THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 854/2020

In the matter between:

SOUTH AFRICAN RESERVE BANK **APPELLANT**

and

RENETTE LEATHERN N O **FIRST RESPONDENT**

WILLIAM DAVID LEATHERN N O **SECOND RESPONDENT**

JERIFANOS MASHAMBA N O **THIRD RESPONDENT**

[In their capacities as duly appointed trustees of the insolvent estate of Ahmed Dawood Bhorat (T2450/16)]

GROBANK LIMITED **FOURTH RESPONDENT**

Neutral citation: *South African Reserve Bank v Leathern N O and Others* (Case no 854/2020) [2021] ZASCA 102 (20 July 2021)

Coram: MAYA P, MBHA and MAKGOKA JJA and GORVEN and UNTERHALTER AJJA

Heard: 20 May 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, and by publication on the Supreme Court of Appeal website and release to SAFLII. The time and date for hand down is deemed to be 10h00 on the 20th day of July 2021.

Summary: Insolvency law – funds in bank accounts blocked in terms of Regulation 22A and/or 22C of the Exchange Control Regulations – whether the requirements to set aside blocking order satisfied – whether such funds vested in an insolvent estate – whether sequestration order invalidates blocking order.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Holland-Müter AJ sitting as court of first instance):

1 The appellant's application to adduce further evidence is dismissed with costs including the costs of two counsel.

2 The appeal is upheld with costs including the costs of two counsel.

3 The order of the high court is set aside and replaced with the following:

'The application is dismissed with costs including the costs of two counsel.'

JUDGMENT

Makgoka JA (Maya P, Mbha JA and Gorven and Unterhalter AJJA concurring):

[1] On 15 June 2017 the appellant, the South African Reserve Bank (the Reserve Bank) issued a blocking order against two bank accounts of Mr Ahmed Dawood Bhorat, trading as R & R Traders and Brokers (R and R Traders) held with the fourth respondent, Grobank Limited (formerly the Bank of Athens). The accounts were blocked on suspicion that Mr Bhorat had used them in contravention of certain provisions of the Exchange Control Regulations (the regulations); promulgated in terms of s 9 of the Currency and Exchanges Act 9 of 1933 (the Act).[1] At the time, the funds standing to his credit in the two accounts were R13 132 887.98 and R1 868 995.05, respectively.

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[1] In terms of s 9(2)(*b*)(i) the President may make any regulation affecting currency, banking or exchanges for-

'the blocking, attachment and obtaining of interdicts for a period of [36 months] . . . and the forfeiture and disposal by the [National] Treasury of any money or goods referred to or defined in the regulations or determined in terms of the regulations or any money or goods into which such money or goods have been transformed by any person, and-

(aa) which are suspected by the [National] Treasury on reasonable grounds to be involved in an offence or suspected offence against any regulation referred to in this section, or in respect of which such offence has been committed or so suspected to have been committed;

(bb) which are in the possession of the offender, suspected offender or any other person or have been obtained by any such person or are due to any such person and which would not have been in such possession or so obtained or due if such offence or suspected offence had not been committed; or

[2] Five days later, on 20 June 2017, Mr Bhorat's estate was provisionally sequestrated at the instance of the South African Revenue Services (SARS), pursuant to an unsatisfied judgment obtained against Mr Bhorat in March 2015 for outstanding tax liability of over R40 million. The first, second and third respondents were provisionally appointed co-trustees of Mr Bhorat's estate on 11 July 2017, and finally appointed on 24 October 2018, following confirmation of the provisional sequestration order on 5 March 2018.

[3] The trustees asserted that in terms of s 20(2)(*a*) of the Insolvency Act 24 of 1936 (the Insolvency Act) the funds formed part of Mr Bhorat's estate, and as such, vested in them as the trustees of his insolvent estate with effect from the date of Mr Bhorat's provisional sequestration, 20 June 2017. Accordingly, they demanded that the funds be paid over to them. The Reserve Bank declined for Grobank to do so, and contended that according to its investigations, the funds did not 'belong' to Mr Bhorat and accordingly did not accrue to his insolvent estate.

