REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 2022/013502

(1) REPORTABLE: NO/~~YES~~

(2) OF INTEREST TO THE JUDGES: NO/~~YES~~

(3) REVISED

DATE: 20/11/24

SIGNATURE:

In the matter between :

CRRC SOUTH AFRICA YONGI ELECTRIC COMPANY LTD **APPLICANT**

and

DEPUTY GOVERNOR OF THE RESERVE BANK **RESPONDENT**

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by e mail. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge or his/her secretary. The date of the judgment is deemed to be the date it is typed and delivered.

JUDGMENT

L I VORSTER, AJ:

1. This is an application for a review and setting aside a decision the Respondent forfeiting to the State the sum of US$115 484,00 in capital standing to the credit of the applicant with interest thereon held in bank account number 6[…] at China Construction Bank Johannesburg branch, which forfeiture was published on the General Notice 1033 of 2022 dated 16th of May 2002. The Applicant also applies for an order granting the Applicant the right and authority to remit the sum of US$115 484,00 plus interest thereon to CRRC Yongji Electric Company LTD, a company incorporated according to the laws of the People of the Republic of China with unified social credit code 91140881166445487511. The Applicant also claims an order for costs.

2. The facts of this matter are not disputed and can conveniently and concisely been stated as follows:

2.1. The Applicant develops and produces specialised electric drive systems and micro computer control system products for railway locomotives for distribution in South Africa and CRRC Yonqji Electric Company Ltd (CRRC China) is a manufacturer of such systems.

2.2. African Rail & Traction Services (Pty) Ltd (African Rail) a subsidiary of the Surtees Group Holdings (Pty) Ltd, directed enquiries to CRRC China for the supply of certain locomotive components in or about May 2018.

2.3. Ultimately African Rail required the generators manufactured by CRRC China and couplings for such generators, manufactured by Suzhou Sujue (SUZHOU) with whom CRRC China has a business relationship.

2.4. The orders for the generators and couplings were placed though the Applicant and delivered to African Rail through their clearing agents Golden Star Enterprises (Pty) Ltd t/a Dynamic Freight (Dynamic Freight).

2.5. The contract for the supply of the generators and couplings was specifically on the basis of the quote which specified CIF Durban which required the Applicant to be responsible for and cover the costs of transport, insurance and freight to the port of Durban. Any further responsibility relating to the generators and couplings transferred to African Rail.

2.6. African Rail paid the purchase price of the couplings and generators to the Applicant and all that remained was for the applicant to pay CRRC China and Suzhou for the generators and couplings.

2.7. It was established that when Dynamic Freight cleared the goods, an incorrect SARS Movement Reference number(MRN with with an incorrect invoice value allegedly due to an unknown "*software malfunction*" was produced by Dynamic Freight and accepted at face value at the time. When the mistake was detected, Dynamic Freight subsequently rectified the documents and the entries in the SARS import verification system.

2.8. The rectification of the documents was accepted by SARS on the 10th of June 2019 and a Voucher of Correction issued as approved by SARS which should have paid the way for the approval of the foreign exchange application by the Applicant to effect payment of USO of the purchase price that it had received from African Rail to CRRC China.

2.9. In considering the application to pay CRRC China, Finsurv again rose issues which had previously formed the subject matter of the problem which was ultimately rectified by a correction voucher which had been approved by SARS as mentioned above. Finsurv is entity of Respondent dealing with authorisations to deal with foreign currency. No amount of correspondence by the applicant through further light on the problem and presumably acting on the advice of Finsurv, the respondent issued a Forfeiture Notice declaring the funds standing to the credit of the applicant with CCB of USD115 484,00 which comprised the purchase price paid by the African Rail to be forfeited to the State.

3. The relevant factual matrix which deals with the discrepancies in the application documents on one hand, and the concerns of FinSurv is dealt with in

paragraphs 32 - 51 of the answering affidavit. There is no real dispute of fact arising from allegations made in these paragraphs and they can be accepted. As will appear below, the applicant seeks to lay the discrepancies and problems of the documentation used to make application to the Respondent at the door of Dynamic Freight, the entity which the applicant used to handle the application to the Respondent for authority to transfer the payment in respect of the goods to the supplier which is an entity in China. That application contained several discrepancies which caused the suspicion of the Respondent. These are:

3.1. There was no record of the movement reference number (MRN) that had been used in the application.

3.2. The MRN is a document that is used as a tool to verify the transaction is what it purports to be.

3.3. Although there was a record of the relevant transport document number, that was linked to goods other than those referred to in the import application submitted.

3.4. The Cost Insurance Freight and Commission (CIFC) value furnished to the SARB was in an amount of R1 745 547,00. The CIFC value of the goods that actually corresponded to the Payment sought to be approved was, only R557 982,00.

