

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE Number: 2022-014624

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

Date: 19 February 2025

In the matters between:-

DRAKENSBERG FARMS (PTY) LTD

FIRST APPLICANT

KHUMALO MZILIKAZI GODFREY

SECOND APPLICANT

and

THE SOUTH AFRICAN RESERVE BANK

FIRST REPENDENT

THE MINISTER OF FINANCE

SECOND RERSPONDENT

THE DEPUTY GOVERNOR OF

THE SOUTH AFRICAN RESERVE BANK

THIRD RESPONDENT

THE GOVERNOR OF THE SOUTH

AFRICAN RESERVE BANK

FOURTH RESPONDENT

THE PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA

FIFTH RESPONDENT

JUDGMENT

BOTHA, AJ

Introduction

1

This is an application in which the Applicants apply to the court to review and set aside a Notice of Forfeiture published in the Government Gazette No 45955 of 25 February 2022, wherein the amount of \$354 000 (R 5 029 632.00 at the time) was forfeited to the State. The said amount of money was deposited by the Second Applicant (Khumalo) into the ABSA bank account of the First Applicant (Drakensberg). The Applicants claim the following relief in the Notice of Motion:¹

1.1 Reviewing and setting aside the decision taken by the Third Respondent to forfeit to the State the money listed in the Notice of Forfeiture 855 of 2022, published in the Government Gazette No 45955 of 25 February 2022, signed

¹ CL 02-2

by the Third Respondent on 18 February 2022, a copy of which is attached to the Founding Affidavit marked “FA 21”.

1.2 Declaring the Notice and Order of Forfeiture 855 of 2022¹, published in the Government Gazette No 45955 of 25 February 2022 to be invalid.

1.3 Declaring Regulation 22D (b) of the Exchange Control Regulations 1961 (as promulgated by Government Notice R 1111) as amended, made in terms of Sec 9 of the Currency and Exchanges Act, 9 of 1933 (The Act and the Regulations) to be inconsistent with the Constitution and invalid.

1.4 Declaring section 9(2)(d)(iii) of the Act to be inconsistent with the Constitution and invalid.

1.5 Declaring Regulation 22C of the Regulations to be inconsistent with the Constitution and invalid.

1.6 Cost of the Application, including the cost of two counsel.

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All the Respondents except the Fifth Respondent opposed the application

Relevant background facts

3.1 Khumalo (Second Applicant) established a game farm/reserve in the province of KwaZulu Natal. The game reserve was owned by Mawela Properties (Pty) Ltd and the Mawela Trust (of which Khumalo was one of the two trustees, his wife being the other trustee), was the sole shareholder in Mawela Properties.²

3.2 As from 2008 up to 2011 the SARB (First Respondent) attached and forfeited assets to the State, by reason of contraventions of the Exchange Control Regulations by Khumalo and companies associated to him, inter alia the afore mentioned Mawela Properties. These attachments and forfeitures were judicially challenged by Khumalo but were unsuccessful.³

3.3 As a direct result of the actions of the SARB, Mawela Properties was liquidated. Khumalo then erected the First Applicant as a special purpose vehicle to purchase the Game Reserve out of liquidation. An agreement of sale was conducted with a purchase price of R 37 million.⁴

3.4 Initially, since inception in 2015, Khumalo was the only director of Drakensberg. Later in 2017, a Siyabonga Khumalo became the second director. Initially Khumalo stated under oath that he is the sole shareholder in

² FA- para40

³ SARB v Khumalo 2010 (5) SA 449 (SCA)

⁴ FA para 57

Drakensberg, as a matter of fact he testified that his wife (Dr Khumalo) was in no way connected to Drakensberg Farms, she was not a director, nor was she a shareholder of Drakensberg Farms.⁵ Much later, in the supplementary founding affidavit, Khumalo said that his wife is the sole shareholder.⁶

3.5 The Game Reserve was apparently not intended to generate its own income. It had to be funded and the costs of maintaining the farm whilst in liquidation were funded by Khumalo through other entities like the Mawela Trust and Mawenzi Management Services (Pty) Ltd. These costs are known as sec 89 costs in terms of the Insolvency Act 24 of 1936.⁷

3.6 Drakensberg Farms was placed on terms to produce the guarantee during January 2017 but granted an extension provided that Drakensberg continue to pay the sec 89 costs. The liquidator cancelled the agreement of sale on 6 February 2017, the reason being that Drakensberg defaulted on its payment obligations.

