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"FA2"

IN THE HIGH COURT OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE

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

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

(3) REVISED.

9/06/2011 DATE — SIGNATURE

CASE NO: 2010:18552

In the matter between:

TULIP DIAMOND FZE	~~Appellant~~
and	
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	First Respondent
MENZI SIMELANE N.O. [in his capacity as past Director-General of the Department of Justice and Constitutional Development]	Second Respondent
STEVEN HOZEN N.O. [in his capacity as Magistrate, Kempton Park Magistrate's Court]	Third Respondent
DIRECTOR-GENERAL: DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fourth Respondent
BRINKS SOUTHERN AFRICA (PTY) LIMITED	Fifth Respondent

JUDGMENT

C.J. CLAASSEN J:-

INTRODUCTION

[1] The applicant, Tulip Diamonds FZE ("Free Zone Establishment"), is a company incorporated and registered in the United Arab Emirates. It operates its diamond trading business from the free zone at the Dubai Airport. The business of the applicant includes, *inter alia,* importing and exporting of rough diamonds.

[2] The fifth respondent is Brinks Southern Africa (Pty) limited ("Brinks"), a company incorporated in South Africa. It is a subsidiary of a global provider of secured transport and associated security services. In the present matter Brinks operated as the courier of diamonds from Angola and the Congo to Dubai. No relief is sought by the applicant against Brinks.

[3] One of the applicant's clients is a company called Omega Diamonds DVBA ("Omega") domiciled in Belgium. Omega is the subject of an investigation by the Belgium authorities in regard to alleged tax related transgressions.

THE FACTS

[4] In a letter dated 23 December 2008, the office of the examining Magistrate Mr. B. De Hous of the Court of First Instance in Antwerpen, addressed a request for assistance to the second respondent in his capacity as the then Director-General of the Department of Justice and Constitutional Development.[1] In short, the letter requested assistance from the appropriate South African authorities to gather information which may assist in the conduct of a criminal enquiry against Omega and a Belgium citizen by the name of Sylvain Goldberg. The assistance required related to alleged forgery of and the use of false documents which violated the Belgian Code which criminalises certain income tax transgressions and money laundering.

[5] The aforesaid letter discloses that the Belgian authorities are in possession of information which indicates that Omega imported diamonds from Angola and Congo

[1] The request drafted in Flemish was attached to a letter dated 16th February 2009 from the Embassy of the Kingdom of Belgium addressed to the Department of Foreign Affairs in Pretoria. In accordance with protocol this letter and its attachments were forwarded to the second respondent for attention.

through an associated company in Dubai into Belgium. Omega ordered the shipment of diamonds, purchased in Angola and Congo in accordance with legally required Kimberley Certificates, for delivery to the applicant located in Dubai. The shipment of diamonds was packed in small parcels. Upon arrival in Dubai, the small parcels were retained but repacked into larger parcels without physically mixing the stones. There after the new shipment of diamonds was provided with a new Kimberley Certificate indicating that the shipment emanated from the United Arab Emirates and marked "diamonds of mixed origin". The new shipment was issued with a new invoice made out by the applicant and addressed to Omega wherein the value of the diamonds was increased by between 20% and 31%. In so doing, the value of the diamonds were artificially increased, generating profits which were kept secret from the Belgian tax authorities.

[6] The letter further intimates that a search and seize operation was conducted at the premises of Omega in Belgium. During this search exhibits and documents were seized including nine invoices on which the names of Brinks and the applicant appeared. The letter of request also confirmed that the Belgium authorities did not regard either Brinks or the applicant as in any way a possible perpetrator, co-perpetrator or accomplice to the aforesaid criminal activities.

[7] The letter requests the South African authorities to assist in the identification of Brinks in South Africa and to inspect its administration and bookkeeping in order to --

> "(a) compare and investigate the nine invoices coming from Brinks South Africa which were found in the office of Omega Diamonds (and which will be in the possession of the Police officers travelling to South Africa);
> (b) search and establish other similar transports made from Angola and Congo to Dubai;
> (c) search and investigate all invoices and diamond transports made for and to the following companies in Dubai; Tulip Diamonds....."