[4] Consequently, the trustees launched an application in the Gauteng Division of the High Court, Pretoria (the high court) seeking a declaratory order that the funds vested in them as the trustees of the insolvent estate of Mr Bhorat. Ancillary thereto, they sought an order lifting the 'blocking' order; and for Grobank to pay over the funds to them. The Reserve Bank opposed the application. Grobank did not oppose the application, and has adopted the same stance in this appeal by filing a notice to abide the decision of this Court.

[5] The thrust of the trustees' application was that: (a) the Reserve Bank did not have reasonable grounds to block Mr Bhorat's accounts; (b) neither the regulations under which the accounts were blocked, nor the common law, exclude or exempt the funds from vesting in the insolvent estate; (c) the blocking of the accounts did not divest Mr Bhorat's insolvent estate of the ownership of the funds, nor did it grant the Reserve Bank a

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(cc) by which the offender, suspected offender or any other person has been benefited or enriched as a result of such offence or suspected offence -

Provided that, 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.'

preferent right to the funds above the rights of the creditors in the insolvent estate. The trustees' assertions prevailed in the high court, which issued a declaratory order that the funds vested in Mr Bhorat's insolvent estate. The high court accordingly lifted the blocking order and ordered Grobank to immediately pay over the funds to the trustees. The Reserve Bank was also ordered to pay the costs of two counsel.[2] In addition, the high court extended the blocking order on the following terms:

'1 That the blocking order issued by the [Reserve Bank] on 15 June 2017 in respect of the accounts numbers 30000001640 and 20000441617 of Mr Ahmed Bhorat (trading as R and R Traders and Brokers) standing to his credit at Grobank be extended in terms of section 9(2)(g) of the Currency and Exchanges Act 9 of 1933 to date of a final determination of the main application (including any appeal); unless the [Reserve Bank] is ultimately successful, in which event the order shall be extended with a period of 90 days from the date of the final determination.

2 The [Reserve Bank] is directed to take such steps as may be necessary to procure that the accounts identified in prayer 1 above be converted into interest-bearing accounts.

3 That the [trustees'] rights to challenge the validity of the blocking order is not prejudiced by the extension.'

[6] The Reserve Bank appeals against that order, with the leave of the high court, on four grounds, namely: (a) that the relief sought by the trustees was not competent as the blocking order was a final administrative order which should have been challenged under the Promotion of Administrative Justice Act 3 of 2000 (PAJA); (b) that the high court was incorrect in its evaluation as to whether the Reserve Bank had established a reasonable suspicion that Mr Bhorat had contravened the regulations; (c) that the funds deposited into Mr Bhorat's accounts did not 'belong' to him as he was merely a collection agent; (d) and that the sequestration order did not invalidate the blocking order.

[7] There are three key issues on appeal. First, whether the high court was correct to set aside the blocking order. Secondly, whether the funds standing to the credit of Mr Bhorat's bank accounts 'belonged' to him and fell into his insolvent estate, thus vesting in the trustees. Thirdly, and closely linked to the second issue, is whether a sequestration order invalidates a blocking order by operation of law. To determine these issues, it is

[2] The high court order granted an order 'in terms of prayers 1 – 4' of the Notice of Motion. Those prayers included a prayer for costs against Grobank, which did not oppose the application. In the body of the application, the trustees stated that, if Grobank did not oppose, no costs order would be sought. Therefore, to the extent the costs order was made against Grobank, it was made *per incuriam*.

necessary to set out the provisions of the regulations under which the accounts were blocked, as well as the factual background underpinning the decision to block them.

