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REPUBLIC OF SOUTH AFRICA



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

Case Number: 047643/2023

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

DATE

SIGNATURE

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA

Applicant

and

THE SOUTH AFRICAN RESERVE BANK

First Respondent

THE MINISTER OF FINANCE N.O

Second Respondent

NOMFUNDO TSHABIZANA N.O

Third Respondent

JACQUES ANDRE FISHER N.O

Fourth Respondent

(In his capacity as joint liquidator of
Lep Cash and Carry (Pty) Ltd

NEDBANK LIMITED

Sixth Respondent

JUDGMENT

Motha, J

Introduction

[1] The consequences of the massacre of Black people in Sharpeville reverberated inside the corridors of the Apartheid economy and shook the very foundations of the regime. To stem the tide of the resultant capital flight and a run on the rand, the apartheid regime passed the Exchange Control Regulations in 1961(Excon), which, save for a few changes, is still in place. Promulgated in terms of s 9 of the Currency and Exchange Act, Regulation 22D of Excon forms the subject matter of this review application before this court. The vexed question is whether these 60 plus old Excon Regulations are fit for purpose to deal with the machinations in the world of cryptocurrency.

[2] Having had the money in its Money Market Account and Nedbank Limited Account declared forfeited to the state in terms of Regs 22A and/or 22C of Excon, the Standard Bank Limited, the applicant, brought this review application to set aside the order of forfeiture, in terms of Reg 22B of the Excon.

The parties

[3] The applicant is The Standard Bank of South Africa Limited, a company with limited liability registered and incorporated in accordance with the company laws of the Republic of South Africa.

- [4] The first respondent is the South African Reserve Bank, a central bank that is governed by s 223 of the Constitution of the Republic of South Africa¹ and South African Reserve Bank Act². It is established in terms of section 9 of the Currency and Banking Act, and as an organ of state has as its primary object the protection of the value of the currency in the interest of balanced and sustainable economic growth in the Republic, in terms of s 224 of the Constitution of South Africa.
- [5] The second respondent is Enoch Godongwana, the Minister of Finance of the Republic of South Africa, who is cited in his official capacity.
- [6] The third respondent is Nomfundo Tshazibana N.O. an adult male person who is the Deputy Governor of the Prudential Cluster of SARB and is cited in his official capacity as an employee of the SARB.
- [7] The fourth respondent is Jacques Andre Fisher N.O. an adult male who is cited in his capacity as the joint liquidator of Leo Cash and Carry.
- [8] The fifth respondent is Luisa Zanele Macalagh N.O. an adult female who is cited in her capacity as the joint liquidator of Leo Cash and Carry.
- [9] The sixth respondent is Nedbank Limited, a company with limited liability registered and incorporated in accordance with the company laws of the Republic of South Africa.

Facts in brief

- [10] Prior to its liquidation, Leo Cash and Carry (Pty) Ltd (the LCC), established in 2018, was a wholesale trading business operating in Rustenburg, in the North West Province. In August 2019, it approached the applicant to open a business

¹ Act 108 of 1996.

² 89 of 1990.

current account, and an account under number 2[...] was opened. (Current Account).

- [11] In December 2019, the LCC applied to the applicant for an overdraft facility of R40 000 000.00 rand, which was approved on 10 January 2020. As collateral for the overdraft facility, the applicant required, amongst others, that the LCC provide an Unrestricted Pledge of Money Market Call Account number 0[...] with a balance of R15 000 000.00, in December 2019.
- [12] Furthermore, the applicant informed the LCC that it (LCC) would be granted the overdraft facility if it transferred its primary banking relationship to the applicant and closed its account held with Nedbank, which included its Nedbank overdraft facility totalling R10 000 000.00.
- [13] On 9 January 2020, the LCC and the applicant concluded an agreement of pledge and cession, as required in terms of the overdraft facility agreement and as security for the overdraft facility. In terms of this agreement the LCC, *inter alia*, surrendered and pledged to the applicant the movable property and/or securities listed in the schedule to the pledge and cession. This schedule referred to the Money Market Account.
- [14] In compliance with the overdraft agreement, on 24 February 2020, the aggregate amount of R15 000 000.00 was transferred in a series of transfers from the LCC's Current Account to the Money Market Account.
- [15] Since the LCC was able to access the overdraft facility, it immediately transferred the sum of R10 000 000.00 from the overdraft facility to Nedbank limited, the sixth respondent, to settle the overdraft facility which the LCC held with Nedbank under account number 1[...] (the Nedbank overdraft facility).
- [16] On 28 February 2020, the applicant received an e-mail from SARB's Financial Surveillance Department (FinSurv) informing it that a hold should be placed on both the current and money market LCC accounts held with the applicant, due

to suspected exchange control contraventions on the part of the LCC. The hold was issued in terms of Regulations 22A and/ or 22C.