[8] The letter also requested the South African authorities to inspect the relevant "work/client file" of Brinks and to seize and take copies of all relevant documents including invoices, Kimberley Certificates, packing lists, shipment dockets, insurance policies, instructions, correspondence, "co-ordinants of principals/intermediates", received instructions, meeting/conversations held, etc. Finally, it requested the authorities in South Africa to interview the responsible persons of Brinks in regard to the invoices reflecting transports made for Omega and their relationship with Omega.

[9] The original letter of request in Flemish, as it appears in the papers, comprises of only three pages. The English translation attached thereto consists of six pages. The translation bears official stamps from the " Federale Overheidsdienst, Justitie" and the "Voorzitter van de Rechtsbank van 1st Aanleg Antwerpen". This authentication of the English translation of the request was never placed in dispute. The fact that the original Flemish document had three pages only, was, however, relied upon by the applicant to attack the validity of the respondents' response and reaction to the request.

[10] On the penultimate page of the English translation an important undertaking by the Belgian authorities appears in the following terms:

> "It goes without saying that enquiry results obtained by means of the current rogatory request will not be used in any other inquiry than this rogatory request". (Emphasis added)

The relevance of this undertaking by the Belgian authorities will become apparent later on.

[11] Upon receipt of the request, the second respondent considered it and then prepared a "Ministerial Memorandum" recommending to the first respondent, the Minister of Justice and Constitutional Development, that the request should be approved and the required assistance granted in terms of section 7 of the International Co-operation in Criminal Matters Act No 75 0f 1996 ("the Act"), and that an appropriate magistrate be designated to act in accordance with its provisions. The provisions of section 7 of the aforesaid Act read as follows:

> "7(1) A request by a court or tribunal exercising jurisdiction in a foreign State or by an appropriate government body in a foreign State, for assistance in obtaining evidence in the Republic for use in such foreign State shall be submitted to the Director-General.
>
> (2) Upon receipt of such request the Director-General shall satisfy himself or herself-
> (a) that proceedings have been instituted in a court or tribunal exercising jurisdiction in the requesting State; or
> (b) that there are reasonable grounds for believing that an offence has been committed in the requesting State or that it is necessary to determined whether an offence has been so committed and that an investigation in respect thereof is being conducted in the requesting State.
>
> (3) For purposes of subsection (2) the Director-General may rely on a certificate purported to be issued by a competent authority in the State concerned, stating the facts contemplated in paragraph (a) or (b) of the said subsection.
>
> (4) The Director-General shall, if satisfied as contemplated in subsection (2), submit the request for assistance in obtaining evidence to the Minister for his or her approval.

(5) Upon being notified of the Minister's approval the Director-General shall forward the request contemplated in subsection (1) to the magistrate within whose area of jurisdiction the witness resides."

[12] In terms of section 8 of the Act the nominated magistrate to whom the request is forwarded subpoenas the person whose evidence is required to appear before him or her to give evidence or to produce any documents or objects. In the present case the second respondent's recommendation to grant the required assistance was approved by the first respondent. The request was sent on for implementation to the magistrate in Kempton Park, the third respondent. On 1 October 2009 the third respondent issued a subpoena in terms of Section 205 of the Criminal Procedure Act 51 of 1977 addressed to one Jane Hamilton at Brinks. The subpoena ordered the aforesaid Hamilton to appear before the third respondent on 30 October 2009 to be examined by the Deputy Director of Public Prosecutions in regard to information set out in the annexure attached to the subpoena. This annexure stipulated the documentation relating to the activities of Omega. It referred to crimes of forgery and the use of false documents, tax fraud and the violation of the Belgian Code for Income Tax in relation to money laundering allegedly committed by Omega.

