REPUBLIC OF SOUTH AFRICA

IN THE NORTH GAUTENG HIGH COURT
PRETORIA

07/11/2012

CASE NO: A248/2010
COURT *A QUO* CASE NO: 21961/08

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

2012-10-
DATE

SIGNATURE

In the matter between:

THE SOUTH AFRICAN RESERVE BANK	Appellant
and	
MAGNUS REINIER HEYSTEK	First Respondent
MINISTER OF FINANCE	Second Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent

JUDGMENT

N F KGOMO, J:

INTRODUCTION

[1] The first respondent launched an application in the court *a quo* to review and set aside a decision purportedly (according to the first respondent) taken by the appellant to declare forfeit to the State an amount of R194 113,66, standing to the credit of the first respondent's bank account number 62035316084 at the Fourways Mall branch of First Rand Bank Limited, which forfeiture order was purportedly made in terms of Regulation 22B of the Exchange Control Regulations.

[2] In essence the said application in the court *a quo* sought –

2.1 To review and set aside that decision to declare the amount forfeit to the State; and

2.2 To challenge the constitutionality of section 9 of the Currency and Exchanges Act, 1933 (Act 9 of 1933) as amended, as well as the Exchange Control Regulations promulgated thereunder.

[3] The first respondent did not pursue the constitutional challenge at the hearing of the application.

[4] The decision which formed the subject matter of the relief claimed was taken by Mr A D Mminele, the Executive General Manager : Markets, which is the competent authority in the Department of Finance, Republic of South Africa, responsible for the Exchange Control Department of the appellant. The Exchange Control Department is currently known as the Financial Surveillance Department. Mr A D Mminele will henceforth be referred to as "*Mminele*".

[5] The court *a quo*, on the basis of several grounds of review, found in favour of the first respondent, setting aside the decision by Mminele.

[6] According to the appellant, the court *a quo* granted the main relief sought, but not in respect of any decision taken by the appellant who was the first respondent in that applicant, as the notice of motion depicted or set out, but granted an order reviewing and setting aside –

> "... *the decision of Mr Mminele representing the first respondent* [the appellant] ..."

which according to them was an amended order that was granted without the first respondent having sought an amendment to the prayers in the notice of motion; and further, despite it having been clearly established in the affidavits that Mminele, who took and when he took that decision to declare the amount

forfeit, was not acting on behalf of or as a representative of the appellant when he so acted; but in fact acted as a designated functionary of the Minister of Justice.

[7] That order of the court *a quo* further granted an order that the amount of R194 113,66 be returned to the first respondent with interest thereon at the rate of 15,5% per annum from 8 February 2008 to date of return (payment). The court *a quo* furthermore ordered the appellant herein to pay the costs of the application, including the costs of three (3) counsel. According to the appellant the effect of the cost order was that the appellant was also ordered to pay the costs relating to the first respondent's constitutional challenge which was abandoned at the commencement of the hearing. According to the appellant further, the costs relating to the constitutional challenge were substantial, a large part of the affidavits in that application being devoted to those issues and separate heads of argument having had to be prepared in respect thereof.

[8] In her judgment delivered on 12 January 2010, the learned Acting Judge Potterill ("*Potterill AJ*") apparently based her decision to review and set aside Mminele's forfeiture decision on three grounds, namely –

8.1 Ground 1 – That on 4 February 2004 Mminele received a memorandum and recommendation from Mr P J Deport and Mr Ellis recommending the forfeiture of the money to the State; that he had regard to the contents of this memorandum as well as

certain letters annexed thereto in reaching his decision. That however, in drawing the memorandum and recommendation Messrs Delport and Ellis had had regard to a comprehensive report issued by the Registrar of Stock Exchanges of the Financial Services Board and normally and in this case sent to the Registrar of Banks. That this report was not placed before Mminele. The learned Acting Judge concluded that Mminele, being the decision-maker, had not been fully apprised of the facts; that the written memorandum prepared by Messrs Delport and Ellis did not contain a fair and accurate synopsis of the relevant facts as well as raised grounds for forfeiture in respect of which Heystek had not been afforded the opportunity to comment; and that Mminele had accordingly failed to take certain relevant considerations into account which would have enabled him to act with procedural fairness.

8.2 Ground 2 – The learned Acting Judge found that should she be wrong on the first ground, then Mminele's decision should be set aside on the grounds that he failed to give reasons for his decision that the money be forfeited to the State. In keeping with the provisions of the Promotion of Administrative Justice Act, 2000 (Act 30 of 2000) as amended, which stipulates that if a decision-maker is asked to furnish reasons for his decision and fails to do so within 90 days, it is presumed that the decision was taken without good reason, Heystek requested reasons by

letter dated 25 February 2008 addressed to the Exchange Control Department and when by 7 May 2008 no reasons were forthcoming, the review application was launched – i.e. 18 days before the expiry of the requisite 90 day period. The court *a quo* accepted that the presumption that Mminele made the decision without good reason could have been rebutted had he furnished those reasons in his answering affidavit, concluding that no reasons were contained in the answering affidavit. The learned Acting Judge came to the conclusion that in his short confirmatory affidavit Mminele was –

> "... *only prepared to state that he considered the memorandum and annexure ...*"

as have been prepared by Delport and Ellis.