- [17] Unbeknown to the applicant, FinSurv had commenced an investigation into cryptocurrency transactions by a range of entities including the LCC, during July 2019. Cryptocurrencies, and in particular Bitcoins, had been acquired by certain individuals and entities including the LCC on a cryptocurrency exchange which were transferred to foreign cryptocurrency exchanges.
- [18] In compliance with the instructions from FinSurv, the applicant placed a hold on both the current and money market accounts. When the block order was lifted on 18 March 2020, FinSurv instructed the applicant to keep surveillance on the accounts. Having learned of a fraud perpetrated against it by several of its clients related to LCC, the applicant instituted a liquidation application against the LCC, in September 2021; and it was granted on 13 December 2021.
- [19] On 15 December 2022, the applicant and the LCC's liquidators were invited by FinSurv to make written representation as to why both the money market funds and the Nedbank funds should not be forfeited to the state in the manner provided for in Regulation 22B.
- [20] Acting in terms of Reg 22B of the Regulations and despite the applicant's representations, on 22 February 2023, the third respondent took the decision to declare forfeited to the state the following amounts:

“...the following money, namely: the amount of R16 404 700. 27 standing to the credit of the Respondent in account number 4[...] held with The Standard Bank of South Africa Limited, together with any interest thereon or any other accrual thereto; and the amount of R10 000 000 standing to the credit of the Respondent in account number 1[...] held with Nedbank Limited, together with any interest thereon or any other accrual thereto.”

[21] On 24 February 2023, the forfeiture order was published in the Government Gazette.

Issues

[22] The bone of contention is whether the applicant is entitled to an order setting aside the forfeiture of the amount of R16 404,700. 27 and R10 000 000.00 together with interest thereon. The applicant submitted that it had acquired the right to the funds in the Money Market Call Account because of the pledge and cession, following an overdraft agreement that was granted in the ordinary course of business, and without knowledge of any Exchange Control contraventions. Therefore, s 9(2)(b)(i) of the Act rendered the forfeiture of R15 000 000.00, held in the Money Market Call Account, incompetent. Additionally, the LCC owed the applicant R 41 443 642. 97, and as its secured creditor, it would recover a significant portion of its exposure from the insolvent estate.³

[23] At this juncture, it is prudent to pause and mention s 9(2)(b)(i) of the Act, which provides:

“In the case of any person other than the offender or suspected offender, no such money or goods shall be blocked, attached, interdicted, forfeited and disposed of if such money or goods were acquired by such person bona fide for reasonable consideration as a result of a transaction in the ordinary course of business and not in contravention of the regulations.”

[24] The applicant maintained that on FinSurv’s version, there was no factual basis to conclude that the Money Market Funds or the Nedbank funds were involved in an Exchange Control contravention. Consequently, these amounts could not be forfeited to the state under Regulation 22B.

³ Heads of argument of the applicant para 24.6 and 24.7.

[25] On the contrary, the first and second respondents argued that the mere fact that the applicant may be regarded as being in possession or quasi-possession of the rights to the Standard Bank funds, in terms of the pledge and cession or for another reason, did not per se constitute a defence to the blocking order or to a potential forfeiture. As a result, the incorporeal rights to the money in the Standard Bank account remained vested in the LCC, subject to the limited conditional rights afforded by the cession.⁴

[26] The respondents contended that the applicant did not have the *locus standi in judicio* to set aside the decision relating to the Nedbank account. They submitted that, first, the R10 million belonged to the LCC. Second, they argued that its *locus standi* was a mere *spes*. The hope that more funds would be recovered by the liquidators of the insolvent company did not vest the creditors with *locus standi* to institute proceedings for the recovery of such funds.⁵ Finally, the payment was made by the LCC from the Standard Bank account which was in credit at the time of the transfer of R10 million, and the said money stood to the credit of the LCC when it was blocked.

The law

[27] To avoid prolixity, I am not going to quote Regulations 22A, B and C. Regulation 22B of Exchange Control Regulations deals with the procedures necessary to obtain forfeiture of both tainted and untainted money and goods. Dealing with both tainted and untainted money and goods, the court in *South African Reserve Bank v Khumalo*⁶ and Another held:

“For present purposes it suffices to record the following in regard to the regulations:

- Regulation r 22A deals with the tainted goods and money, with r 22A(1)(a) providing for the attachment of tainted money and goods and r 22A(1)(b) and (c) providing for the prohibition of

⁴ Heads of argument of the respondents para 75 and 81.

⁵ *Supra* para 30.2.

⁶ (235/09) [2010] ZASCA 53; 2010 (5) SA 449 (SCA) ; [2011] 1 All SA 26 (SCA) (31 March 2010).

withdrawals out of accounts into which tainted money is reasonably suspected of having been deposited and the prohibition of the use of tainted goods (this may loosely be described as the ‘freezing’ of such money and goods). Regulation 22A(3) provides that if attached tainted money and goods are not forfeited under r 22B within ‘the period referred to in paragraph (g) of section 9(2) of the Act’, they are to be returned.