APPLICANT'S CASE

[13] On or about 02 October 2009, the applicant got wind of the proceedings contemplated in the Kempton Park magistrates' court and that Brinks had been served with a subpoena to supply details of certain documents which may have been of concern to the applicant. The applicant immediately launched an urgent application under case number 43311/09 on 12 October 2009 and obtained an interim interdict prohibiting the respondents from disclosing any information regarding the applicant in the proceedings contemplated in the magistrate court. A temporary interdict was granted pending the institution and finalisation of the present application. This application was then launched under case number 18552/2010. Subsequently, these two applications were consolidated. In PART B of the notice of motion, the applicant seeks the following relief:

3. Reviewing and setting aside the following decisions to give effect to a letter of request ("the request") dated 23 December 2008 emanating from Belgian authorities, ---
   3.1 the decision of the second respondent purportedly under the International Co-Operation in Criminal Matters Act 75 of 1996 ("the Act"), made on 11 June 2009;
   3.2 the decision of the first respondent purportedly under the Act made on 17 June 2009;
   3.3 the decision of the third respondent to issue the subpoena made on 1 October 2009, purportedly under Section 205 of the Criminal Procedure Act 51 of 1977 ("the subpoena").

4. In the alternative to prayer 3 above, declaring section 7 and/or section 8 of the Act to be inconsistent with the Constitution Act 108 of 1996 and invalid to the extent of the inconsistency.

5. Setting aside the subpoena.

6. Interdicting the respondents from disclosing any documentation and/or information called for under a subpoena, dated 1st October 2009, addressed to Jane Hamilton, Brinks (South Africa) (Pty) Ltd., to any third party including any court or tribunal in a foreign State or any foreign government body in a foreign State.

7. Costs against the first, second and third respondents (and against the fourth and fifth respondents only in the event of opposition) jointly and severally, the one respondent paying the others to be absolved, such costs to include the costs consequent upon the employment of two counsel."

[14] The basis upon which the applicant brought these proceedings was that documentation in possession of Brinks contained confidential information which affected the applicant's proprietary rights in those documents. It was stated in the founding affidavit that it would be grossly unfair and unconstitutional for Brinks to be ordered to disclose documentation in which the applicant may have a material interest without giving the applicant the opportunity to assert its rights in respect thereof. Brinks' attitude to these allegations was merely to confirm that the information in the documentation was of a confidential nature and that they were unwilling to disseminate such information without valid legal process requiring them to do so. They did not, however, oppose these proceedings.

[15] The applicant attempted to make out a case that the confidentiality in these documents was common cause or at least uncontested in view of Brinks admission in regard thereto. Such confidentiality was, however, denied by the other respondents. Despite such denial the first and second respondents were willing to make these documents available to the applicant. They undertook to compile an index of all such documents relating to the applicant that Brinks intended to make available to the authorities in terms of the subpoena.[2]

[16] The applicant further alleged it had *locus standi in judicio* to bring these proceedings. It alleged that disclosure of the documents will materially impact upon their proprietary rights in the confidential nature of their business information. It contended that at this stage of the proceedings the applicant was deprived of any opportunity to assert its constitutional right to silence and or the right against self incrimination. For this reason it

[2] The index is annexure "FA3" attached to the founding affidavit.

had a real and not a hypothetical interest in the decisions under review. The disclosure in the magistrates' court occurred at the instance of the Belgian authorities in relation to possible offences committed by Omega and not the applicant. Thus, it said, the applicant's only remedy was to challenge the decisions taken by the first, second and third respondents in the jurisdiction where such decisions were taken in order to prevent potentially damaging disclosure of its own confidential information.[3]

[17] The applicant's case was that it's constitutional rights aforesaid were violated by these administrative decisions and they were subject to attack because of various procedural irregularities. These irregularities are set out in paragraph 45 of the founding affidavit in the following terms:

> "45. There are certain procedural irregularities that affect all of the decisions made by the respondents. These are that:
>
> 45.1 the original Dutch request was not considered;
>
> 45.2 the ministerial memorandum upon which the decisions appear to have been based made no attempt to analyse the elements and or requirements of the alleged offences and whether or not these alleged offences could be established on the information provided in the request;
>
> 45.3 no adequate notice was provided to the entities affected by the decisions in circumstances when there was no danger of the documents and/or information being destroyed or spirited away."

