

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH AND SOUTH GAUTENG HIGH COURT, PRETORIA)

Date: 2009-04-24

Case Number: 50711/2008

In the matter between:

KHUMALO, MZILIKAZI GODFREY

First Applicant

MAWENZI RESOURCES AND FINANCE COMPANY

(PTY) LTD

Second Applicant

and

THE SOUTH AFRICAN RESERVE BANK

First Respondent

THE MINISTER OF FINANCE

Second Respondent

JUDGMENT

SOUTHWOOD J

- [1] The South African Reserve Bank ('SARB'), the first respondent in the application brought by the first and second applicants, applies for leave to appeal against the judgment and order granted against it on 19 February 2009. In terms of the order the notice of attachment issued by SARB on 12 August 2008 in terms of Regulation 22C(1) of the Exchange Control Regulations, Annexure MGK1 to the founding

affidavit, was declared to be invalid. This was final relief and the court did not grant or refuse any of the interim relief sought by the applicants.

[2] The first and second applicants filed a notice of application for leave to cross-appeal to the Supreme Court of Appeal 'in respect of those parts of the judgment and the order made by the Full Court on 19 February 2009 that are described below'. These parts of the judgment are nothing more than this court's failure to grant some of the interim relief sought in the notice of motion. The applicants' notice states that if the first respondent were to be granted leave to appeal and that appeal were to succeed, the applicants will contend that the full court ought to have granted this interim relief.

[3] SARB applies in terms of Rule 30 to set aside, as an irregular step, the first and second applicant's notice of application for leave to cross-appeal. SARB seeks this relief on the following grounds:

- (1) This court's failure to grant interim relief does not constitute a judgment or order which can be appealed against in terms of section 20(1) of Act 59 of 1959;
- (2) The applicants' failure to comply with Rule 49(1)(b) by not recording the grounds upon which leave to appeal is sought;

- (3) It is not permissible to seek leave to cross-appeal on condition that leave to appeal is granted and the appeal succeeds.
- [4] With regard to SARB's application for leave to appeal, I am satisfied in the light of the legal arguments and authorities now advanced that the first respondent has a reasonable prospect of success in the appeal. Accordingly leave to appeal to the Supreme Court of Appeal will be granted to the first respondent.
- [5] It will be convenient to deal with the applicants' application for leave to cross-appeal and SARB's application to set aside the notice of application for leave to cross-appeal together as the same issues arise in both. In the main application the applicants sought an interim order declaring invalid the notice of attachment issued by SARB in terms of Regulation 22C(1) of the Exchange Control Regulations; interdicting and restraining the first respondent from taking any steps to implement or give effect to the notice of attachment and directing that the applicants may continue to exercise whatever rights of ownership they have in the assets listed in paragraphs 6.1 to 6.17 of the notice of attachment, unencumbered by the issue of the notice of attachment. The applicants sought this relief pending the outcome of an action to be instituted in which the applicants would seek orders reviewing and setting aside Regulations 22B, 22C and 22D of the Exchange Control Regulations and/or declaring these regulations to be unconstitutional; alternatively, an order as contemplated in Regulation 22D reviewing

and setting aside the notice of attachment and an order declaring section 9(2)(d)(i) of the Currency and Exchanges Act, 9 of 1933, to be unconstitutional.

- [6] One of the grounds relied upon for the invalidity of the notice was that Regulation 22C(1) of the Exchange Control Regulations was *ultra vires*. As appears from paragraph [3] of the judgment appealed against the parties agreed that the relevant facts were before the court, that there were no real disputes of fact and that if the court were to uphold the applicants' contentions regarding *ultra vires* and/or the Regulation 22D review, the court should simply grant a final order declaring the notice invalid. Clearly that was the real relief sought in the application and that is what the court granted. This was also consistent with the general principle that when it is possible to decide any case without reaching a constitutional issue, that course should be followed (**S v Mhlungu and Others 1995 (3) SA 867 (CC)** para 59; **National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC)** paras 21 and 22). Consequently it was neither permissible nor desirable for the court to grant any interim relief. At the hearing the applicants did not contend that in addition to the final relief the court should grant interim relief. This would have been nonsensical.