[8] Amongst other things, the regulations prohibit various financial transactions, including the transfer of money from South Africa to any person outside the country, save within their ambit. In terms of the regulations, where a designated functionary of the Reserve Bank, on reasonable grounds, suspects a person to be involved in the contravention of any provisions of the regulations, the functionary is empowered, under the provisions of regulations 22A and/or 22C, to issue a blocking order in respect of a banking account suspected of being used for illegal purposes. The effect of the order is to prohibit any person from withdrawing, or causing to be withdrawn any money standing to the credit of the bank account in question. If the Reserve Bank is satisfied that contraventions indeed occurred, it may ultimately declare the attached funds forfeit to the State.

[9] Regulation 22A deals with the blocking or attachment of 'tainted' goods and money, ie goods and money which may be the subject of a contravention of the regulations. On the other hand, regulation 22C deals with the blocking or attachment of 'untainted' money to the value of the contravention perpetrated by the exporting of 'tainted' money. In the present case, the Reserve Bank placed reliance on both regulations, albeit in the alternative. Regulation 22D provides, among others, for the review of an attachment or an order made in terms of regulation 22A or regulation 22C. It provides that any person who feels himself aggrieved by such attachment or order may bring an application in a competent court for the review thereof. Such court may set aside any such attachment or order or decision, as the case may be, on the grounds set out in the provisions of s 9(2)(*d*)(i) or (iii) of the Act. Sub-section (i) provides that:

'(i) [a]ny person who feels aggrieved by any decision made or action taken by any person in the exercise of his powers under a regulation…which has the effect of blocking, attaching or interdicting any money or goods, may lodge an application in a competent court for the revision of such decision or action or for any other relief, and *the court shall not set aside such decision or action or grant such other relief unless it is satisfied—*

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

(*bb*) that such person did not have reasonable grounds to make such decision or to take such

action…'

(*cc)* that such grounds for the making of such decision or the taking of such action no longer exist. (Emphasis added.)

[10] The factual basis for blocking the accounts was set out in the Reserve Bank's answering affidavit, deposed to by Mr Andre Malherbe, a manager and an investigator in its Financial Surveillance Department. Mr Malherbe stated that during May 2017, the Reserve Bank commenced an investigation into the affairs of several entities and persons suspected of being involved in illicit financial flows from the country. Its investigation had revealed that R and R Traders and other persons or entities were suspected of having contravened several provisions of the regulations between September 2016 and June 2017. The alleged contraventions involved a scheme in respect of foreign currency, importation of goods and exportation of capital from the country, totaling more than R700 000 000. Mr Bhorat was identified as part of a group of persons and entities designated as 'forex transferring entities', who were suspected of having used their bank accounts as conduits for illicit transfer of money to various foreign beneficiaries, in China and Hong Kong.

[11] On 13 June 2017, the Reserve Bank identified a transfer of R3 320 709 into one of Mr Bhorat's bank accounts (the first account). The examination of the account and the foreign exchange transaction records, revealed that the account was mainly utilised as a foreign exchange trading account. Twenty-six deposits totalling R12 601 794.41 were made into this account mainly by three companies between 14 June 2017 and 15 June 2017. All the funds were 'booked' by authorised dealers as foreign exchange transactions.

[12] The investigation further revealed that R and R Traders had, allegedly in contravention of the regulations, transferred approximately R201 000 000 abroad since June 2016 as advance import payments, whereas goods to the value of approximately R78 400 000 had been received in South Africa. There appeared to be an almost ten-fold increase in foreign exchange turnover within two months preceding the R3 320 709 transaction referred to above. There were also a number of advance import payments in respect of which R and R Traders had failed to clear goods through customs within four months from the date of payment made on account of such goods.

[13] Mr Malherbe further stated that one of the foreign beneficiaries of the foreign exchange transferred by R and R Traders was an entity controlled from South Africa, which acted as an agent in China or Hong Kong for transfers from a number of the forex transferring entities to the ultimate beneficiaries, against payment of commission. Mr Bhorat's second account appeared to have been funded by cash deposits between 13 and 14 June 2017, save for one transfer from the first account. The bulk of these funds were utilised for purposes of foreign exchange transactions.