[18] The aforesaid irregularities go to the merits of the application and the relief sought by the applicant. However, before one gets to a discussion of the merits or demerits of the applicant's case, it is necessary to determine whether or not applicant indeed had sufficient standing to bring the application in the first place. Counsel for the respondents, Ms. K D Moroka SC, contended that the question of standing should be argued as a point *in limine* before entering a debate on the merits. We indicated, however, that the matter should be argued jointly dealing both with the merits and the point *in limine* and that is how the argument proceeded. For purposes of this judgment it would, however, be convenient to deal with the question of standing first.

APPLICANT'S STANDING *IN JUDICIO*

[3] See paragraphs 37 and 38 of the founding affidavit.

[19] It was submitted by Ms Moroka in her supplementary heads of argument filed at the beginning of the argument, that the applicant asserted certain rights of fair administrative action as mentioned in chapter 2 of the Constitution and expressed in the Promotion of Administrative Justice Act No 3 of 2000 ("PAJA"). Although the respondents initially and mistakenly in the answering affidavit accepted that the applicant was entitled to assert these rights, the respondents were of the view, after a proper analysis of the Constitution, that the applicant lacked the necessary standing to invoke the aforesaid provisions in its favour. In fact, the initial acceptance by the respondents aforesaid was based on an error of law which this court is not bound by. That must be so because it would create an intolerable situation if a court were to be precluded from giving a right decision on accepted facts where a party failed to raise a legal point as a result of an error of law on its part.[4]

[20] The question in regard to standing which has to be resolved is whether the applicant has any constitutional rights to just administrative action that may be violated by the impugned administrative decision. The answer to this question depends upon whether a peregrine like the applicant who has no presence within the borders of South Africa can be the beneficiary of such rights. Furthermore, the applicant seeks to impose on the state and all its organs, a duty not to perform an act that would infringe those rights. In order to decide whether or not the applicant is entitled to invoke these rights, one will have to look at Section 7 of the Constitution which provides:

> "7 (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people <u>in our country</u> and affirms the democratic values of human dignity, equality and freedom." (Emphasis added).

[21] In **Lawyers for Human Rights and another v Minister of Home Affaires and Another** 2004 4 SA 125 (CC) and relying on section 7(1) above, it was confirmed that physical presence is necessary for a litigant to invoke the rights enshrined in our Bill of Rights. Our constitution provides a framework for the governance of South Africa. It is therefore territorially circumscribed and has no application beyond our borders. Although the rights enshrined therein are available for everyone, it only benefits everyone **within our borders**. Foreigners are entitled to require the South African state to respect, protect and

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[4] See **Paddock Motors (Pty) Limited vs Igesund** 1976 (3) SA 16 (A) at 23F; the unreported decision of **Government of the Republic of South Africa and others vs Von Abo** (284/10) [2011] ZASCA 65 (delivered on 4April 2011) where Snyders JA in paragraphs [18] and [19] upheld the principle expressed in **Paddock Motors** *supra.*

promote their constitutional rights while they are in South Africa; however they lose that benefit when they move beyond our borders.[5] Section 7 (1) is clear and unambiguous and needs no further interpretation. Its scope and effect is clearly that physical presence is a precondition for any constitutional benefits to operate. [6] Although the word "everyone" in section 7 (1) has been given a broad and purposive interpretation to such an extent that it would extend to and include non-citizens and foreigners within our borders,[7] such interpretation does not extend to include foreigners outside the borders with no presence within it.

[22] It is common cause that the applicant is not a company registered in the Republic of South Africa. It has no physical presence within the borders of our country. It is a company registered in the United Arab Emirates subject to the laws of that country. It conducts its business in that country. In all of these circumstances it seems to me that the applicant can have no standing in this court to invoke the protection and benefits of any enshrined constitutional right, such as fair administrative action. I am therefore of the view that the applicant failed to prove the necessary standing to litigate in these courts. As such the application cannot succeed and should be dismissed.