- Regulation 22C, on the other hand, deals with untainted money and goods, with r 22C(1) providing for the attachment of untainted money and goods and r 22C(2) providing for the issue of an order freezing untainted money and goods. Importantly, while r 22C(3)(b) provides for the provisions of 22A(3) to apply *mutatis mutandis* to a freezing order under r 22C(2), no specific provision is made for a similar time period to apply to attachments under r 22C(1).⁷

[28] The constitutional court in *SA Reserve Bank v Shuttleworth*⁸ held:

“Here we are dealing with exchange control legislation. Its avowed purpose was to curb or regulate the export of capital from the country... The measures were introduced and kept to shore up the country’s balance of payments position. The plain dominant purpose of the measure was to regulate and discourage the export of capital and to protect the domestic economy.

This dominant purpose may also be gleaned from the uncontested evidence of the then Director-General of Treasury, Mr Kganyago. He explained that the exchange control system is designed to regulate capital outflows from the country. The fickle nature of the international financial environment required the exchange control system to allow for swift responses to economic changes. Exchange control provided a framework for the repatriation of foreign currency acquired by South

⁷ Supra para 8.

⁸ 2015 (5) SA 146 (CC).

African residents into the South African banking system. The controls protected the South African economy against the ebb and flow of capital. One of these controls, which we are here dealing with specifically, served to prohibit the export of capital from the Republic (unless certain conditions were complied with).”⁹

[29] Still examining the regulations, the court in *South African Reserve Bank v Leathern N.O and Others*¹⁰ held:

“Applying the injunction in *Cool Ideas* to interpret statutory provisions purposively, I read the purpose of the regulations, among other things, to be three-fold: (a) to prevent loss of foreign currency resources through the transfer abroad of financial capital assets held in South Africa; (b) to ensure effective control of the movement of financial and real assets into and out of South Africa; and (c) to avoid interference with the efficient operation of the commercial, industrial and financial system of the country. In sum, the purpose of a blocking or attachment order in terms of the regulations is to secure assets which may be liable to forfeiture in terms of the regulations. This adds to the general context of the regulations in that a blocking order is provisional only and the final position can only be determined if the Reserve Bank seeks a forfeiture order. Context includes, amongst others, the mischief which the regulations are aimed at, that is, the prevention of illicit flow and influx of foreign capital from the country risk of damage to the economy of the country as a result.”¹¹

Discussion

The money in the Nedbank Limited Account

⁹ Sura para 5 and 54.

¹⁰ (854/2020) [2021] ZASCA 102; 2021 (5) SA 543 (SCA); [2021] 4 All SA 368 (SCA).

¹¹ Supra para 36.

[30] The court deemed it prudent to consider the issue of *locus standi* as its first port of call. Counsel was coy in her engagement on the court's queries of Standard Bank's *locus standi* to challenge the forfeiture of the R10 million in Nedbank Limited account. She argued that her heads of argument were exhaustive of the issue. Following a brief interaction with the court, counsel for the applicant submitted that, if the court was not with her on the standing, it could distinguish between the two amounts, namely: R10 000 000.00 in the Nedbank Account and R16 000 000.00 in the Money Market Account. Her submission was that the applicant sought the forfeiture notice to be set aside. Using the court's parlance, she conceded that Standard Bank was limping on the Nedbank Money, only if the court found that there were, indeed, Exchange Control Regulations contraventions. However, if the court found that there were no violations of the Exchange Control Regulations, she submitted that the court could not give an imprimatur to unlawfulness in the form of forfeiture of the R10 000 000.00.

[31] Counsel for the respondent submitted that Standard Bank contended that, as a secured creditor in the insolvent estate of the LCC, the funds in the Nedbank would constitute a source of money to which it had an entitlement. Referring the court to *Francis George Hill Family Trust v South African Reserve Bank and Others*¹², he submitted that Standard Bank had no *locus standi*. In *Francis'* case, the Reserve Bank attached assets of a company in which Francis George family trust was a shareholder and contended that it was an aggrieved person within the meaning of Regulation 22D. The court held that the appellant was not an aggrieved person and as such had no *locus standi*. He also relied on *Sutherland v Master of the High Court (KwaZulu-Natal, Pietermaritzburg)*¹³, which endorsed *Francis'* decision.

[32] To me, it seems that the applicant cannot gainsay the compelling submission that the money was deposited by the LCC into its Nedbank Limited Account to pay off its R10 million overdraft with Nedbank Limited. It stands to reason that Standard Bank was not a party to that arrangement. Nedbank Limited did not

¹² 1992(3)SA 91(A).

¹³ 2015 JDR 0970(KZD).

institute legal proceedings to challenge the forfeiture of the R10 million. What is more, the LCC had R15 000 000.00 of its own in the Current Account which it transferred to the Money Market Account, after the conclusion of the overdraft agreement with Standard Bank.