3.5. The applicant's clearing agent, t/a Dynamic Freight thereafter requested FinSurv to disregard the initial MRN used in the import application and to replace it with the different number. Dynamic Freight also filed a voucher of correction increasing the initial CIFC value of R557 892,00 to an amount of R1 745 547,00.

3.6. SARS advised respondent that the MRN used by the applicant did not in fact exist, and the respondent issued a blocking order in terms of regulation 22A and/or 22C.

3.7. The SARBS Investigation that followed the blocking or the reviewed several more discrepancies:

3.7.1. The voucher of correction filed by Dynamic Freight, the content of the pro forma invoice contradicted the applicant's initial version of events in its import application:

3.7.1.1. One pro forma invoice reflected an amount of USD129 064,00;

3.7.1.2. Another pro forma invoice of the same date and with precisely the same invoice reference number (YJDLB-002) reflected a substantially lower value, namely USD115 484,00;

3.7.1.3. The difference between what the applicant had represented in its import application and the value represented to Customs was USD13 590,00.

3.7.1.4. The voucher of correction that Dynamic Freight submitted to Customs reflected the value of USD1250,00 in respect of freight and insurance. This value had, however, not been reflected on the invoice submitted by the applicant as part of the import application.

4. During the course of the investigation FinSurv received a second import application from the applicant, in terms of which the applicant sought to clear the goods transported by African Rail. Finsurv requested further information from the applicant in support of its claim that the goods referred to had indeed been cleared through Customs as alleged in the application. The Applicant did not respond to this request. Instead, it delivered a supplementary import application in which further documentation was submitted to Finsurv. Rather than clarifying the discrepancies and align their SARB's suspicions, the information finished confirmed the concerns of the SARB. The pro forma invoice submitted reflected the same date and reference number as the initial invoice submitted by the applicant and included an identical

description of the goods, namely for "*alternator YJ62A3 and necessary*". The two invoices, however reflected different prices. The invoice initially submitted with the import application was for an amount of USD115 484,00 whereas the one accompanying the supplementary application reflected the price of USD129 064,00. The price of USD129 064,00 is also different to the price reflected in the "*purchase contract of alternator YJ62A3*" which had been submitted as part of the initial export application.

5. Dynamic Freight, stated that the invoice issued to it for USD129 064,00 was furnished to it by the client and was used for the clearing of the relevant goods through Customs. The Customs worksheet furnished to Finsurv on 13th of May 2000 reflected the CIFC value of the goods cleared through Customs as an amount of R1 762 453,00. That is the same amount which was reflected in the initial MRN relied on by the applicant and later contradicted in its subsequent MRN.

6. The above discrepancies and defects in the applications submitted to obtain the authority to export currency to a foreign entity raised the suspicions on and in the mind of FINSURV that the respondent have contravened regulations 2(3), l0(l)(c) and 22 of the regulations. On the basis of that belief Finsurv recommended to the Deputy Governor that the requirements for decision for forfeiture under regulation 228 of the regulations were established in respect of USD115 484,00. The Deputy Governor can't agree and confirmed the forfeiture decision.

7. The aforesaid factual matrix is not disputed by the applicant. The defence of the Applicant is that those who were instructed and employed to handle the process of obtaining consent to pay the money owed in respect of the alternator and couplings to the supplier, were responsible for the discrepancies referred to above. Its defence is that it had no *mens rea* in respect of the offences and are therefore not liable to be impacted upon negatively by the Respondent. The answer of the Respondent to this contention is that *mens rea* is not a requirement for liability in respect of transgressions of the regulations referred to above. In my view theRrespondent is correct. As is clear from the facts of this case, the process of obtaining the various clearances and permissions to get to the point where the Respondent can and should decide on an application to pay or transfer valuta to an

entity in a foreign country, is a cumbersome process involving a number of persons or entities. If the intention of the legislature could have been that the *mens rae* of the person or company who is the applicant for the concerned or permission of the Respondent would be an element of liability for transgression of the regulations, the mischief which the regulations seek to avoid would easily be committed without any negative consequences as the transgressions of the regulations would be committed by those people rather than the applicant for permission to the Respondent. Consequently I am in agreement with the submission that *mens rae* is not an element for liability in terms of transgression of the regulations.

8. It follows that I am of the view that the application cannot succeed. The Respondent also raised certain points *in limine* which consist of technical arguments based on the lack of authority of the deponent to the founding affidavit and indeed the authority of the Applicant to bring this application. I do not find it necessary to make a decision on those issues as I have come to the conclusion that the application should be dismissed on the merits. Consequently I make an order as set out below.

ORDER

(a) The application is dismissed with costs;

(b) The Applicant is ordered to pay the costs of suit of the Respondent in accordance with scale B.

JUDGE

LI Vorster

Appearances:

Applicant : Attorney K J van Huyssteen

Respondent Adv **M D Stubbs : Sandton**

Attorneys : Applicant : Fluxmans Johannesburg

Respondent : Gildenhuys Malatji, Groenkloof Pretoria.

Date of hearing:7/11/24