3.7 The liquidator proceeded to put the reserve on auction and obtained a bid that was much lower than the purchase offer made by Drakensberg. This offer to buy also did not materialised as there was non-compliance by the prospective buyer.

⁵ FA para 61

⁶ Supplementary founding affidavit paras 6 and seven

⁷ FA para 55

3.8 During August 2018, another offer was made to the liquidator to purchase the game reserve, but the liquidator rejected the offer. Meanwhile, over and above the sec 89 costs, the reserve incurred additional costs and expenses to the amount of approximately R 4.4 million by April 2019. These additional costs consisted mainly of employees' salaries and costs for security to safeguard the rhino population on the reserve.

3.9 At this point, just to take a step back, it is common cause that during the period January 2010 to July 2018, Khumalo (second applicant) exceeded his SDA (single discretionary allowance) to the tune of R 22 658 000.73, comprising of overseas spending on his credit card.

3.10 Khumalo was informed by FinSurv that there exist reasonable grounds that he contravened Regulations 3(1), 10(1)(c) and 19 read with Regulation 22 of the Exchange Control Regulations. He was invited to make written representations, inter alia as to why the amount of R 18 million should not be repatriated to the RSA and further administrative action should not be initiated⁸.

3.11 The deadline for these representations was 11 September 2018. He was also informed that if he was unable to meet the deadline or required assistance to do so, he should notify a designated employee of FinSurv.⁹

⁸ Record paras 4-4.3 of item 3; paras 6-6.1 of item 3.

⁹ Record para 8 of item 3

3.12 Khumalo ignored the invitation to make representations, nor did he request assistance or an extension of time.

3.13 Back to the sec 89 costs. On 2 April 2019, Khumalo transferred the amount of US \$354 000 from his offshore account in either the UK ¹⁰ or from a Swiss bank¹¹ into the ABSA account of Drakensberg Farms.

3.14 On 3 April 2019, the SARB issued a blocking order i.t.o. Reg 22A and/or Reg 22 C of the Exchange Control Regulations on the ABSA account by reason of Khumalo exceeded his SDA supra.¹²

3.15 On 2 December 2021, FinSurv addressed a letter to Khumalo and to the attorneys of Drakensberg informing them of the SARB's view that the US\$354 000 paid into Drakensberg's account is money that may be forfeited to the State i.t.o. sec 22B. There was again an invitation extended to make a representation as to why a forfeiture should not take place. A schedule of the exceeded SDA was also attached, showing the exceeded amount as R 22 658 173.74¹³

3.16 Again, Khumalo did not make use of the opportunity to make representations or to ask for assistance.

¹⁰ FA par 70

¹¹ Supplementary affidavit par 18

¹² FA annexure FA 18

¹³ FA annexure FA 19

3.17 As a result, on 18 February 2022, the amount of US \$354 000, standing to the credit of Drakensberg Farms in the ABSA account, was declared forfeited to the State by the Third Respondent. The official date of the forfeiture is 25 February 2022 being the date of the notice in the Government Gazette. Khumalo was informed on the same date.¹⁴

Issues to be determined

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In terms of paragraph 5 of the Joint Practise Note the court is required to determine whether:¹⁵