- [33] Since the LCC's Account was in credit, it is logical that the LCC transferred its own money to Nedbank Limited. There is certainly no *lis* between Nedbank and SARB. When tackling Reg 22A, the applicant cited *South African Reserve Bank v Leathern NO and Others* and stated: "When money is deposited into a bank account it mixes with other money and, by virtue of *commixtio* becomes the property of the bank." The applicant is hoisted by its own petard, if by virtue of *commixtio* the money deposited into the Money Market Account became the property of Standard Bank, surely by virtue of *commixtio* the R10 million deposited into Nedbank Limited became its property. I am persuaded that Standard Bank does not have *locus standi* to challenge the R10 million in Nedbank Limited. Accordingly, the applicant's review stands to be dismissed, as far as it relates to the R10 million deposited into Nedbank Limited.

Applicant's submissions on the money in the Money Market Account.

- [34] Counsel for the applicant submitted that the respondents' case pivoted around the contraventions of Regulations 3(1)(c) and 10(1)(c) of Excon. Firing her opening salvo, she referred to the matter of *Oilwell (Pty)Ltd v Protect International Ltd and Others*¹⁴, which dealt with Reg 10(1)(c) of Excon. Furthermore, she cited the matter of *Democratic Alliance v African National Congress and Another*¹⁵, where the court said:

"The restrictive interpretation of penal provisions is a long-standing principle of our common law. Beneath it lies considerations springing from the rule of law. The subject must know clearly and certainly when he or she is subject to penalty by the state. If there is any uncertainty

¹⁴ [2021] ZASCA 102.

¹⁵ Applicant's heads of argument subparagraph 59.7.

about the ambit of a penalty provision, it must be resolved in favour of liberty.”

[35] Pointing out that cryptocurrency is neither currency nor a legal tender in South Africa, she submitted that the Exchange Control Regulations regime did not apply to cryptocurrency as a novel asset class. In essence, her submission was that there is a regulatory *lacuna*. In developing her argument, she quoted with approval the academic paper on cryptocurrency, which paper was uploaded and relied upon by the respondents. In its conclusion, the author, of the said paper, wrote: “...the full legal ramification for a lack of regulation still remain unknown, and the cryptocurrencies are operating in a legal vacuum,”¹⁶ and this met with her approval.

[36] Having made those submissions, she scrutinized the regulations relied upon by the respondents, to repeat, viz: Regs 3(1)(c) and 10(1)(c) of Excon, which in that sequence read:

“3. Restriction on the export of currency, gold, securities, etc., and the import of South African banknotes.- (1) Subject to any exemption which may be granted by the Treasury or a person authorized by the Treasury, no person shall, without permission granted by the Treasury or a person authorized by the Treasury and in accordance with such conditions as the Treasury or such authorized person may impose:

(a)...

(b)...

(c) make any payment to, or in favor, or on behalf of a person resident outside the Republic, or place any sum to the credit of such person; or...”

AND

“10. Restriction on export of capital.-(1) No person shall, except with permission granted by the Treasury and in accordance with such conditions as the Treasury may impose:

¹⁶ Page 17 of the paper.

(a)...

(b)...

(c) enter into any transaction whereby capital or any right to capital is directly or indirectly exported from the Republic.”

[37] Dissecting Reg 10(1)(c), she zeroed in on the meaning of capital as contained in the Regulation. She reminded the court of the matter of *Oilwell*, which held that intellectual property rights did not fall within the meaning of capital in Regulation 10(1)(c). In response to that judgment, Treasury introduced Excon Regulation 10(4), which defines the word capital to include Intellectual Property rights. The takeaway from *Oilwell* is that the regulations must be given a restrictive interpretation, she argued. Therefore, if the scope of capital was to be extended it had to be done by way of legislative amendment, as was the case with Intellectual Property Rights, she argued. This, she continued, would be in keeping with the rule of law requirement of certainty. To further advance her point, she referred to the case of *Abahlali Basemjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others*¹⁷:

“There can be no doubt that the over-expansive interpretation of section 16 is not only strained but also offends the rule of law requirement that the law must be clear and ascertainable. In any event, separation of power considerations requires that courts should not embark on an interpretative exercise which would in effect re-write the text under consideration. Such an exercise amounts to usurping the legislative function through interpretation.”¹⁸

[38] When the court enquired whether the ordinary and dictionary meaning of capital fits within the restrictive approach of *Oilwell*, she submitted that cryptocurrency was not capital. She argued that a cogent framework was warranted in order to apply the Regulations of Excon to cryptocurrency as an assets class and to determine when such assets were said to exist within the Republic of South Africa. Furthermore, she asserted that the fundamental difference between

¹⁷ (CCT12/09) [2009] ZACC 31; 2010 (2) BCLR 99 (CC) (14 October 2009)2011 (4) SA 394 (SCA).