- [7] The applicants' notice of application for leave to cross-appeal states that the application is made in terms of section 20(4)(b) read with

section 20(1) of Act 59 of 1959 and Rule 49(1) read with Rule 49(4) of the Uniform Rules of Court. Section 20 clearly provides for an appeal against a judgment or order of the court (***Zweni v Minister of Law and Order 1993 (1) SA 523 (A)*** at 531B-C). It is well-settled that such a judgment or order generally is a decision which has three attributes: (i) the decision must be final in effect and not susceptible to alteration by the court of first instance; (ii) it must be definitive of the rights of the parties, i.e. it must grant definitive and distinctive relief; and (iii) it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings (***Zweni v Minister of Law and Order supra*** at 532J-533B; ***South African Chemical Workers Union v African Commerce Developing Co (Pty) Ltd t/a Buffalo Tapes 2000 (3) SA 732 (SCA)*** at 737I-J). SARB contends that no such order was made in respect of interim relief and accordingly there cannot be an appeal. The applicants contend that this court in effect refused to grant interim relief and that such refusal is appealable (***Van Niekerk v Van Niekerk 2008 (1) SA 76 (SCA)*** para 9). In my view the applicants' contention is ill-founded. As appears from the judgment appealed against this court did not refuse the application for interim relief. Once it held that Regulation 22C(1) was *ultra vires* it did not consider the interim relief let alone refuse it. I agree with SARB that if leave is granted and the appeal is upheld the Supreme Court of Appeal will in all likelihood refer the remaining issues back to this court for their determination (***Aktiebolaget Hässle and Another v Triomed (Pty) Ltd 2003 (1) SA 155 (SCA)***).

- [8] In terms of Rule 49(1) the party seeking leave is required to furnish the grounds for the application. The applicants' notice of intention to apply for leave to cross-appeal does not contain any grounds. It simply sets out the background and the interim relief which it is contended should have been granted. On the face of it the notice does not comply with the rule and the application is fatally defective (***Songono v Minister of Law and Order 1996 (4) SA 384 (E)*** at 385C-386B).
- [9] It also seems wrong in the circumstances of this case to grant leave to appeal which is conditional upon the first respondent obtaining leave to appeal and succeeding in that appeal. This court cannot predict the outcome of the first respondent's appeal and it will make no sense to grant leave on that basis.
- [10] In my view the applicants' application for leave to cross-appeal is bad in law and must be refused.
- [11] SARB's application in terms of Rule 30 to set aside the notice of application for leave to cross-appeal was *ex abundanti cautela*. All the points raised in that application could have been raised at the hearing of the application for leave to appeal and SARB was not prejudiced by the fact that the applicants delivered the notice. The application therefore cannot succeed and SARB is not entitled to the costs of the

application. In the circumstances it is not appropriate to make an order in the application.

Order

- [12] I Leave is granted to the first respondent to appeal to the Supreme Court of Appeal against the judgment and order of this court granted on 19 February 2009;
- II The costs of the application for leave to appeal are to be costs in the appeal and such costs will include the costs consequent upon the employment of two counsel;
- III The applicants' application for leave to cross-appeal is refused with costs, such costs to include the costs consequent upon the employment of two counsel.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

I agree

J.R. MURPHY
JUDGE OF THE HIGH COURT

I agree

T.J. RAULINGA
JUDGE OF THE HIGH COURT

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HEARD ON: 23 April 2009

FOR THE APPLICANTS: ADV. A.R. BHANA SC
A. COCKRELL

INSTRUCTED BY: Mr A.B. Smith of Maritz Smith Matshidiso Inc

FOR THE FIRST RESPONDENT: ADV. P.G. GINSBURG SC
K.W. LÜDERITZ

INSTRUCTED BY: Dr. D.H. Botha of Newtons Attorneys

DATE OF JUDGMENT: 24 April 2009