- 4.1 There is a basis to effect the Drakensberg Farms Forfeiture against Drakensberg Farms.
- 4.2 Drakensberg Farms was afforded administrative procedural fairness underpinning the administrative decision in accordance with the Regulations and the Promotion of Administrative Justice Act No 3 of 2000 (“PAJA”)
- 4.3 The application should have been made within 90 days as is provided for in Regulation 22D(b) of the Exchange Control Regulations, 1961 (as promulgated

¹⁴ FA annexures FA 20 and FA 21

¹⁵ CL 16-16

by Government Notice R1111), as amended, made in terms of Section 9 of the Currency and Exchanges Act 9 of 1933 (“the Act”)(“the Regulations”) or 180 days as is provided for in the letter addressed to the Second Applicant by the First, Third and Fourth Respondents on 25 February 2022, to which the Drakensberg Farms Forfeiture was attached and PAJA.

- 4.4 Section 9(2)(d)(iii) of the Act and Regulation 22C and Regulation 22D(b) of the Regulations are inconsistent with Section 22, Section 25, Section 33, Section 35 and Section 36 of the Constitution insofar as they permit the forfeiture of clean assets and then limit the review of such administrative action and justified under Section 36 of the Constitution or invalid.

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I regard it prudent to start with the issue formulated in 4.3 above as it might serve to curtail this judgment.

- 5.1 The Applicants argued that the Application is governed by PAJA
- 5.2 Section 7(1) of PAJA states that any proceedings for judicial review in terms of sec 6(1) must be instituted without unreasonable delay and not later than 180

days after the date on which proceedings with regard to internal remedies as contemplated in sub sec 2(a) have been concluded.

- 5.3 Sec 7(2)(a) of PAJA states that, subject to para (c), no court or tribunal shall review an administrative action in terms of the act unless any internal remedy provided for in any other law has been exhausted. Para (c) provides that in exceptional circumstances and on application by the person concerned, a court or tribunal may exempt such person from the obligation to exhaust any internal remedy.
- 5.4 The Notice or Order of Forfeiture was published on 25 February 2022 and the Applicants thus argue that they have 180 days to institute the review proceedings.
- 5.5 The First, Third and Fourth Respondents contend that PAJA is not applicable in this instance, but that the matter is governed by Regulation 22D(b) read with sec 9(2)(d)(iii) of the Currency and Exchanges Act.
- 5.6 Regulation 22D(b) stipulates that in the case of a decision to forfeit money or goods to the State under Regulation 22B (as in the instant case) a person who feels aggrieved by the said decision, may at any time but not later than 90 days after the date of publication of the said notice, (in this case the date is 25 February 2022) institute action in a competent court for setting aside of such decision.

- 5.7 The Applicants argue that the SARB had given them the option to utilise PAJA to review and set aside the forfeiture in the covering letter dated 25 February 2022.¹⁶
- 5.8 The Applicants used the term “legitimate expectation” during the hearing of this matter. This was the first time that that particular term was used. Nowhere in the Founding affidavit, the Replying affidavit or in the Heads of Argument was this argument raised. It appears to be an afterthought. In any event, it is trite that the law does not protect every expectation but only those which are legitimate. One of the requirements of an expectation to be legitimate is that the representation must have been a competent and lawful one to make by the decisionmaker, otherwise it may happen that a created expectation may give rise to an illegality.¹⁷
- 8.9 Mr Badenhorst, for the Applicants, argued that PAJA is the umbrella legislation, and that Regulation 22 is the foundation. The court asked the question if the SARB was competent to give the Applicants the option of the PAJA path. Mr Badenhorst argued that PAJA gave the SARB a choice to stick to the 90 days as in the regulations or to use PAJA and therefor, he argued, the application is proper before court.

¹⁶ FA annexure FA 21

¹⁷ Hauptfleisch v Caledon District Council 1963 (4) SA 53 (C)

5.10 Mr Luderitz, for the First, Third and Fourth Respondents, argued that in terms of the Statute (Currency and Exchanges Act) a review is time barred and there is no power conferred on a court to grant an extension of time and that means that the review should be governed by the Act and the Regulations and not PAJA.