¹⁸ Supra para 87

cryptocurrency with money was that when one purchased cryptocurrency, a Blockchain recorded one's purchase, and would be stored on thousands of computers throughout the world. Moreover, one would have a bitcoin wallet which could be hot or cold, hot if the software was linked to the internet, and cold if not linked to the internet, for example: USB sticks. These scenarios illustrated the desperate need for a new regime, she maintained.

[39] Turning her attention to Regulation 3(1)(c), she argued that since cryptocurrency was not a sum of money that caused a problem for the respondents because Regulation 3(1)(c) dealt with the restrictions of currency, gold, security and the like, including the import of South African banknotes. She also questioned whether there was any evidence for a cause for the transactions and argued that the transfer of cryptocurrency from one to another was not a payment, as cryptocurrency was not recognized as a legal tender in South Africa. A restrictive approach had to be followed when examining Reg 3(1)(c) and cryptocurrency was not a sum of money, she reiterated.

[40] Following the energetic endeavor to impress on the court that the Exchange Control Regulations do not find application in cryptocurrency due to a regulatory *lacuna*, she submitted that the forfeiture notice, dated 23 February 2023, does not apply whether in the class under monies forfeited in terms of Reg 22A(1)(a), (b) or (c) or 22C. Since Reg 22A (1) (c) deals with goods, it certainly does not find application in this case.

[41] Following a belts and braces approach, she submitted that SARB relied on 22C, the untainted money. As proof for that conclusion, she referred to paragraph 79 of the answering affidavit, where the SARB wrote:

“With regard to the contention that the funds blocked were, *inter alia*, not involved in contravention of the regulations... It was indicated that the origin of the funds is not relevant for purposes of a decision to block and /or forfeit under the regulations and that even money which is not involved or suspected of having been involved in the contravention of the relevant regulations may be ‘blocked’, if it is required to enable the

Treasury to recoup the differences between an amount attached or 'blocked' under regulation 22A (if any) and the amount actually involved or suspected to have been involved in the contravention or suspected contravention of the latter regulations."

[42] To be sequential, she began to unpack Regulation 22A and submitted that the highwater mark of the respondents' case is found in subparagraph 123.1 of the answering affidavit, which reads:

"I reiterate that the scheme and the pattern of Leo Cash and Carry's conduct is borne out by the evidence and is clearly described in the PWC report. There is no gainsaying that the funds in Leo Cash and Carry's current account (which ended up in the Standard Bank Account and the Nedbank Account) in all probability emanated from cash and other deposits received from third parties who participated in the scheme and would not have been paid into the said accounts, but for the contraventions."

[43] She argued that Reg 22A does not find application because we simply did not have evidence or know where funds came from or their involvement in the contraventions. As mentioned *supra*, she submitted that the money transferred from the Current Account to the Money Market Account became, by virtue of *commixtion*, the property of Standard Bank. It was not enough to say that the numerous large cash deposits, at regular intervals and in various locations were unusual, suspicious, and an indication of probably irregular activities, which did not accord with the expected activity of wholesale business based in Rustenburg, the argument went.¹⁹

[44] Even if that were true, she maintained that not all suspicious activities amounted to proof of the Exchange Control Regulations violation. She reminded the court of the differences in blocking and forfeiture. To this end, she mentioned *Leathern* where the court said:

¹⁹ Respondents' heads of argument para 51

“The reasonable suspicion of the Reserve Bank may never amount to anything more and the blocking order may lapse...

On the other hand, if the Reserve Bank’s investigation leads to a conclusion that indeed the accounts were used in contravention of the regulations, a forfeiture order could ensue, in which case, Mr Borat or the depositors would have no claim to the funds, subject to a right to challenge the forfeiture order.”

[45] Therefore, Reg 22A was not applicable, she argued and continued to tackle Reg 22C, which, as already hinted, deals with untainted money. She cited *South Africa Reserve Bank v Torwood Properties (Pty)Ltd*,²⁰ which said the following:

“This sub regulation presupposes that the shortfall is actual and not merely suspected. If a shortfall is suspected, albeit on reasonable grounds, the remedy is to be found in subreg (2). It permits of a type of interim interdict.”²¹

[46] Having suggested that the shortfall was not actual, she argued that SARB decided to rely on the Reg 22C attack based on the legal opinion of Adv Kromhout. In brief, Adv Kromhout concluded that:

“21.1 the incorporeal rights to Standard Bank funds in the money market account (and the interest accruing thereon) remained vested in Leo Cash and Carry, subject to the limited conditional rights afforded by the cession;

this cession per se did not result in Standard Bank acquiring Leo Cash and Carry’s rights to the Standard Bank funds- at best for Standard Bank, it had in terms of the cession acquired a conditional right to, in the future, take over the Standard Bank funds upon the happening of an event in the form of a breach or default which had not been

²⁰1997 (2) 169(SCA).

²¹ Para 3.

remedied by Leo Cash and Carry - but this appears not to have happened prior to the date of the blocking order;
consequently, Leo Cash and Carry's rights to the Standard Bank funds remained vested in Leo Cash and Carry at the time of the blocking order, and still are so vested;
not having acquired Leo Cash and Carry's rights to the Standard Bank funds reliance by Standard Bank on the proviso section 9 (2) (b) of the Act does not assist Standard Bank."

