REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case Number : 548 / 04

In the matter between

MAURICE ALPHONSE JACQUESSON **APPELLANT**

and

MINISTER OF FINANCE **RESPONDENT**

Coram : HARMS, STREICHER, MTHIYANE, LEWIS *et* PONNAN JJA

Date of hearing : 4 NOVEMBER 2005

Date of delivery : 16 NOVEMBER 2005

SUMMARY

***Condictio sine causa* – moneys declared forfeit to the State: on the facts, not affected by the grant of amnesty in terms of s 20(1) of the Promotion of National Unity and Reconciliation Act 34 of 1995.**

J U D G M E N T

PONNAN JA

[1] The issue in this appeal is whether, by virtue of the amnesty granted to him on 10 May 2001 in terms of s 20(1) of the Promotion of National Unity and Reconciliation Act 34 of 1995 ('the Act'), the appellant is entitled to repayment from the respondent (the Minister of Finance) of certain funds that were declared forfeit to the State on 4 March 1994 in terms of Regulation 22B of the Exchange Control Regulations ('the ECR').[1]

[2] In chronological sequence the undisputed facts are:

(a) During 1958 the appellant's father started a family business known as Jacques Film Distributors ('JFD') in Johannesburg. Subsequent to the death of his father the appellant took over all of the assets of the business, assumed responsibility for all of its liabilities and ultimately became its sole proprietor.

(b) On 21 September 1987 the Exchange Control Department of the South African Reserve Bank instructed Standard Bank to block the accounts of JFD. Standard Bank confirmed having done so on 29 September 1987.

[1] Made under s 9 of the Currency and Exchanges Act 9 of 1933. The Regulations are published in Government Gazette Number R1111 of 1 December 1961.

(c) On 22 January 1988 the appellant was arrested and indicted before Didcott J in the Durban and Coast Local Division of the then Supreme Court on a total of 3 255 charges.

(d) On 26 January 1988, four days after the appellant's arrest, the Deputy Governor of the South African Reserve Bank ordered attachment in terms of Regulations 1, 22A, 22C, 22D and 22E of the ECR of all funds standing to the credit of JFD which at that stage totalled R1 252 648.75.

(e) On 3 February 1988 those funds were transferred to the Corporation for Public Deposits, a juristic person established in terms of s 2 of the Corporation for Public Deposits Act 46 of 1984.

(f) On 17 September 1992 the appellant was convicted on 1 058 counts of fraud (being all of the main charges) and sentenced to imprisonment for a term of seven years.

(g) On 1 December 1992, just over two months after the appellant's conviction, the Senior Deputy Governor of the Reserve Bank despatched a letter in terms of Regulation 22B to the appellant ('the *audi* letter'). There was no response to the *audi* letter.

(h) On 1 March 1994 the funds together with all the interest that had accrued thereon was declared forfeit to the State. By that stage the amount had grown to R2 861 651. The order of forfeiture was published in Government Gazette Number 15529 on 4 March 1994. On 7 April

1994 the funds were deposited into the State Revenue Fund in terms of Regulation 22B of the ECR.

(i) On 2 June 1994 and whilst the appellant was still incarcerated, he, together with five other applicants, launched an application for the setting aside of the notice of forfeiture and the release of the forfeited moneys. On 12 July 1994 three of the six applicants were ordered by the Pretoria High Court to furnish security. On 15 February 1995 the application was withdrawn and payment of the respondents' costs tendered.

(j) On 5 November 1994 the appellant was released from prison under correctional supervision.

(k) On 20 December 1996 the appellant made application for amnesty in terms of s18 of the Act.

(l) On 21 November 1997 the applicant launched an application ('the second application') to secure repayment of the forfeited funds. This application was opposed. On 19 March 1999 Mynhardt J dismissed the second application on a point in limine, namely that the appellant's claim had become prescribed by virtue of the Prescription Act No 68 of 1969.

(m) On 10 May 2001 the appellant was granted amnesty in terms of s 20(1) of the Act in respect of

' .... all offences and delicts resulting from the export to the United Kingdom of capital in contravention of the South African Exchange Control Laws, committed during or about the period 1982 to 1987'.

[3] Following upon the grant of amnesty to him, the appellant sought in the application, which is the subject of the present appeal, an order directing the respondent to pay to him the amount of R2 861 651 as also interest and costs. The application was dismissed by Mynhardt J in the Pretoria High Court and with leave of the learned judge the matter is before this court on appeal.