[14] It was on the basis of the above information that Mr Malherbe, on behalf of the Reserve Bank, suspected that Mr Bhorat's accounts had been used as conduits for illicit financial flows from the country, hence the action taken to put in place the blocking orders. In the light of the Reserve Bank's explanation, it must first be determined whether the Reserve Bank's suspicion, which triggered the invocation of regulation 22, was reasonable. As already stated, the absence of reasonable suspicion is one of the three bases for setting aside a blocking order in terms of regulation 22D, read with s 9(2)(*d*)(i)(*bb*) of the Act. The high court was not persuaded that there was reasonable suspicion. It said:

'The [Reserve Bank] argues that the monies blocked do not vest in the trustees as it is the fruit of either theft of fraudulent action. There are only vague unsubstantiated allegations in this regard and no proof of any kind was before the court…'

[15] 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':[3]

'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.'[4]

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[3] *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 819I; *Minister of Law and Order v Kader* 1991 (1) SA 41 (A) at 50H-I; *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another* 1992 (3) SA 673 (A) at 690G-H; *Powell N O and Others v Van der Merwe N O and Others* [2005] 1 All SA 149 (SCA); 2005 (5) SA 62 (SCA) para 36.

[4] *Shabaan Bin Hussien and Others v Chong Fook Kam and Another* [1969] 3 All ER 1626 (PC); [1970] AC 942 (PC) at 948B.

[16] 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 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.

[17] I turn now to consider whether Mr Bhorat was the owner of the funds standing to his credit. The high court correctly referred to the general position in our law, which is this. Generally, where money is deposited into a bank account of an account holder it mixes with other money and, by virtue of *commixtio*, it becomes the property of the bank.[5] The account holder has no real right of ownership of the money standing to his credit[6] but acquires a personal right to payment of that amount[7] from the bank, arising from their bank-customer relationship. The bank's obligation, as owner of the funds credited to the customer's account, is to honour the customer's payment instructions.[8] Once ownership passes to the bank it immediately incurs the obligation to account to its customer.

[18] Based on this general position, the high court concluded that Mr Bhorat had acquired a personal right against Grobank in respect of the funds. The court reasoned as follows:

'It is only when a credit in the account was obtained by theft or fraud, or erroneously paid into the account that the client will have no claim against the bank for that money. See *Nissan South Africa (Pty) Ltd v Marnitz N O* 2005 (1) SA 441 (SCA) at 448-449.[9] The necessary proof is lacking in this matter.'

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[5] *Commissioner of Customs and Excise v Bank of Lisbon International and Another* 1994 (1) SA 205 (N) at 208I; *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd* 1995 (4) SA 510 (C) at 530G-532D; *ABSA Bank Bpk v Janse van Rensburg* 2002 (3) SA 701 (SCA) at 709A-B.

[6] *S v Kearney* 1964 (2) SA 495 (A) at 503; *S v Graham* 1975 (3) SA 569 (A) at 577; *Trustees, Estate Whitehead v Dumas and Another* [2013] ZASCA 19; 2013 (3) SA 331 (SCA) para 13.

[7] *Louw N O and Others v Coetzee and Others* 2003 (3) SA 329 (SCA) para 12.

[8] *Muller N O and Another v Community Medical Aid Scheme* [2011] ZASCA 228; 2012 (2) SA 286 (SCA); [2012] 2 All SA 252 (SCA) para 13.

[9] The full and correct citation is *Nissan South Africa (Pty) Ltd v Marnitz N O and Others (Stand 186 Aeroport (Pty) Ltd Intervening)* 2005 (1) SA 441 (SCA); [2006] 4 All SA 120 (SCA).

[19] With respect to the learned Judge, *Nissan* is no authority for the proposition that theft, fraud, or erroneous payment are the only circumstances in terms of which an account holder will have no claim against the bank for the money standing to their account. While those instances might be the obvious ones, this is certainly not a closed list. As Du Plessis explains:

'The question whether funds "belong" to a particular person, in the sense that such a person enjoys a right to claim the credit balance in the account, depends on the agreement governing the operation of the account. The name of the account holder is not decisive. The agreement may for example determine that a party may deposit funds into the account as agent, and also withdraw funds as agents, but without personally enjoying the right to claim the credit balance in the account…'[10] (Footnotes omitted.)