[47] On the strength of this legal opinion, SARB accepted that the money in the Standard Bank Account was standing to the credit of the LCC, she argued and said this was an incorrect legal exposition.

The respondents' counsel submissions

[48] Frontally confronting the submissions that there were no Excon contraventions, he submitted that the facts of the matter are uncontested as set out in the forfeiture notice. First, he argued that the uncontroverted statements were that the LCC was advised that it committed and/or was party to and/or involved and/or acted in concert with others with a common purpose to commit acts, which on reasonable grounds, constituted contraventions of the Exchange Control Regulations; and the LCC did not challenge all that.

[49] Second, the investigation conducted by SARB was on the strength of the PWC report, which was not contested, he continued. He stated that the focus of this matter is on the violations of Regs 3(1)(c) and 10(1)(c), even though the forfeiture notice mentioned Regs 19 and 22. Addressing the issues of interpretation and reasonable suspicion, he too relied on the matter of *South African Reserve Bank v Leathern N.O and Others*.²² First, he dealt with the question of interpretation and referred to paragraphs 34 and 35 of the said judgment, in which the court said:

²² (854/2020) [2021] ZASCA 102; 2021 (5) SA 543 (SCA); [2021] 4 All SA 368 (SCA) (20 July 2021).

“Other than considering the absence of an express exclusionary provision, the high court did not engage in any interpretive exercise of the regulations. Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous. The high court erred in its approach and reasoning.

A general principle of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. In *Cool Ideas 1186 CC v Hubbard and Another*²³ para 28 the Constitutional Court put three interrelated riders to this general principle, namely that: (a) statutory provisions should always be interpreted purposively; (b) the relevant statutory provision must be properly contextualised; and (c) all statutes must be construed consistently with the Constitution.”

[50] Turning to what constituted a reasonable suspicion, he cited paragraphs 15 and 16 of the very same judgment, which read:

“The high court applied the wrong test by requiring the Reserve Bank to provide some ‘proof’ that the regulations had, in fact, been contravened. The high court also failed properly to assess the explanation and evidence provided by the Reserve Bank. This Court has endorsed Lord Devlin’s formulation of the meaning of ‘suspicion’:

‘Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; “I suspect but I cannot prove”. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end.’

Thus, all that was required of the Reserve Bank was a suspicion based on reasonable grounds, which had to be objectively assessed. When one considers the Reserve Bank’s detailed explanation, supported by an excerpt from Mr Bhorat’s bank statement, the suspicion is

²³ [2014] ZACC 16; 2014 (4) SA 474 (CC).

overwhelming. For example, in just one day, 14 June 2017, there were alarming movements of large sums of money in and out of the first account: a total amount of R7 525 442 was debited in payment of foreign entities. In all the circumstances, the Reserve Bank's suspicion was well-founded and reasonable. The high court was thus not entitled to set aside the blocking order, as the provisions of regulation 22D, read with those of s 9(2)(d)(i)(bb) of the Act, discussed earlier, were not satisfied."

[51] As was the case in *Leathern*, in which the court placed reliance on the expert evidence, before this court there was the PWC report which stood uncontested. Therefore, he drew parallels and argued that there was a reasonable suspicion.

[52] With that done, he shifted his focus to Regulation 3(1)(c). He pointed out that the contravention is not informed by the causa of the payment nor by the identity of the recipient. Essentially, the heart of his debate was that cryptocurrency was covered by this regulation. He directed the court's attention to the definitions in Excon and read that money was defined as including "foreign currency or any bill of exchange or other negotiable instrument." The rhetorical question would be what was meant by foreign currency. It is defined as: "foreign currency means any currency which is not legal tender in the Republic and includes any bill of exchange letter of credit money order postal order this other note traveller's cheque or any other instrument for the payment of currency payable in current unit which is not legal tender in the Republic"

[53] Notwithstanding that all the parties agree that cryptocurrency is not a legal tender in the Republic, he submitted that cryptocurrency was an instrument that permitted payment in currency which is not legal tender in the Republic. As elucidated in the forfeiture notice, the common cause fact was that cryptocurrency was exported from South Africa to a cryptocurrency-operating foreign jurisdiction. He narrated that the moment the rands were paid into a South African cryptocurrency wallet, the rands lost their character and became cryptocurrencies, and the rand value was forever lost from the South African balance sheet. Whilst in the foreign jurisdiction that cryptocurrency enabled the

holder of that cryptocurrency to withdraw in a foreign currency a sum equivalent in value to that cryptocurrency, he continued. Cryptocurrency was, therefore, a form of payment, he concluded.