8.3 Ground 3 – That the forfeiture decision taken by Mminele on 4 February 2008 and published in the Government Gazette of 8 February 2008 was invalid because a period of more than 36 months had passed or elapsed since or from the date on which the blocking order (of the account in question) was issued until the date on which the forfeiture decision was made and published. The above is purported to be in line or keeping with section 9(2)(g) of the Currency and Exchanges Act, read with the Exchange Control Regulations 22A and 22C which stipulate that a blocking order issued in respect of an account must be

cancelled not later than 36 months from the date of issue of such blocking order unless the money is in-between forfeited or declared forfeit under Regulation 22B. The learned Acting Judge found that the blocking order issued by Delport had been issued on 4 January 2005 and that the 36 months period had expired on 3 January 2008 without a forfeiture order having been made. She consequently further found that since the blocking order should have been cancelled on 3 January 2005, it was thus not competent to have issued a forfeiture order on 8 February 2008 when the 36 months had already expired.

[9] It is against the above judgment that the appellant is now appealing. Leave to appeal the judgment in or to the full bench of this Court was granted by the trial judge on 1 March 2010, costs being costs in the appeal.

ISSUES TO BE DETERMINED ON APPEAL

[10] The issues to be determined in this appeal are –

10.1 Whether the decision-maker took the relevant facts into account and his decision to declare the money standing to the credit of the first respondent's banking account in terms of Regulation 22B of the Exchange Control Regulations was justified on the grounds of the facts which he did take into account.

10.2 Whether the decision-maker was called upon to furnish reasons for his decision, whether he did furnish reasons for his decision and whether the court *a quo* was correct in concluding that it must be presumed that he had no good reason for his decision; and

10.3 Whether the forfeiture decision was made after the expiry of the 36 month period as contemplated in Exchange Control Regulation 22C(3) read with Regulation 22A(3).

THE PARTIES

[11] The appellant, The South African Reserve Bank, is the central bank of the Republic of South Africa, a juristic person and statutory body regulated in terms of the South African Reserve Bank Act, 1989 (Act 90 of 1989) as amended ("*S A Reserve Bank or appellant*") and having its principal place of business within the jurisdiction of the above Honourable Court, at 370 Church Street, Pretoria.

[12] The first respondent, Magnus Reinier Heystek is a major male businessman and journalist born on 1 April 1953 and resident as at the date of the launching of this application in the court *a quo* at 711 Sandalford Close, Dainfern, Johannesburg.

[13] The second and third respondents are The Minister of Finance, Republic of South Africa and the President of the Republic of South Africa respectively. The second respondent was, according to the first respondent herein and applicant in the court *a quo*, joined to the proceedings by virtue of the provisions of Regulation 22E(2) of the Regulations ("*Regulations*") made in terms of section 9 of the Currency and Exchange Act 9 of 1933 ("*the Act*") as well as because he/she is the national executive authority responsible for the administration of the Regulations, the constitutionality whereof was challenged before the challenge was abandoned on the date of hearing in the court *a quo*.

[14] The third respondent is joined in these proceedings in his/her official capacity and by virtue of the interest he/she may have in the constitutional validity of the Regulations.

[15] No order of costs were sought against the second and third respondents. They also have not joined issue in this application in any way or at any stage and are not parties to this appeal *per se*.

CHRONOLOGY OF EVENTS AND COMMON CAUSE FACTS

[16] It is common cause that the Minister of Finance, Republic of South Africa, has by virtue of the provisions of Regulation 22E of the Exchange Control Regulations delegated the powers and/or functions conferred upon the Treasury by the provisions of certain of the Exchange Control Regulations

and assigned the duties imposed thereunder on the Treasury, to the Governor, Deputy Governor, Executive General Manager of the South African Reserve Bank responsible for the Exchange Control Department, the General Manager and/or Deputy General Manager, Assistant General Manager and/or any official of the South African Reserve Bank who, in terms of the internal rules and regulations of the Exchange Control Department of the South African Reserve Bank, is authorised to exercise these powers.

[17] Those delegated powers form part of the papers filed of record in this application as Annexure "PJD 1" titled "*Delegation of Powers in terms of Exchange Control Regulation 22E*" signed by the Minister of Finance and re-issued on 13 December 2006.

