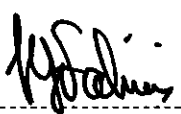


**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case Number: 63330/2011

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES ☒ NO ☒
(2)	OF INTEREST TO OTHER JUDGES: YES ☒ NO ☒
(3)	REVISED. ☒
8/5/17	 _____ DATE SIGNATURE

8/5/2017

In the matter between:

KHUMALO, MZILIKAZI GODFREY

APPLICANT

And

SOUTH AFRICAN RESERVE BANK
THE MINISTER OF FINANCE
THE DEPUTY GOVERNOR OF THE
SOUTH AFRICAN RESERVE BANK
ASSISTANT GENERAL MANAGER AND
HEAD OF INVESTIGATIONS DIVISION OF THE
CONTROL DEPARTMENT OF THE
SOUTH AFRICAN RESERVE BANK
A D MMINELE

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

4TH RESPONDENT

5TH RESPONDENT

SIMANE SECURITIES (PTY) LTD	6 TH RESPONDENT
MAWELA PROPERTIES (PTY) LTD	7 TH RESPONDENT
T VAN DEN HEEVER N. O., in his capacity as liquidator of MAWENZI RESOURCES (PTY) LTD (IN LIQUIDATION)	8 TH RESPONDENT
T VAN DEN HEEVER N. O., in his capacity as liquidator of METALLON CORPORATION (PTY) LTD (IN LIQUIDATION)	9 TH RESPONDENT
LEBOGANG MORAKE N. O., in his capacity as liquidator of BONNEVIE PROJECTS (PTY) LTD (IN LIQUIDATION)	10 TH RESPONDENT
SEAN CHRISTENSEN N. O., in his capacity as liquidator METALLON HOTELS AND LEISURE HOLDINGS (PTY) LTD (IN LIQUIDATION)	11 TH RESPONDENT
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	12 TH RESPONDENT

JUDGMENT

Fabriclus J,

1.

In this application the Applicant sought the following relief:

1. "Reviewing and setting aside the decision taken to attach the Applicant's goods/money which led to a notice of attachment dated 12th August 2008 in terms of *Regulation 22C (1) of the Exchange Control Regulations* made under *Section 9 of the Currency and Exchanges Act No. 9 of 1933*, as amended, as promulgated by *Government Notice R. 1111 of 1961-12-01* as amended from time to time thereafter, being served on the Applicant on 2 September 2008 and the attachment having been effected.
2. Declaring the notice of attachment dated 12th August 2008 made in terms of *Regulation 22C of the Exchange Control Regulations* in terms of *Section 9 of the Currency and Exchanges Act 9 of 1933*, as amended, as promulgated by *Government Notice R. 1111 of 1961-12-01* as amended from time to time thereafter to be invalid.
3. Reviewing and setting aside the decision/s taken to forfeit to the State the money and/or goods as evidenced by the notice and order of forfeiture published in the *Government Gazette Notice 521 of 2011* dated the 5th of August 2011, signed by the Third Respondent on 2nd August 2011.

4. Declaring the notice and order of forfeiture published in the *Government*

Gazette, Notice 521 of 2001 dated 5th August 2011, to be invalid.

5. Declaring that *Regulation 22A, 22B, 22C of the Exchange Control*

Regulations 1961 (as promulgated by *Government Notice R.1111*), as

amended, made in terms of *Section 9 of the Currency Exchange Act, 1933*

(*Act 9 of 1933*) to be unconstitutional.

6. Costs of suit."

2.

At the hearing, Mr Puckrin SC on behalf of the Applicant abandoned the relief sought as per Prayers 1 and 2. The dispute that remained therefore was whether the relevant forfeiture order ought to be reviewed and set aside as being invalid and whether or not the mentioned *Regulations* of the *Exchange Control Regulations* were unconstitutional.

3.

The Respondent had been involved in various transactions which according to the Reserve Bank amounted to contraventions of various *Exchange Control Regulations*. After a lengthy process the attachment order was issued which is referred to in Prayer 1 of the Notice of Motion. At a later stage, and before the three year period expired (in terms of *Regulation 22C1*), the forfeiture decision was taken and this led to the present application which was filed with the Registrar of this Court on 4 November 2011.

The Applicant had been involved in a previous application in this Court – details of which can be found in *South African Reserve Bank v Khumalo and Another 2010 (5) SA 449 SCA*. In that case the Supreme Court of Appeal found that Regulation 22C (1) was not invalid.

4.

The issue before me is whether or not the Applicant has shown the necessary *locus standi* to seek the relief referred to, and this must be decided *in limine*.

See: *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* 2013 (3) BCLR 257

(CC).

5.