[20] Indeed, in *Joint Stock Company Varvarinskoye v Absa Bank Ltd and Others* [2008] ZASCA 35; [2008] 3 All SA 130 (SCA); 2008 (4) SA 287 (SCA) para 31, this Court explained that the rule that only an account holder may assert a claim to money held in its account with a bank, is not a universal and inflexible one. In that case, it was held that where to the knowledge of the bank and the account holder, the account holder had limited control over the funds, the right to claim the funds standing to the credit of the account, did not accrue to the account holder but to the depositor. I shall revert to this decision.

[21] Counsel for the respective parties referred to *Muller N O and Another v Community Medical Aid Scheme* [2011] ZASCA 228; 2012 (2) SA 286 (SCA); [2012] 2 All SA 252 (SCA). There, Humanity, a medical aid scheme, had agreed to transfer its members to another medical aid, Commed, with effect from 1 September 2008. Humanity was wound up later that month. The September 2008 contributions, were, however, paid into Humanity's account and its liquidators laid claim to them. This Court held that but for the provisions of s 63(14) of the Medical Schemes Act 131 of 1998 (Medical Schemes Act), in terms of which the contributions vested in Commed on confirmation by the Council of Medical Schemes of the transfer of the membership of Humanity's members to Commed,

[10] J E du Plessis *The South African Law of Unjustified Enrichment* (2012) p 237. See also *McEwen N O v Hansa* 1968 (1) SA 465 (A).

the contributions would have formed part of Humanity's estate. At para 13, the following was said:

'[T]he September contributions were not kept separately in an earmarked account, with the agreement of the bank, for payment to Commed or repayment to Humanity's members. They were "mixed" with other funds in the account resulting in an amount standing to the credit of Humanity. To call Humanity a "custodian" of the September contributions deposited into its bank account, as the court below did, adds nothing to the issue. The contributions paid were not trust funds. Nor was Humanity's bank party to any agreement between Humanity and Commed. There is no evidence to suggest that Humanity's bank had agreed to hold the September contributions as agent or custodian for Commed, whether disclosed or undisclosed, or that it had knowledge of such arrangement. Nor is there any evidence to suggest that Commed had acquired any personal rights against Humanity's bank in respect of the contributions. Moreover, there is no evidence to the effect that Humanity's rights to operate upon its bank account had in any way been limited by reason of the payment of the September contributions into it. The fact that Humanity undertook to pay the amount of the September contributions to Commed had no effect on its powers as account holder and did not fetter or restrict them.' (Footnotes omitted.)

[22] Counsel for the trustees relied on these findings, and submitted that they were applicable in this case. Counsel emphasised that: Mr Bhorat opened and operated the accounts in his own name; none of the deposits were kept in a separate earmarked account on behalf of any of the depositors and the funds were mixed with Mr Bhorat's other funds; there was no evidence that Grobank had agreed to hold the funds as agent for the depositors; there was no evidence to suggest that Mr Bhorat's rights to operate on his bank account were in any way limited.

[23] Counsel also relied on *Trustees, Estate Whitehead v Dumas and Another* [2013] ZASCA 19; 2013 (3) SA 331 (SCA), where an investor had transferred funds to the account of a fraudster after he had been induced to enter into an agreement by the fraudster's misrepresentation. This Court concluded that the investment transaction between the investor and the fraudster, though tainted by fraud, nevertheless constituted a *causa* for the payment. The investor intended to pay the fraudster and voluntarily made the payment into the latter's account, who had no restrictions to operate his bank account once the funds were deposited into his account. The fraudster had a valid claim against

the bank in respect of those funds. Thus, upon the sequestration of his estate, the funds fell into the estate of the fraudster.