[18] During 2002 the Registrar of Stock Exchanges in the Financial Services Board appointed inspectors in terms of section 3 of the Inspection of Financial Institutions Act, 1998 (Act 80 of 1998) as amended, ("*Financial Institutions Act*"), to investigate the affairs of Magnus Heystek International (Pty) Ltd and other related entities under the control of the first respondent. A copy of the inspection report was furnished to the Registrar of Banks, who stands at the head of the Bank Supervision Department of the appellant, in particular to Adv Michael Blackbeard ("*Blackbeard*"), an employee in the office of the Registrar of Banks. This report or copy thereof is found at page 5 to 189 of the record of proceedings filed by the appellant in terms of Rule 53 of the Uniform Rules of Court.

[19] The Exchange Control Department of the appellant is a department entirely separate from the office of the Registrar of Banks but by reason of the fact that that inspection report raised possible contraventions of the Exchange Control Regulations, the report was referred by the office of the Registrar of Banks to the Exchange Control Department in October 2002.

[20] After receiving the inspection report the Exchange Control Department, also during October 2002, commenced an investigation into the affairs of the first respondent and the companies under his control as identified in the inspection report, with a view to identifying possible contraventions of the Exchange Control Regulations. They sent a letter to the first respondent and Magnus Heystek International (Pty) Ltd by registered post on 30 May 2003 regarding this investigation.

[21] On 4 January 2005 Blackbeard on behalf of the Registrar of Banks furnished the Manager in the Exchange Control Department and designated functionary of the Minister of Finance, for purposes of applying and administering the Exchange Control Regulations, Petrus Jacobus Delport ("*Delport*") with a report by Deloitte & Touche Auditors who had been appointed as inspectors to determine whether the first respondent and the companies controlled by him had carried on the business of a bank in contravention of the provisions of the Banks Act, 1990 (Act 94 of 1990) as amended and/or the provisions of the Mutual Banks Act 1993 (Act 124 of 1993) as amended. The report and its covering memorandum appear in pages 113 to 189 of the record of proceedings.

[22] Although the report concludes that on the available information and records made available to the inspectors, the first respondent and the companies investigated did not accept deposits from the general public as a regular feature of their business and did not solicit or advertise for such deposits, the report also dealt with various transactions which had been dealt with in the inspection report issued to the Registrar or Stock Exchanges and identified possible contraventions of the Exchange Control Regulations.

[23] On the basis of the report of the Registrar of Stock Exchanges of the FSB and the Deloitte & Touche report as well as the documents in the possession of the Exchange Control Department several acts or omissions were suspected, by the above delegated functionaries, upon grounds they reckoned to be reasonable, to have constituted contraventions of the Exchange Control Regulations as fully set out hereunder.

[24] A certain Ms De Flamingh had during September 2000 and October 2000 deposited an aggregate amount of R460 000 to the credit of a South African banking account of Mallfour Property (Pty) Ltd, being a company controlled by the first respondent. During or about March 2001, and as a repayment of the amount received from Ms De Flamingh, the first respondent caused a sum of US $61 000 to be transferred from a banking account in the name of Dainfern Ltd held at Standard Chartered Bank in Jersey, USA and which fell under the first respondent's control, to an account which had been opened in the names of Ms De Flamingh at HSBC Bank in Guernsey outside South Africa. No exemption or permission had been granted by the Treasury

in respect of this transaction. This constituted *prima facie* a contravention of the provisions of Exchange Control Regulation 3(1)(c) and/or Regulation 6(2) and/or Regulation 10(1)(c).

[25] During November 2000 the first respondent drew two cheques of R100 000 and R350 000 on the South African banking account of Mallfour Property (Pty) Ltd in favour of J Samowitz. Samowitz subsequently repaid the money to the credit of the banking account of Dainfern Ltd at Standard Chartered Bank in Jersey, which bank account, as indicated above, was under the control of the first respondent. No exemption or permission was sought from and/or granted by the Treasury in terms of the Exchange Control Regulations in respect of this transaction also. This also *prima facie* constituted a contravention of the provisions of Exchange Control Regulation 3(1)(c) and/or Regulation 10(1)(c).

[26] Dainfern Ltd company was registered by or at the instance of the first respondent during 1992 in Jersey. It was controlled by him and he appeared to be the beneficial shareholder. It was, as stated above, at Standard Chartered Bank. No exemption or permission was granted by the Treasury in terms of the Exchange Control Regulations in respect of the formation of the company and the acquisition of the shares in the foreign company or in respect of the opening and conduct of the banking account. The first respondent received funds into and made payments from this account. This also constituted a contravention of Exchange Control Regulation 6(2) and/or Regulation 7(1).