[54] Referring to the academic paper, which he had uploaded and relied upon by the applicant, he dismissed the submission of a regulatory *lacuna* and argued that the vacuum was concerned with the South African Reserve Bank Act's failure to recognize cryptocurrency as a form of tender, as recorded in s17(1). Consequently, cryptocurrency is within the remit of currency in Reg 3(1)(c), he argued.

[55] When dealing with Reg 10(1)(c), he too placed reliance on *Oilwell's* elucidation of the word capital. He cited paragraph 12 of *Oilwell*, in which the court held:

“It is also useful to refer to the Afrikaans text. Since the Regulations were promulgated in English and Afrikaans at a time when these languages were on a par, the two texts have equal authority.⁸ Regulation 10(1)(c) uses the term ‘kapitaal’ and ‘uitvoer’ for ‘capital’ and ‘export’. According to the authoritative Afrikaans dictionary, *Woordeboek van die Afrikaanse Taal*, the term ‘kapitaaluitvoer’ means ‘verplasing van geldkapitaal na die buiteland’ and ‘beskikbaarstelling op die lang termyn van geldmiddele aan die buiteland’ which accords with the financial meaning of ‘capital’ referred to above.”

[56] He submitted that capital is the making of monetary resources in a foreign jurisdiction and Reg 10(1)(c) of the Exchange Control Regulations had been contravened. Rhetorically, he asked: Does the pledge and cession permit the Standard Bank to claim, as it were, ownership of the money in the Money Market Account? He not only disagreed with that proposition but also challenged the applicant's understanding of the matter of *Development Bank Southern Africa Ltd v Van Rensburg N.O. and Others*.²⁴ He argued that the

²⁴ [2002] (5) SA 425 (SCA).

last word on this topic was found in the matter of *Grobler v Oosthuizen*²⁵, which summed up the law as it stands, in paragraph 20, as follows:

“The accessory nature of pledge has the effect that on the discharge of the principal debt the right of pledgee is automatically extinguished... In the case of a pledge of incorporeals where only the power to realise the right is transferred, this power reverts to the pledgor automatically rendering it unnecessary for the pledgee to re-cede it to him.”

[57] In terms of cession and pledge what is transferred to Standard Bank is the power to realise the right, but this right is not unbridled, he argued. This right is informed by the expressed agreement of the parties. Scrutinizing the terms and conditions of the loan agreement between the LCC and Standard Bank, he cited clause 8.4. which reads:

“8.4 The Collateral may be realized in part or in full:

8.4.1 If you give written notice to us to terminate the Agreement and request that we sell (realize) any Collateral held by us for your obligations in terms of this Agreement. We may realise the Collateral and credit your loan Account and/or Current Account with the proceeds from the realization of the Collateral and/or

8.4.2 If you are in default in terms of this Agreement and we withdraw your rights in terms of this Agreement in accordance with the Default clause of this Part B and/or

8.4.3 where a court has issued an attachment order in our favour.”

[58] From the above, the argument went, it was clear that Stand Bank did not have the entitlement to the money in the Money Market Account.

Analysis

²⁵ 2009(5) SA 500 (SCA).

[59] Following the conclusion that Standard Bank does not have *locus standi* to challenge the forfeiture of the R10 million in the Nedbank Limited Account, the only live issue confronting this court is the money in the Money Market Account. Indeed, it is undeniable that the LCC was involved in a scheme, and/or used as a conduit to directly or indirectly export funds, foreign currency, and capital from the Republic. The PWC Report, which remains uncontested, indicated, as captured in the forfeiture notice, that the LCC opened and activated a business account with VALR (Pty) Limited (VALR). The terms of service of VALR stated that clients are only allowed to make payments from their fiat account to their cryptocurrency account.

[60] From September 2019 until March 2020, there were frequent transactions involving inflows and outflows in the Rand wallet and the bitcoins wallet of the VAR account of the LLC. Without tabulating chapter and verse of the PwC report, it is enough to state that the LLC sent 4,405.9783 BTC with the equivalent ZAR value of R 556 020, 325,68 to Huobi Global during the 2019 calendar year, which represented approximately 75.72% of the total quantity of BTC sent by the LCC to Huobi Global.²⁶

[61] Thus, it is incontrovertible and uncontroverted that the LCC dabbled in cryptocurrency. The vexed question confronting this court is whether all the LCC's machinations amounted to the contraventions of Regs 3(1)(c) and 10(1)(c) of the Exchange Control Regulations. For a better understanding, a brief outline of cryptocurrency is, perhaps, called for.

[62] The PWC report records that Cryptocurrency is a digital currency that was introduced into the global market in 2009. There are various types of cryptocurrencies, inter alia, BTC, ETH, and USDT. The first and most famous of these is the BTC (Bitcoin). Bitcoins are not backed by any government or other legal tender entity and are not redeemable for gold or other commodities. The bitcoins are regulated by rules contained "in the bitcoin Protocol. The Protocol provides for the total number of bitcoins that can ever exist. Users may acquire

²⁶ Notice dated 2022-12-15.

a bitcoin wallet. A bitcoin wallet is a software programme that includes private keys for each bitcoin address saved in the wallet of the user who owns the balance... There is no master server responsible for all operations. There is no central control authority in the network and every bitcoin transaction is recorded on the public blockchain ledger, which increases transparency.”²⁷

[63] A Blockchain is a decentralised ledger of all transactions across a peer-to-peer network and using this technology participants can confirm transactions without a need for a central clearing authority. In short, a Blockchain is the technology that enables the existence of cryptocurrency and due to its inherent nature (the algorithm, cryptography, and distributed nature), it is regarded as not being open to manipulation.

