An unreported judgment of the Western Cape High Court, Cape Town, under case number 1912/2014 on 9 June 2014.

[31.] The contention that the order regarding the assets should in some way have been limited to only certain assets or to only assets to the value of the illegally obtained money, as suggested in the founding affidavit, is in any event clearly not correct. Subsection (b) of section 84(1A) of the Act provides that "*On appointment of a repayment administrator and whilst the person is subject to the relevant direction as contemplated in this section- (i) the repayment administrator shall recover and take possession of* ***all*** *the assets of the person subject to the relevant direction …"* (My emphasis)

[32.] The qualification "*subject to the relevant direction*" clearly pertain to the "*person*", and not to the "*assets*"[9], and there is therefore nothing in these provisions that would suggest any limitation on the assets that may be taken possession of. Subsection (b)(ii) in fact also makes it clear that it is the person that is subject to the direction.

[33.] In his heads of argument Mr Jagga sought to avoid the consequences of what has been confirmed in **Kruger v Joint Trustees of the Insolvent Estate of Paulos Bhekinkosi Zulu**, by submitting that the applicants' case has never been that a repayment administrator may not take possession of all of a person's assets, "*but rather that due to the lapse of a substantial amount of time, it cannot be said that the Respondent may continue to under the guise of such directive hold onto those assets*".

[34.] This is not entirely correct. The case made out in the founding affidavit as regards the return of the assets rested on two grounds:

34.1 In the founding affidavit reference was made to the fact that the respondent had in his founding affidavit in the original application stated that he had been directed to "*recover and take possession of all the assets*" of the applicants. The words "*subject to the relevant direction*" in the Act were emphasised, clearly to motivate the statement that the respondent had "*misstated the Act*", that he had, presumably incorrectly, thereby "*created the impression that all … assets had to be taken possession of*" and that "*this (had) constituted overreach and clearly*

[9] See **Kruger v Joint Trustees of the Insolvent Estate of Paulos Bhekinkosi Zulu** 2016 JDR 2102 (SCA)

militate(d) against the limitation by s 84(1A)(b)(i) of the Act to assets that are subject to the directive". The applicants therefore clearly relied on the respondent having mistakenly interpreted the Act, in substantiation of their request that the order regarding the assets should be deleted or amended.

34.2 No case was made out in the founding affidavit that the particular provisions would only have provided for possession for a reasonable period, or for what a reasonable period would have been in this case, and that the applicants would on this basis be entitled to the return of their assets. The mere fact that the applicants pointed out in the founding affidavit the long time that had lapsed since the appointment of the respondent, cannot be said to have amounted to such a case. It is trite that an applicant must set out its case in clear terms[10].

34.3 The declaratory order sought by the applicants is also not that "*a substantial amount of time*" has lapsed and that the respondent is on that basis no longer entitled to retain the assets. When the contents of the founding affidavit are read with the relief sought in the notice of motion, the case made out by the applicants is very clearly that the purpose of the direction has been served, that the repayment process has been completed and that there would therefore no longer be any reason for the respondent to retain possession of the assets.

[35.] The direction issued to the applicants in terms of section 83(1) did in any event not specify or limit the assets that could be taken into possession by the respondent, neither did his letter of appointment[11].

[36.] In any event, whatever the basis may be upon which the applicants seek the return of their assets before the whole repayment process has been finalised, they would not be entitled to such relief by means of a reconsideration of the original order, for the reason already pointed out.

[10] **National Director of Public Prosecutions v Phillips and Others** 2002 (4) SA 60 (W) para [36]

[11] Compare section 84(2) of the Act.

[37.] The scheme of the Act is in any event also clearly that the repayment administrator will be entitled to retain possession of the assets until the whole repayment process has been finalised, which has not happened in this case.

[38.] The contention that the direction has been fully complied with is premised on the fact that the applicants had, in response to the letter of the respondent's attorneys, paid into trust the full amount that was in that letter described as the "*true amount*". It was argued that, if the respondent has in three years' time, and after several meetings and further investigations, not come up with any evidence of further payments, there can be no real dispute about the allegation that there has been full repayment.

[39.] The first problem with this argument is that, even if it was to be assumed that the payment mentioned in the letter is indeed the total amount derived from the applicants' illegal activities, payment by the applicants of that amount into trust could not be said to have completed the repayment process envisaged in section 84 of the Act. Surely the distribution of that amount to claimants must be part of this process, as conceded by Mr Jagga, and there is no dispute that this has not yet taken place. A declaratory order that "*the applicants had settled the true amount fully and finally*" would therefore not mean that the repayment process has been finalised.

[40.] The second problem is that, while the applicants conceded that they are liable to pay interest on the money obtained by them, they have not claimed to have settled this. In fact, their calculation of the amount that they say they paid too much and of which they now claim repayment makes it very clear that they have not factored in any interest on the unlawful deposits. In this regard it is also important to note that the "*true amount*" claimed from the applicants was described, in the letter of the respondent's attorneys, as the amount unlawfully "*obtained*", as opposed to the amount "*owing*" by or "*recoverable*" from the applicants.

[41.] On the applicant's own version it cannot therefore be said that the repayment process, and "*the pursuance of the provisions of sections 83 and 84 of the Banks Act*" envisaged in paragraph 6 of the order, has been completed. Insofar as the return of their assets is sought, in prayer 3, in circumstances where "*pursuance of the provisions of sections 83 and 84 of the Banks Acts*" has not been completed, it would require a reconsideration of paragraph 6 of the order, to which the applicants are in the present circumstances not entitled.