[4] The appellant was party to a systematic series of frauds which, according to the Reserve Bank, resulted in R103 260 576 leaving the country illegally under the false and dishonest guise that it was for the purchase of films when in fact it was neither for the purchase of films nor for any other legitimate purpose. By the end of the appellant's criminal trial, according to Didcott J:

'It had become common cause that a fraudulent scheme had been put into operation for the illegal exportation from South Africa to the United Kingdom of huge amounts of money.'

[5] Count 3 255 in the indictment concerned a contravention of Regulation 3(1)(c) read with Regulations 1 and 22 of the ECR. It alleged that the appellant had unlawfully and without permission of the Treasury

made payments to a person resident outside the Republic of South Africa. Of that charge Didcott J stated:

'Lastly, we have count 3255, an alleged contravention of the exchange control regulations, a single count with its own single alternative. This count and its own alternative were cast in the indictment as an alternative to counts 1 to 1057 taken together and read as a whole. In other words, the contravention of the exchange control regulations was not alleged as an alternative to each of the main counts 1 to 1057. The result was that the State did not seek a conviction under the exchange control regulations on any individual occasion covered by counts 1 to 1057 which failed to produce a conviction for fraud. It sought a conviction on count 3255 only in the event of an acquittal of all of counts 1 to 1057. By the stage of argument not even that was, in the event, sought. It is an element of the charges brought under count 3255 that money was exported without the permission of the Treasury or anyone authorised by the Treasury. All the money which was exported in this case was exported with the permission of one or other bank acting as an agent of the Treasury. True, the permission was said to have been fraudulently obtained. If the accused is proved to have obtained such permission fraudulently, he will be guilty on the count of fraud. If that is not proved, however, it is not proved for the purpose of this count either.

In the end therefore the entire case revolves around counts 1 to 1057, which are all the same, each relating to a particular instance or occasion.'

[6] The *audi* letter, which I set out in some detail, states:

'3. On 22 September 1992 Mr Maurice Alphonse Jacquesson was sentenced to seven years imprisonment in the Supreme Court in Durban after conviction on 1 058

counts of fraud committed over the period 1985 to 1987 in that he made certain misrepresentations which enabled him to transfer R103 260 576 in foreign currency out of the Republic of South Africa in contravention of the exchange control regulations, more fully set forth in paragraph 4 below.

4. As referred to in paragraph 3 above the following contraventions of the Exchange Control Regulations have been committed or I, on reasonable grounds, suspect that the following contraventions of the Exchange Control Regulations have been committed, namely: ...

7. The purpose of this letter is, therefore, in compliance with the *audi alterem partem* rule, to invite you, which I hereby do, to make representations to me –

7.1 In connection with the possibility that some or all of the money described in paragraph 5 above together with interest earned thereon, may be forfeited to the State and disposed of in the manner envisaged in paragraph 6 above; and/or

7.2 As to why some or all of the money described in paragraph 5 above, together with interest earned thereon should not be forfeited to the State and be disposed of in the manner envisaged in paragraph 6 above. ... '

[7] The relevant provisions of s 20 of the Act read:

'(7)(a) No person who has been granted amnesty in respect of an act, omission or offence shall be criminally or civilly liable in respect of such act, omission or offence and no body or organisation or the State shall be liable, and no person shall be vicariously liable, for any such act, omission or offence.

(10) Where any person has been convicted of any offence constituted by an act or omission associated with a political objective in respect of which amnesty has been granted in terms of this Act, any entry or record of the conviction shall be deemed to be expunged from all official documents or records and the conviction shall for all

purposes, including the application of any Act of Parliament or any other law, be deemed not to have taken place: Provided that the Committee may recommend to the authority concerned the taking of such measures as it may deem necessary for the protection of the safety of the public.'

[8] The appellant's entitlement to repayment of the moneys derived, so it is asserted, from the *condictio sine causa*. Without attempting to define its ambit, it is available to a claimant, it would seem, seeking to recover money or property that had been transferred in terms of a valid *causa* that has since fallen away (see *B & H Engineering v First National Bank of SA Ltd* 1995 (2) SA 279 (A) at 284G – 285C; 9 *Lawsa* (2ed) para 220). Logically the first issue to be resolved therefore is whether the *causa* has indeed fallen away. The order of forfeiture issued in terms of Regulation 22B of the ECR. Regulation 22B provides:

'… the Treasury may issue an order in writing in which it forfeits to the State any money or goods referred to in paragraph (a), (b) or (c) of Regulation 22A(1)…'.