[24] It must be emphasised that the account holders in both *Muller* and *Dumas* (Humanity and the fraudster) had unfettered discretion in respect of the funds deposited into their respective accounts. To the contrary, in this case, on the uncontroverted version of the Reserve Bank, Mr Bhorat did not have such right in respect of the funds deposited into his accounts, and could only deal with them as directed by the depositors. It is instructive that although in a position to do so, the trustees did not procure an affidavit from Mr Bhorat to refute the Reserve Bank's assertion. This would not have been an onerous task, as one of their first obligations as provisional trustees was to interview Mr Bhorat to determine, among other things, exactly what the assets and liabilities of the insolvent estate were.[11] In the absence of any explanation by Mr Bhorat, the Reserve Bank's uncontradicted version must therefore be accepted. There is nothing clearly untenable or palpably implausible about its version to justify its rejection on the papers.[12]

[25] Therefore, this case has to be approached on the footing that there was an understanding between the depositors and Mr Bhorat that his control of the accounts was restricted to the extent he could deal with the funds only as directed by the depositors. Viewed in this light, *Muller* and *Dumas* are distinguishable from the present case. It should be stressed that this can only apply to the present matter since, at a later stage, the question might need to be determined by recourse to oral evidence if the Reserve Bank seeks a forfeiture order and this is opposed by the trustees. The further comments hereunder must be understood in this provisional light.

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[11] Section 81(1)(*a*) of the Insolvency Act.

[12] This is in accordance with the well-known principle enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C, which is this: in motion proceedings where disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavit, which have been admitted by the respondent together with the facts alleged by the respondent, justify such an order. This is so, unless the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.

[26] The restricted right of an account holder to deal with funds in its account was also a defining feature in *Joint Stock.* There, Joint Stock had deposited funds into the bank account of an entity whose account was held with Absa. The funds were earmarked for payment of building contractors for the establishment of a mine and processing facilities. Absa knew about the purpose of the account and that the account holder had limited rights in respect of those funds. Absa had also agreed with the account holder that the funds could only be withdrawn upon a particular procedure being followed; and that the account holder had no interest in or control over the funds. Despite knowledge of the above, Absa appropriated the funds, asserting a right of set-off in respect of monies owed to it by the account holder. In these circumstances, this Court held that Absa could not rely on set-off and could not justify the appropriation of the funds, as the right to claim the funds did not accrue to the account holder.

[27] This brings me to the latest pronouncement by this Court on the issue. In *FirstRand Bank Limited v Spar Group Limited* [2021] ZASCA 20; [2021] 2 All SA 680 (SCA) the following were the pertinent facts. A franchisee had defaulted on the terms of a franchise agreement between it and Spar. Spar decided to operate the franchisee's outlets at its own cost and for its own benefit. The funds generated from operating the outlets went through speed-point facilities operating in the outlets, which were linked to the franchisee' three bank accounts held with First Rand Bank (FirstRand). Both FirstRand and the franchisee declined Spar's request to alter the receiving bank accounts so as to allow it to have control of the funds. The result was that the funds generated by Spar were paid into the franchisee's accounts. Both FirstRand and the franchisee knew that the personal right to the deposited funds accrued to Spar, and not to the franchisee. Despite this knowledge, FirstRand subsequently used the funds to set-off the monies owed to it by the franchisee, and also allowed the controlling mind behind the franchisee to withdraw funds from two of the accounts.