[23] If, however, I am wrong in the aforesaid conclusion, it may be advisable to shortly indicate my views in regard to the merits of this application. I do so also in view of the principle that where it is possible to decide a case without reaching or deciding a constitutional issue, that course should be adopted.[8]

THE ORIGINAL DUTCH REQUEST WAS NOT CONSIDERED

[24] In my view there is no substance in this argument. Counsel for the applicant Mr. Thompson SC conceded that the Act does not demand, as a pre-existing jurisdictional fact, that the first, second or third respondents are obliged to peruse and consider the original

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[5] See **Kaunda and Others vs. President of the Republic of South Africa** 2005 4 SA 235 (CC) at paragraph [36] page 252.

[6] See **Bid Industrial Holdings Pty Ltd vs. Strang and Another** 2008 3 SA 355 (SCA) at paragraph [52] page 368.

[7] See **Mahlaule and Others vs. Minister of Social Development and Others** 2004 6 SA 2005 (CC) at paragraphs [46] [47] page 529.

[8] See **S v Mhlungu and Others** 1995 3 SA 867 (CC) at [59] page 895E. It would however seem as if this principle enunciated in **Mhlungu** has been watered down somewhat. See **Bid Industrial Holdings Pty ltd vs Strang** supra paragraphs [14] and [15] at page 360.

text of the request. [9] If there was any merit in this argument one wonders what the position in South Africa would have been if the original request was in French, the latter also being an official language in Belgium? This problem has expressly been foreseen by the legislature. It has sought to overcome any communication problems between countries with different official languages by enacting section 30 of the Act which reads as follows:

> " Any deposition, affidavit, record of any conviction or any document evidencing any order of a court, issued in a foreign State, **or any copy or sworn translation thereof,** may be received in evidence at any proceedings in terms of a provision of this Act if it is –
>
> (a) authenticated in the manner in which foreign documents are authenticated to enable them to be produced in any court in the Republic; or
>
> (b) authenticated in the manner provided for in any agreement with the foreign State concerned."

[25] In my view the sworn translation of the original Flemish request which is to be found as an annexure attached to the founding affidavit, is compliant with the aforesaid provisions. It is adequately authenticated. Such authentication was in any event never in dispute. There is in my view no merit in the purported irregularity relied upon by the applicant in this regard.

NO ATTEMPT TO ANALYSE THE ELEMENTS OF THE ALLEGED OFFENCES

[26] In argument Mr. Thompson was asked to indicate what additional analyses by the first and/or second and/or third respondent would have been required to overcome the so-called lack of analyses. He was unable to point to any particular deficiency in this regard. The statement of facts contained in the letter of request is, in my view, quite comprehensive. It describes in quite some detail the scheme of arrangement by which diamonds are imported into Belgium at an increased price by virtue of forged and or false documents. A "well organised laundering mechanism" was established. In my view, the scheme of the Act does not require an intensive analysis of the allegations contained in a letter of request for assistance from a foreign state. In this instance a careful reading of the request by the first and/or second and/or third respondents would have been an adequate exercise of their administrative duty to enable them to apply their discretionary powers whether or not to accede to the request. It is not expected of an official of one country to

[9] By the way, the original text is in Flemish and not Dutch. I have been told on good authority that calling a Flemish speaking person a Dutchman is equal to calling a Scotsman an Englishman!

have extensive knowledge and insight into the internal criminal law and proceedings of another to enable such assistance to be afforded. If it were otherwise, the entire scheme of the Act to combat international crime by co-operation between foreign states would be defeated. This much is evident from the preamble to the Act which concisely states that it was enacted to "facilitate the provision of evidence ... in criminal cases ... between the Republic and foreign States." The purpose of the Act is not to ensure that assistance to the requesting state will result in a successful prosecution of any crimes. The purpose is *simpliciter* to **facilitate the transfer of evidence** once the Director-General has satisfied himself or herself that (i) there are reasonable grounds for believing that an offence has been committed in the requesting state (ii) or that it is necessary to determine whether an offence has been so committed (iii) and that an investigation in respect thereof is being conducted in the requesting state. In my view the content of the letter of request establishes such "reasonable grounds" as contemplated in the Act. It also establishes that evidence may be necessary to determine whether an offence had been committed in Belgium. Finally it undoubtedly establishes that an investigation has been commenced in Belgium as contemplated in section 7(2)(b) of the Act. In these circumstances I am of the view that the purported second irregularity relied upon by the applicant had not been established in its founding affidavit.