It is not clear from the order of forfeiture itself which of sub-paragraphs (a), (b) or (c) underpinned the forfeiture. It is to either (a)(i) or (a)(ii) that we must look, we were told by counsel. To the extent here relevant, Regulations 22A(1)(a)(i) and (ii) provide:

'(i) any money or goods,…, in respect of which a contravention of any provision of these regulations has been committed or in respect of which an act or omission has been committed which the Treasury on reasonable grounds suspects to constitute any such contravention, or, …

(ii) any money or goods, notwithstanding the person in whose possession it is –

(aa) which the Treasury on reasonable grounds suspects to be involved in a contravention of any provision of these regulations or in a failure to comply with any such provision, or which the Treasury on reasonable grounds suspects to be involved in any act or omission which the Treasury so suspects to constitute a contravention of any such provision or a failure to comply with any such provision …'

[9] The Regulations in question do not contemplate a criminal conviction or for that matter even a criminal prosecution as a necessary prerequisite to forfeiture. Whilst it may well be desirable for a criminal conviction to precede a forfeiture, a valid forfeiture is not dependent upon a criminal conviction or a criminal prosecution. That much was conceded by counsel for the appellant.

[10] For a valid attachment all that is envisaged by the Regulations is either a contravention or a suspicion on reasonable grounds that a contravention of any provision of the Regulations has been committed. Criminal charges and a criminal sanction may follow the contravention. That will depend in the main on whether the contravention complained of constitutes a criminal offence. If a criminal prosecution follows, the Treasury may delay its decision on forfeiture until finalisation of the trial. Then again it may not. The wrong envisaged by the Regulations is a contravention or suspected contravention of the Regulations not a

criminal conviction. That wrong may be followed by either criminal or civil sanctions. The question in truth that confronts the decision-maker is thus not whether there is a criminal conviction, but rather whether there has been a contravention or suspected contravention of the Regulations. If there has been such a contravention or suspected contravention the Treasury may, in the exercise of its discretion, act.

[11] The appellant was convicted of 1 058 counts of fraud, not the alternative charge of contravening the ECR. Those convictions related to moneys that had already left the country. Precisely why the funds standing to the credit of JDR were attached does not emerge with any clarity on the papers. Two possibilities come to mind: First, the moneys attached were connected to some other contravention of the ECR not covered by the indictment before Didcott J; and, secondly, the attachment and subsequent forfeiture was unlawful and invalid at inception, inasmuch as it was effected in the erroneous belief that those moneys were connected to contraventions of the ECR covered by the indictment before Didcott J. Those two possibilities appear to be exhaustive. Whether the forfeiture was indeed invalid at inception and therefore impeachable on that basis need not detain us (*Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA)). Plainly on either hypothetical possibility the moneys forfeited to

the State were unconnected to the allegations giving rise to the indictment before Didcott J. What is clear and follows logically on this analysis is that the grant of amnesty and the consequent setting aside of the conviction is wholly irrelevant to the moneys that were attached and declared forfeit by the Treasury. It must thus follow that the *condictio* fails as the appellant has failed to establish that the *causa* has indeed fallen away.

[12] In my view, a further insuperable obstacle stands in the way of the appellant. Interpreting the amnesty granted in a most liberal and generous way, as indeed I must (*Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (4) SA 671 (CC)), it cannot be said that its reach extends to the forfeited moneys. The amnesty granted is in respect of all offences and delicts resulting from the export to the United Kingdom of capital in contravention of the South African Exchange Control laws committed during or about the period 1982 to 1987. First, the moneys in question were attached on 26 January 1988 - on any reckoning, outside the amnesty period. Secondly, the forfeited moneys do not fall into that class of capital that was exported to the United Kingdom in contravention of this country's exchange control laws.

[13] It follows that the appeal must fail. In the result the appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

V M PONNAN
JUDGE OF APPEAL

CONCUR:

HARMS JA
STREICHER JA
MTHIYANE JA
LEWIS JA