Sec 9(2)(d)(iii) reads:” any person who feels aggrieved by any decision to forfeit and dispose of such money or goods may, within a period prescribed by the regulations, which shall not be less than 90 days after the date of the notice published in the Gazette and referred to in subparagraph (ii), institute legal proceedings in a competent court for the setting aside of such decision, and the court shall not set aside such decision unless it is satisfied-

(aa) that the person who made such decision did not act in accordance with the relevant provision of the regulation; or

(bb) that such person did not have grounds to make such decision; or

(cc) that the grounds for making of such decision no longer exist”

5.11 The relevant regulation is Reg 22D (b). It states that “**action**” may be instituted in a competent court.. The controlling section in the act is sec 9(2) and Regulation 22D (b) must be interpreted in the context of sec 9(2) which states “**legal proceedings**” to be instituted which can either be action or application. To drive the point home, review proceedings can be brought by way of action

also. In this regard see the Constitutional Court in **Mamadi and Another v Premier of Limpopo and Another**¹⁸

5.12 Mr Luderitz therefor argued that the specific timeperiod in the Regulations must prevail over the timeperiod provided for in PAJA.

In the case of **Rustenburg Platinum Mines v The CCMA**¹⁹ it was held that: “.... PAJA requires that proceedings for judicial review be instituted without unreasonable delay and, in any event, not later than 180 days after exhaustion of internal remedies or after the person became aware of the action challenged and the reasons for it(s 7(1)). That is a longer period than the six weeks sec 145(1) affords. However, as both the CC and this Court have emphasised, labour disputes require speedy resolution, and the Legislature gave clear effect to this special imperative in s 145(1) by requiring a labour disputant to act quickly. The Constitution does not require that the legislation enacted to give effect to the right to administrative justice must embody any particular time periods. This is therefore a question on which the Legislature may be expected to legislate differently in different fields, taking into account particular needs”

5.13 During the hearing I was referred by Mr Luderitz to two cases of this division which are exactly on point. They are Evergrand Trading (PTY) LTD v SARB

¹⁸ (CCT 176/21)[2022ZACC 26] (6 July 2022)

¹⁹ 2007 (1) SA 576 (SCA) at para [27]/588 D-E

and Another²⁰ and Yanling International Trade CC v SARB²¹. Both cases held that where forfeiture orders are involved, the matters are governed by the Act read with the Regulations to the exclusion of PAJA. Unless I can find that the two judgments are clearly wrong, I am bound to follow them and apply them.

5.14 The Notice and Order of Forfeiture was published in the Government Gazette on 25 February 2022. If this review is governed by the Act and the regulations, the 90 days expiry date would be more or less towards the end of May 2022 and therefore be out of time. If governed by PAJA, the 180 days would have expired near the end of August 2022. The Application was launched on 16 August 2022 and thus within the 180- day period.

5.15 Mr Dewrance, for the Second Respondent, indicated to the court during the hearing that the Second Respondent mainly challenge the constitutionality aspects that were attacked by the Applicants. He furthermore aligned him with the arguments of the other respondents.

Findings

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Considering the above I find as follows:

²⁰ 2022 JDR 2827 GP

²¹ 2023 JDR 0456 GP

- 6.1 The SARB was not competent to represent to the Applicants that PAJA was applicable.
- 6.2 I cannot find any basis to criticise the judgments in Evergrand Trading (PTY) Ltd and Yanling International Trade CC as wrong and therefore I am bound to follow.
- 6.3 In light of the finding in 6.2 above, the other issues for determination are moot and of academic interest only.

ORDER

The order of this court is as follows:

- 1) The application is dismissed.
- 2) The Applicants are ordered to pay the cost of the Respondents, jointly and severally which cost to include the cost of counsel on scale B

A black rectangular box redacting the signature of the Acting Judge. A horizontal line extends from the left side of the box, and a handwritten flourish is visible above the box.

Acting Judge of the High Court, Gauteng