[64] Cryptocurrency is not considered legal tender in many countries including South Africa. However, in South Africa, there are various registered operating cryptocurrency exchanges such as VALR, Luno and AltCoin Trader. Did the LCC contravene Reg 3(1)(c)? The answer lies in one’s interpretation of the word currency. Certainly, gold, securities, etc. and the import of South African banknotes do not include cryptocurrency. Cryptocurrency is not money. The construction that cryptocurrency is money, by looking at the definition of money which includes foreign currency, is strained and impractical. If cryptocurrency were money, then the crypto wallets would be attached in terms of Reg 22B.

[65] Cryptocurrency is an asset that is bought and sold. There are practical challenges and implications if cryptocurrency is viewed as money. These are, *inter alia*: can one deposit cryptocurrency? Does one have to declare cryptocurrency when entering or leaving the Republic? As pointed out in the article uploaded by the respondents, cryptocurrencies “are nothing more than codes on a digital ledger. Thus, they exist anywhere and everywhere and have a global nature.”²⁸ Given the punitive nature of the Excon Reg, there is no

²⁷ The Development of Cryptocurrencies as a payment Method in South Africa by NH Hamukuaya page 13.

²⁸ Supra para 15.

room for an unnatural and fictitious reading into the Regulations to cover cryptocurrency.

[66] Did the LCC contravene Reg 10(1)(c)? When dealing with Reg10(1)(c), the court must be mindful of the dicta in *Oiwell*. The court categorically stated that

“These examples show that a restrictive interpretation is called for, particularly in view of the fact that any legislation that creates criminal and administrative penalties, as the Regulations do, requires restrictive interpretation.”²⁹

[67] To me, on any construction, much less on a restrictive interpretation, cryptocurrency falls outside the ambit of capital under Reg 10(1)(c). I agree with the counsel for the applicant that a regulatory framework addressing cryptocurrency is long overdue. In the same way, intellectual property rights had a niche carved for them in Excon, cryptocurrencies need some legislative attention. Top of mind for this court is the fact that South Africa is a constitutional democracy, a country governed by the rule of law. Courts must not pay lip service to separation of powers, see *Abahlali basemjondolo*.

[68] Finally, Cryptocurrency has been in existence for over 15 years, one cannot say SARB has been caught napping, because the point is abundantly made in the academic paper:

“SARB published a position paper in 2020 that highlighted the risks associated with cryptocurrencies such as Bitcoin, which are, *inter alia*: There is a lack of proper regulatory legal framework, which substantially increases the risk associated with the enforcement of the principle of finality and irrevocability in the payment system; There is no regulatory protection that would compensate the owner or user of cryptocurrency for any loss that may be suffered

²⁹ Oiwell at para 11.

Cryptocurrencies such as bitcoins are less susceptible to freezing or seizure actions by law enforcement agencies. The identification of relevant laws applicable to the contravention and the gathering of evidence regarding a transaction can be an unattainable task.

Exchange regulations do not govern the transfer of cryptocurrencies in and out of South Africa. Any cross-border exchange can therefore not be authorized by SARB.”³⁰

Conclusion

[69] I am compelled to conclude that the LCC did not contravene the Exchange Control Regulations regime, as it stands. It, therefore, becomes unnecessary to deal with Regulations 22A and/or 22C. In the result, the forfeiture of the money in the Money Market Account is set aside.

Costs

[70] In casu, both parties have enjoyed substantial success. I need hardly mention that the award of costs is within the discretion of the court and must be exercised judicially. In exercising my discretion, I am of the view that each party should pay its own costs.

Order

1. The applicant’s application to set aside the R10 000 000.00 in account number 1[...] held within Nedbank Limited together with any interest thereon or any other accrual thereto is dismissed.

2. The third respondent’s decision published in Notice number 1637 of 2023, as published in the Extra Ordinary Government Gazette number 48111 on 24 February 2023, to declare forfeit to the State:

³⁰ The paper pages 16 and 17.

the amount of R16 404 700.27 in account number 4[...] held with the Standard Bank of South Africa Limited, together with any interest thereon or any other accrual thereto is set aside.

3. Each party to pay its own costs.

M.P MOTHHA
JUDGE OF THE COURT
PRETORIA

Date of Hearing: 18 February 2025

Date of Judgment: 15 May 2025

APPEARANCES:

For the Applicant: G Engelbrecht SC and KD Iles
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