A party to litigation must have a direct and substantial in the right, which is the subject matter of the litigation, and in the outcome of the litigation. If a party does not comply with this requirement, he lacks legal standing. Whether a litigant's interest is sufficient to clothe him or her with standing, involves a consideration of the facts, the relevant statute in Public Law disputes and its purpose. The issue is determined in the light of the factual and legal context. An own-interest litigant does not acquire standing from the merits of its cause of action, but from the effect the alleged offending act will have on its interests or potential interests.

See: *Harms, Civil Procedure In The Supreme Court at A-55 and Jacobs v Waks* 1992 (1) SA 521 (A) at 534.

Mr Puckrin SC conceded that the Applicant herein was an own-interest litigant. In this context it is important to note that an own-interest litigant does not acquire

standing from the invalidity of the challenged decision or law, but from the effect it will have on his or her interest or potential interest. The interests that confirm standing to bring the challenge, and the impact the decision or law has on such a litigant, must be demonstrated. It is clear that a successful challenge to a public decision can be brought only if "the right remedy is sought by the right person in the right proceedings". Furthermore, it is not in issue that Courts should not be required to deal with abstract or hypothetical issues, and should devote its scarce resources to issues that are properly before it.

See: *Giant Concerts CC v Rinaldo Investments supra at par. 34.*

6.

As far as a constitutional challenge is concerned, the litigant must show how the claim of constitutional infringements would have a material bearing on him.

See: *South African Reserve Bank and Another v Shuttleworth and Another 2015*

(5) SA 146 (CC).

Courts of law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important. A declaratory order cannot be claimed merely because the rights of the claimant have been disputed, but that such a claim must be founded upon an actual infringement.

See: *Geldenhuis and Neethling v Beuthin* 1918 AD 426 at 441.

More recently it was decided that the following considerations apply:

1. Courts will not decide issues of academic interest only.

See: *Radio Pretoria v Chairman Independent Communications Authority of South Africa* 2005 (1) SA 47 (SCA);

2. Courts will not make determinations that will have no practical effect.

See: *Rand Water Board v Rotek Industries (Pty) Ltd* 2003 (4) SA 58 (SCA) at 63 H to I;

3. A case is moot and therefore not justifiable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.

See: *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 CC at par. 21;*

4. As far as the granting of a declaratory order is concerned, the Court has an undoubted discretion to grant such with due regard to all relevant circumstances. At the very least, it must however be satisfied that the Applicant has an interest in an existing, future or contingent right or obligation.

See: *Ex parte Nel 1963 (1) SA 754 (A)* and *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd 2005 (6) SA 205 SCA at 213 E to G.*

The Court may decline to grant a declaratory order if it regards a relevant question raised before it as hypothetical, abstract or academic. In essence, it must be shown that a declaratory order would have a practical effect.

See: *Rumdel Cape v South African Road Agency SAC Ltd [2016] ZASCA 23*

(18 March 2016).

5. Where an Applicant relies on the provisions of the *Promotion of Administrative Justice Act ("PAJA"), Act 2 of 2000*, as the Applicant does in the present proceedings, it must bring itself within the definition of administrative action, and must show that a decision taken adversely affected its rights and which had a direct, external legal effect. The decision must have the capacity to affect legal rights.

See: *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others 2005 (6) SA 313 (SCA)*.

8.

It is not in issue that in these proceedings the Applicant is an own-interest litigant and that he relied on *PAJA* in the context of review proceedings.

9.

In the Founding Affidavit, and in the context of the forfeiture notice that was addressed to Applicant and Mawenzi Resources, he gives detail with reference to the companies mentioned in the notice of the status of such companies, which he said have either been placed in liquidation, are dormant, are deregistered or do not exist. He also stated that "a substantial number of assets attached by the Reserve Bank do not vest in me or in the Mawenzi". He stated further that "the fact that the Reserve Bank has sought to unilaterally attach these assets on such a broad and all-encompassing basis, in circumstances where the Applicants (sic) neither own nor hold an interest in such assets is clearly indicative of the attitude and manner in which the Reserve Bank has sought to deal with the Applicants".

10.

The relevant attachment notice was addressed to Applicant and Mawenzi Resources and Finance Company (Pty) Ltd. It also referred to the relevant Respondents' right, title and interest in a number of other companies. It is dated 12 August 2008. An

explanatory memorandum from the Financial Surveillance Department of the South African Reserve Bank dated 19 May 2011 was also addressed to Applicant and a number of companies, as well as to Mawenzi Resources and Finance Company (Pty) Ltd. It sets out in great detail the facts relied on by the Reserve Bank relating to the potential forfeiture of attached assets in terms of *Regulation 22B of the Exchange Control Regulations*. In this memorandum the Reserve Bank relies on certain allegations of fraud allegedly committed either by the Applicant or by persons acting on his behalf. The actual "Notice and Order of Forfeiture" vis-à-vis the Applicant and/or Mawenzi Resources and Finance Company (Pty) Ltd is published in the *Government Gazette No. 34507* on 5 August 2011. It merely sets out what is being forfeited and contains no other factual allegations relating to any fraud committed by the Applicant or by persons acting on his behalf.