[42.] The applicants have in any event not presented any independent evidence of what the exact amount is that they obtained from their illegal activities. It appears to be common cause that the amount claimed in the letter was calculated on the basis of credits reflected in their bank statements. The applicants went no further, in their founding affidavit, than to state that not all of those credits resulted from deposits by investors and that some were the result of transfers of funds from other accounts. It was on this basis then stated that the amount in the letter should actually have been only R637 200.00, obviously when the amounts of the transfer credits are subtracted from the amount of which payment was claimed in the attorneys' letter. They have not from their side made out a case that the amount of R637 200.00 represents the total of what had been obtained by them through their illegal activities.

[43.] In fact, the applicants did not in their founding affidavit even make the statement that no other money, than that reflected in the bank statements, had been obtained from their illegal activities. It is equally trite that an applicant must generally make out its case in the founding affidavit[12]. The failure to do so is especially significant when regard is had to the following:

43.1 The very same letter that the applicants rely upon contained the qualification that the amount of R1 535 400.00 was, despite it having been referred to as "*the true amount … unlawfully obtained*", nevertheless "*subject to further investigation and consequent variation*".

43.2 Secondly, the applicants have themselves in their replying affidavit disclosed a letter which their attorneys received from the respondent's attorneys, in which it was stated that investigations had resulted in

[12] **Democratic Alliance v Kouga Municipality and others** [2014] 1 All SA 281 (SCA)

allegations of cash payments, which would obviously not have been among the credits reflected in the bank statements.

[44.] In the circumstances I would in any event not have been prepared to find that the fact that the respondent has not, about three years after the letter claiming payment of the amount of R1 535 400.00, produced proof that there had been other deposits than those reflected in the bank statements, justifies the inference that there has in fact been no other payments.

[45.] The amount of which payment is sought in prayer 4 of the notice of motion is the total amount of the credits in the bank statement which the applicants say were not deposits, but rather the result of the transfer of funds from other bank accounts of theirs. That this is how the calculation is made appears to be common cause.

[46.] The applicants have furnished the respondent with an unsworn statement by one Ms Theart, a private banker at the bank where the account is held, in which she confirms that credits in the total amount of R898 200.00 represent "*inter-account*" transfers by the first applicant.

[47.] The respondent's only response to this is that he requires an affidavit to this effect. There is no indication that the respondent has ever, since being furnished with this statement as long ago as in February 2016, himself contacted Ms Theart to verify this information or to obtain such an affidavit from her. This while he is the one who is enjoined, in terms of the schedule to his letter of appointment, and in terms of section 84(4)(a), to conduct such further investigations "*as (he) may deem necessary*".

[48.] In the circumstances I agree with Mr Jagga's submission that there does not on the papers exist a real dispute about this issue. The problem is, however, that there is a dispute about whether all the payments by investors have been traced and about whether all investors have been identified. There are also the issues of the outstanding interest and of the respondent's costs in the administration of the repayment process, for which the applicants could also be held liable. Until the repayment process has been finalised in all respects the money remains an asset in the possession of the respondent, like all of the applicants' other assets.

[49.] In the circumstances it cannot be said that the total amount claimed would not in the end in any event be needed to refund investors and to cover the costs of the repayment administrator.

[50.] I have to say that it is quite understandable that the applicants would, in the circumstances, feel frustrated by the respondent's attitude, and his apparent lack of efforts. The respondent now claims that he needs to advertise the plan or intention to distribute the recovered money to investors, and he claims that he was on the point of approaching this court to obtain sanctioning for this part of the process, but he does not explain why this has not already been done.

[51.] The investors who have according to the respondent's attorneys claimed to have made cash payments have on the face of it not been identified to the applicants, and not a single confirmatory affidavit by such a person has been annexed to the answering affidavit in this application.

[52.] Mr Jagga argued that, in the event that the court finds that the applicants are in the circumstances not entitled to the relief that they claimed, the court should, under the prayer for "*Further and/or alternative relief*", make an order that would put the respondent on terms to finalise the repayment process. The problem is that there is not enough information on the papers for this court to come to a finding regarding what a reasonable period would be for this to be accomplished. It was not the case that the respondent had to meet and for some reason the applicants decided not to follow the route of an application for a mandamus. Mr Jagga confessed to being unable to explain this.

[53.] It follows that the application cannot succeed. Costs would usually follow the result, but Mr Jagga argued that it would in this case be unfair to the applicants, given the extraordinary long time that has lapsed without finalisation of the repayment process and the absence of any attempt whatsoever to explain it.

[54.] Mr Theron SC, counsel for the respondent, countered by pointing out that, after this application had been lodged, the respondent's attorneys informed the applicants' attorneys that the court would be approached during that same month (June 2018) for the sanctioning of a repayment plan. It was stated in the letter that the applicants could in that application raise their concerns and grievances, and it was proposed that the present application be withdrawn and that costs be tendered by the applicants.

[55.] The problem is that the first mention by the respondent's attorneys of an intended application to obtain court sanctioning of a repayment plan was made as long ago as in January 2016. Nothing has come of it until now and there is no explanation at all for this.

[56.] However ill-advised the applicants may have been as regards the basis of their application and the form of relief they sought, I do not think that they can be blamed for not accepting the invitation to reserve their grievances for the promised sanctioning application.

[57.] In the circumstances it would in my view indeed be fair, in view of what has already been said about the respondent's conduct, that each party bear its own costs. No costs order will therefore be made.

[58.] In the premises the following order is made:

THE APPLICATION IS DISMISSED.

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C J OLIVIER
ACTING DEPUTY JUDGE PRESIDENT
NORTHERN CAPE DIVISION

For the applicants:	**ADV. N Jagga** (oio **Du Plessis Viviers** c/o **Van De Wall Inc.**)
For the respondent:	**ADV. EL THERON SC / ADV. M ROURKE** (oio **Bowman Gilfillan Inc.** c/o **Mervyn Joel Smith**)