NO ADEQUATE NOTICE WAS PROVIDED TO THE APPLICANT

[27] Let me say immediately that the Act does not provide for any such notice to parties affected by the decisions taken in this particular instance. That, of course, does not mean they are disentitled to proper notification if their rights to just administrative action were materially affected. But in this case, the danger of being prejudiced by the implementation of the Act was substantially reduced by the attitude evinced in the letter of request. It was at pains to state that neither the applicant nor Brinks faced any possibility of being criminally involved in the scheme which was being investigated. [10]

[28] The alleged irregularity relied upon by the applicant in this regard is, however, dependant on the question whether its proprietary interests in any confidential information would be violated if the subpoena was put into effect without notification to the applicant.

[10] See paragraph [10] above.

At no stage did the applicant in the founding affidavit explain what the nature of the so-called confidential information was. It merely stated that the nine invoices contained confidential information without elaborating there on. In the answering affidavit the respondents expressly denied that the documents contained confidential information that may prejudice the applicant. Despite such denial the applicant did not seek to elaborate in its replying affidavit what the true nature of the confidentiality was. Nor did the applicant in its heads of argument favour the court with such an explanation. It was only when Mr. Thompson was pressed for an answer to this question in argument that he stated the confidentiality related to price comparisons that may be made by the applicant's competitors once the documents are in the open.

[29] When Mr. Thompson was confronted with the fact that such clarification of the nature of any potential prejudice was no where to be found in the papers, he applied, rather faintly, for a postponement in order to amplify the affidavits with more details in regard to confidentiality. This application was opposed and we had very little difficulty in refusing it. The applicant had sought it fit not to disclose the nature of such confidentiality while it had ample opportunity to do so. It failed to utilize these opportunities at its own peril.

[30] Absence of any or adequate notification to the applicant of the proceedings in the magistrates' court of Kempton Park, did not, in my opinion, under these circumstances establish any irregularity. Nor did the absence of notification prejudice the applicant. In the circumstances of this case, I am of the view that the principle of *audi alterem partem* did not apply.

[31] It was further suggested that once the process contemplated by the letter of request is allowed, such information would be in the public domain. This argument does not take account of the undertaking made by the Belgian authorities not to use any of such information in any other enquiries. Furthermore, even if disclosed, the price differences cannot in any way prejudice the applicant. It is not as if the documents will be made available to its competitors with the intention to damage its custom.

[32] For the aforesaid reasons there can be no substance in the third basis upon which the applicant attempted to establish irregularities on the part of the respondents.

CONCLUSION

[33] For the reasons set out above I am of the view that even on the merits the application cannot succeed, irrespective of the issue of lack of standing raised by the respondents. The following order is therefore issued:

> The application is dismissed with costs which include the costs occasioned by the employment of two counsel.

THUS DATED AND SIGNED AT JOHANNESBURG ON THIS 9th DAY OF JUNE 2011

C J CLAASSEN
JUDGE OF THE HIGH COURT

I agree:

P/P
C JORDAAN
ACTING JUDGE OF THE HIGH COURT

Counsel for the Applicant: Adv A Thompson SC and Adv A Stein
Attorneys for the Applicant: Edward Nathan Sonnenbergs

Counsel for the first to fourth respondents: adv K D Moroka SC and Adv M Sello
Attorneys for the first to fourth respondents: The State Attorney, Johannesburg

Attorneys for the fifth respondent: Goldman Judin Incorporated

The matter was argued on 16 Monday of 2011