11.

In Applicant's Supplementary Affidavit filed in terms of *Rule 53 of the Rules* of this Court dated 13 September 2013 in the context of the forfeiture order, he gives details of the entities in which he had no interest whatsoever.

12.

In the Answering Affidavit of the First, Third, Fourth and Fifth Respondents, the point of Applicant's lack of *locus standi* is pertinently raised. Reference is made to Applicant's own allegations as to the entities which either did not exist, were in liquidation, were dormant or were deregistered. Reference was also made to the previous interdict application during October 2008, where the Applicant made certain factual allegations regarding his interests in the various companies/entities that were later the subject matter of a forfeiture order. It is clear from this Affidavit and the details given in respect of all the entities that were the subject matter of the forfeiture order that Applicant, on his own version, had no interest in any of the assets to which the order of forfeiture related. Accordingly, it was said that Applicant

had failed to disclose that he had a direct and substantial interest in the dispute whether the notice of attachment and the order of forfeiture were lawfully and validly issued, and that he had the requisite *locus standi* to seek the relief that he sought. It must be remembered in this context that Applicant is an own-interest litigant and that the liquidator of Mawenzi Resources and Finance Company (Pty) Ltd, is the Eighth Respondent. It certainly seeks no relief in these proceedings.

13.

In the Replying Affidavit, the Applicant states that the Reserve Bank had in fact conceded that he did not own any of the relevant assets that were the subject matter of the forfeiture order, nor that owned any assets in Mawenzi Resources and Finance Company (Pty) Ltd. For that reason the notice to attach the property was improper in that the attached assets did not belong to him, and similarly for the same reason the notice of forfeiture was improper. He stated that in the absence of the assets belonging to him, the entire decision-making mechanism relating to the attachment and the forfeiture of the assets was a flawed process. He contended

further that he had said all along and certainly since at least 2008, "and which now seems to be common cause between the parties", that the assets did not belong to him. He did however have *locus standi* in that the entire proceedings were aimed at himself. He added the following: "The effect of the attachment and forfeiture was that none of my assets were attached, some assets of Mawenzi were attached and assets of third parties were attached who were not related to the application, without any basis in law and fact".

12.

In argument, Mr N. Maritz SC, on behalf of First, Third, Fourth and Fifth Respondents referred me to the authorities which I have mentioned above and submitted with reference to *Giants Concerts CC supra par. 30* that a litigant may be denied own-interest standing even though the result could be that an unlawful decision stood. This was not illogical, as standing determined solely whether the particular litigant is entitled to mount the challenge in the particular proceedings. It was contended that Applicant's own Affidavits did not demonstrate how the

decisions made by the Reserve Bank affected his rights or had the capacity to affect his rights in a direct and immediate way. Details were given of all the Applicant's own allegations relating to the various entities, and it is clear from this analysis that on Applicant's own version he had no interest in any of these entities at all, many having been wound up subsequently in any event. At the time of the lodging of this application, on Applicant's own version, he had no interest in any of these companies or assets. Accordingly none of his rights could be adversely affected by the forfeiture order and he had therefor no direct and substantial interest in the relief claimed.

15.

It was also submitted in the context of the constitutional challenge that Applicant similarly lacked standing. A constitutional attack on *Regulation 22A* was impermissible as this Court is not required to deal with hypothetical, abstract issues. Reference was made to the decision *South African Reserve Bank v Shuttleworth* *supra* in which the Constitutional Court declined to allow a constitutional attack

against *Regulations* having no bearing on the relevant facts. The attack on *Regulations 22B and 22C* could also not be entertained inasmuch as Applicant had failed to impugn the constitutionality of the *Regulations* by review in terms of *PAJA* as he was required to do.

See: *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd 2010 (3) SA 589 SCA (par. 10).*

It was submitted, correctly in my view, that it is impermissible to by-pass *PAJA* by impugning directly the constitutionality of administrative action.

See: *BATA Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (4) SA 490 (CC) par. 25.*

During Mr N. Maritz SC's argument Mr Puckrin SC very properly and fairly interjected to state that none of the assets listed in the forfeiture order belonged to Applicant. Mr N. Maritz SC also pointed out that the debate regarding the lawfulness of the forfeiture order was now moot, in that even if I granted it, it would not reverse anything done. The decision to issue the forfeiture order was indeed an administrative action in terms of *PAJA*, but not, importantly, *vis-à-vis* the Applicant.