[28] After a survey of the authorities, including *Joint Stock*, this Court held as follows. Even in the absence of an agreement between an account holder, the bank and a third party in terms of which the account holder has no right to the funds in their account, as was the case in *Joint Stock*, where a bank owes a personal obligation to a third party which has credited the account of bank's customer, such funds cannot be used to set off

the customer's debts against the Bank. In such circumstances the rights in respect of those funds accrued to a third party, and not to the account holder. Mere knowledge of the personal right accruing to a third party by the bank gives rise to an obligation to the third party (para 58-60). Relevant to the present case is the following part of the court's summary of the position in our law at para 86:

'A customer, with no entitlement to moneys deposited into their account, who knows that they enjoy no such entitlement, may not make disbursements from the account in respect of credits deriving from these moneys. To do so amounts to theft…'

[29] As I see it, the position can be no different where, as in this case, there seems to be an understanding between the depositor(s) and the account holder that the latter is only entitled to deal with the funds as directed by the depositor(s). The payment of the monies by the depositors into Mr Bhorat's account were bilateral juristic acts requiring the meeting of minds between the depositors and Mr Bhorat (See *Burg Trailers SA Pty Ltd & Another v Absa Bank Ltd and Others* 2004 (1) SA 284 (SCA) para 7; *Nissan* para 24). Although there is no suggestion that Grobank was aware of this arrangement, the understanding between the depositors and Mr Bhorat meant that for the duration of the Reserve Bank's investigation, and for as long as the accounts are subject to a blocking order, Mr Bhorat had no right to claim those funds. This is based on the fact that there is reasonable suspicion that the accounts were used for purposes of contravening the regulations.

[30] The reasonable suspicion of the Reserve Bank may never amount to anything more and the blocking order may lapse. In that event, Mr Bhorat may press a claim to the funds which, for the reasons given, may well be contested. In addition, Mr Bhorat may ultimately be found to have no claim against Grobank in respect of the funds, if the accounts were simply being used as a conduit by recourse to which persons other than Mr Bhorat sent their funds abroad. I make no finding on this score, but simply indicate that the high court's conclusion that Mr Bhorat enjoyed a personal right to the funds as against Grobank could not be made on the evidence before it and on the basis of the law that now governs these matters.

[31] 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 Bhorat or the depositors would have no claim to the funds, subject to a right to challenge the forfeiture order. Consequently, whether the funds are subject to a *concursus creditorum* and thus vest in the trustees, can only be determined once either of the two scenarios occurs.

[32] The effect of the above is that, at this stage, the trustees have no better claim than Mr Bhorat as against the Reserve Bank. Provided the Reserve Bank's blocking order complies with the regulations, it may block the funds and the trustees cannot enjoy access to them, whatever is ultimately proven as to who has a claim to the funds. Viewed in this light, the trustees' application to the high court was premature and should not have succeeded.

[33] This brings me to the trustees' contention that a blocking order lapses by operation of law once a sequestration order is granted, and that the assets subject to such an order vest in the insolvent estate. It is trite that all the property of the insolvent on the effective date vests in the Master and after appointment, in the trustees of the insolvent estate. The Insolvency Act[13] excludes certain property from the insolvent estate, as do other statutes.[14] The trustees contended that because the regulations do not contain a similar provision, the blocking order lapses once a provisional sequestration order is granted, and the funds vest in the insolvent estate. This contention found favour with the high court, which held:

'[I]n my view the regulations should contain similar exclusions as in other statutes, particularly as in s 35 of POCA to warrant the desired outcome. To argue that monies subject to a blocking order do not vest in the trustees in the absence of an exclusion is not convincing and should be rejected. It is not for the court to read into regulations what is not included. There is no ambiguity with regard to the regulations and the argument on behalf of the [Reserve Bank] cannot succeed.'

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[13] In terms of s 23 of the Insolvency Act, remuneration for work done; compensation for personal injuries, and pensions are expressly excluded from the insolvent estate. Section 82(6) of the Insolvency Act excludes wearing apparel, bedding etc.

[14] For example, compensation payable under the Occupational Injuries and Diseases Act 130 of 1994; Unemployment Insurance Benefits; Section 35(1) of the Prevention of Organised Crime Act, 121 of 1998 (POCA).

[34] 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.[15] The high court erred in its approach and reasoning.

[35] 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* [2014] ZACC 16; 2014 (4) SA 474 (CC) 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.[16]

[36] Applying the injunction in *Cool Ideas* to interpret statutory provisions purposively, I read the purpose of the regulations, among others 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.

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[15] *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC) para 53; *Road Traffic Management Corporation v Waymark (Pty) Limited* [2019] ZACC 12; 2019 (5) SA 29 (CC) para 29; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC) para 90.

[16] Constitution of the Republic of South Africa Act, 1996.

[37] A blocking or attachment is therefore a prerequisite for a valid forfeiture of the funds to the State. If a blocking order is terminated by the grant of a subsequent sequestration order, the forfeiture of the assets used in the contravention of the regulations might never be realised. The effect would be that assets which legitimately ought to be forfeited to the State in terms of the regulations, would vest in the insolvent estate and be subject to distribution by the trustees. The remedy of forfeiture, a sanction of public law imposed to protect the currency and the economy, would be lost by operation of the law of insolvency. That is an absurdity so glaring that the legislature could not have contemplated it.

[38] Just as a solvent person must suffer the lawful attachment of funds in his or her bank account, with the possible imposition of forfeiture in due course, the trustees of the insolvent estate of that person can be in no better position. Seen in this context, the reach of the regulations is such that a sequestration order must yield to a blocking order. This interpretation is consistent with s 224 of Constitution, in terms of which the primary object of the Reserve Bank is to protect the value of the currency 'in the interest of balanced and sustainable economic growth in the Republic.' The regulations constitute mechanisms, among others, to assist the Reserve Bank to execute its Constitutional mandate.

[39] To sum up, when the estate of a person is sequestrated, and an account held in the name of a person is subject to a blocking order, for the duration of the Reserve Bank's investigations or the allowed 36-month period, it cannot be determined whether the funds vest in the trustees of the insolvent estate. This depends on proof of whether the funds 'belong' to the account holder. This can only be finally determined if a forfeiture order is sought. As such, a blocking order functions to temporarily delay a determination whether the funds in a blocked account vest in the trustees. For that reason, in the interim, the trustees are not entitled to demand that the funds be paid out to them for distribution. As to the legal consequences of a forfeiture order after sequestration, should this occur, this issue need not be determined in this appeal.

[40] It remains to furnish the reasons for our order dismissing the Reserve Bank's application to adduce further evidence on appeal, which we heard separately. Given that the Reserve Bank is victorious in the appeal, the reasons for refusing its application to

adduce further evidence on appeal pales into insignificance. The trustees won the battle but lost the war. The only real relevance thereof is in respect of costs. Because of that, the reasons for the order are stated pithily.

[41] The Reserve Bank sought to introduce further evidence in the form of two affidavits by Mr Malherbe and Mr Bhorat. The upshot of the affidavits is two-fold. The first is that, after the judgment in the high court had been handed down, Mr Bhorat approached Mr Malherbe and essentially 'confessed' that he was involved in illicit flow of money from the country in contravention of the regulations, and that he was not the 'owner' of the funds in his accounts. Secondly, the Reserve Bank furthermore sought to establish that the trustees knew about Mr Bhorat's version a month prior to the hearing in the high court, but failed to disclose that fact to the court.

[42] As to the first, I have already mentioned that the regulations do not require proof of contravention thereof – only a reasonable suspicion. To the extent that the affidavit of Mr Bhorat is meant to prove the truthfulness of the Reserve Bank's allegations, it will achieve nothing more than enhance an already established case. Simply put, the Reserve Bank did not need the new evidence to establish its case. Regarding the alleged failure to disclose the information to the court by the trustees, whilst it might be relevant to the trustees' professional conduct, it is totally irrelevant to the issue in dispute. For these reasons the application to adduce further evidence was dismissed.

[43] In the result the following order is made:

1 The appellant's application for leave to adduce further evidence is dismissed with costs including the costs of two counsel.

2 The appeal is upheld with costs including the costs of two counsel.

3 The order of the high court is set aside and replaced with the following:

'The application is dismissed with costs including the costs of two counsel.'

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T Makgoka
Judge of Appeal

APPEARANCES

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