Mr Puckrin SC on behalf of Applicant submitted that the case put forward by the Respondents on *locus standi* was not that simple inasmuch as the Applicant, having regard to the explanatory memorandum relating to the notice of attachment was alleged to have committed fraud. According to **Regulation 22**, in the context of the **Exchange Control Regulations**, the Applicant could be guilty of an offence, and in this context, there was a potential risk to the Applicant of being found guilty and being subject to a criminal sanction and procedure and forfeiture of certain relevant assets. He argued that it was inherent in the relevant **Government Notice** that a contravention of the Regulations had been committed which could result in a potential prosecution. It was in this context that the rights of the Applicant lay. This was then also the illegal interest that the Applicant had in these proceedings and the relief sought.

16.

It must immediately be said that this was the first time that this argument on behalf of the Applicant was raised. It was certainly not his case in the Founding Affidavit

and in fact it appears nowhere in any Affidavit made by the Applicant. In application proceedings, the Affidavits constitute not only the evidence, but also the Pleadings.

The necessary allegations must appear in the Supporting Affidavits. The general rule is that in motion proceedings the particular Applicant must set out the full case in the Founding Affidavit.

See: *Herbstein and Van Winsen, The Civil Practice Of The High Courts In South Africa, 5th Edition Volume 1 p. 439.*

Mr N. Maritz SC also added in reply that it had been held that the *Exchange Control Regulations* do not contemplate either a criminal prosecution or a criminal conviction as a prerequisite to forfeiture. *Mens rea* in that context was not a prerequisite, although it certainly would be in the context of a criminal trial.

See: *Jacquesson v Minister of Finance 2006 (3) SA 334 SCA par. 9.*

The forfeiture notice made also no reference to the grounds on which it was made, and there was no publication of any reasons that could affect any Personality Rights of the Applicant. I was also referred to *Oilwell (Pty) Ltd v Protech International Ltd and Others 2011 (4) SA 394 SCA*, where it was held that criminalization of

contraventions of, or failures to comply with, any provision of the *Regulations* in *Regulation 22* required *mens rea*. This did not mean that a contravention of the *Regulations* required *mens rea*: it only meant that in the absence of such the relevant parties could not be punished criminally. In this particular instance, the perceived threat of prosecution was not raised in the Affidavits, and the Reserve Bank was therefore unable to deal with such an alleged threat on the facts. Applicant's relevant affairs in the present context had commenced in 2001, and no threat of prosecution has ever been shown or raised anywhere. The setting aside of the forfeiture decision was in any event irrelevant in the context of a possible prosecution in that it was certainly not a prerequisite. The grant of a forfeiture order was certainly not determinative of a prosecution prospect.

17.

Mr Puckrin SC's argument cannot be sustained in the light of the authorities that I have referred to in the immediately preceding paragraphs. Added to that, it would not be in the interest of justice were I too allow this argument to be raised at this

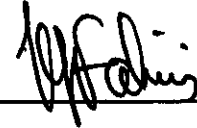
stage of the proceedings in the complete absence of any reference thereto in any of the Affidavits of the Applicant. I agree with Mr N. Maritz SC that the Reserve Bank would certainly be prejudiced if I had to entertain this argument, but in any event, it has no merit. A prosecution for a contravention of the relevant Regulations can be instituted irrespective of the existence of a forfeiture order.

18.

In the light of the undisputed fact that the Applicant had no interest in any of the entities referred to in the forfeiture order, and having regard to the authorities and considerations that I have dealt with in par. 6 above, I find that Applicant has no *locus standi vis-à-vis* the relief that is sought in these proceedings.

The following order is therefore made:

1. The application is dismissed;
2. Applicant is to pay the costs of the proceedings, including costs of two Counsel.

A handwritten signature in black ink, appearing to read 'H.J. Fabricius', is written over a horizontal line.

JUDGE H.J FABRICIUS

JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA

Case number: 63330/2011

Counsel for the Applicant:

Adv C. Puckrin SC

Adv A. Bava SC

Adv G. Badhela

Instructed by: Shepstone and Wylie Attorneys

Counsel for the 1st, 3rd, 4th & 5th Respondents:

Adv N. Maritz SC

Adv E. Muller

Instructed by: Newtons Attorneys

Counsel for the 2nd Respondent:

Adv P. Mtshaulana SC

Adv L. Kutumela

Instructed by: The State Attorney

Counsel for the 12th Respondent:

Adv N. Cassim SC

Adv A. Platt SC

Instructed by: The State Attorney

Date of Hearing: 24 April 2017

Date of Judgment: 8 May 2017 at 10:00