[27] During 1999 a sum of £60 000 was paid to the credit of the banking account of Dainfern Ltd at Standard Chartered Bank in Jersey, which account was under the control of the first respondent. No exemption or permission would have been granted by the Treasury in terms of the Exchange Control Regulations in respect of the receipt of this amount. This also was a contravention of Exchange Control Regulation 6(2) and/or Regulation 10(1)(c) and/or Regulation 22.

[28] Because of the abovementioned as well as other information in the hands of the designated functionaries of the Minister of Finance in the Exchange Control Department of the appellant the conclusion was reached that the first respondent had contravened and/or was contravening the Exchange Control Regulations.

[29] On 4 January 2005 the designated functionary issued a written order to First National Bank in terms of Exchange Control Regulation 22A and/or Regulation 22C in terms of which the bank was prohibited to withdraw or cause to be withdrawn any money standing to the credit of the following banking accounts held at the Fourways Mall branch of First National Bank –

29.1 Account No. 9753 in the name of Magnus Heystek International (Pty) Ltd;

29.2 Account No. 3938 in the name of Mallfour Property (Pty) Ltd; and

29.3 Account No. 3460 in the name of the first respondent.

[30] This order appears on page 190 of the record of proceedings. This order was issued in reliance of or pursuant to the powers granted them from or through the provisions of Exchange Control Regulation 22A(1)(b) and Regulation 22C(2)(a).

[31] The money standing to the credit of the above accounts was not attached in terms of Regulation 22A(1)(a) or Regulation 22C(1) as understood by the first respondent.

[32] On 4 January 2005 the Manager of the Exchange Control Department of First National Bank confirmed in writing that the abovementioned three accounts had been "*blocked*", meaning, funds in them could not be withdrawn.

[33] On 5 January 2005 the first respondent telephoned the Exchange Control Department enquiring about why the accounts were blocked. An arrangement was made that he meets the designated functionary, Delport, at the appellant's offices in Pretoria on 6 January 2005. On 6 January 2005 this meeting took place attended by Delport, the first respondent and one A Malherbe ("*Malherbe*") of the appellant's Exchange Control Department in the Sterling Boardroom at the South African Reserve Bank in Pretoria. It lasted from 11h00 to 12h08 and Malherbe kept contemporaneous notes of the discussions. Delport also took down notes. The contemporaneous notes

appear at pages 203 to 217 of the record and a typed version thereof is annexed to the papers as Annexure "PJD 3".

[34] At this meeting the first respondent's request that the money standing to the credit of the account of Magnus Heystek International (Pty) Ltd would be transferred to the applicant's personal account number 54860053460 which is the third account that was blocked and that the restriction placed on the withdrawal of funds from the company account, Magnus Heystek International (Pty) Ltd would be lifted so that the first respondent could continue to use that company account for business purposes. It was further agreed that the order prohibiting the withdrawal of funds (blocking) from the first respondent's personal account and from the account of Mallfour Property (Pty) Ltd would remain in force.

[35] After this meeting and on the afternoon of the same day, i.e. 6 January 2005, Delport sent an e-mail to Jennifer Page at First National Bank in which he informed her that the amount of R47 554,29 standing to the credit of the account of Magnus Heystek International (Pty) Ltd should be transferred to the applicant's personal account, further that the order prohibiting the withdrawal of funds from the account of Magnus Heystek International (Pty) Ltd was lifted, and that the order prohibiting the withdrawal of funds from the first respondent's personal account as well as from the account of Mallfour Property (Pty) Ltd was to remain in force.

[36] On 14 January 2005 the first respondent, on the letterhead of Magnus Heystek International (Pty) Ltd, sent a letter to Blackbeard (of the Registrar of Banks). Because the contents of the letter referred to exchange control matters, particularly the meeting on 6 January 2005 between the first respondent, Delport and Malherbe, it was referred to Delport for attention and further action. That letter is at pages 234 to 240 of the record.

[37] On 24 January 2005 Delport received a letter from the first respondent on a letterhead of Magnus Heystek International (Pty) Ltd (pages 241 to 243 of record). In paragraph 7 of this letter the first respondent requests that the amount of about R234 000 standing to the credit of his personal banking account at First National Bank be transferred to a Money Market account which he held at the bank, that the Money Market account be blocked and that the order issued by Delport blocking his personal account be lifted.

[38] Before Delport could take a decision over the above request, attorney Mark Korten of the firm of attorneys Daniel Erasmus Incorporated sent a letter by e-mail to one Alexander Ellis ("*Ellis*"), an assistant general manager in the Exchange Control Department. This letter was referred to Delport for further attention. The latter arranged a meeting with the first respondent at the appellant's Pretoria office for 9 February 2005.

[39] This meeting (on 9 February 2005) was attended by Delport, Malherbe, M M Korten and the first respondent. Malherbe kept contemporaneous notes of the discussions at the meeting. They are at pages 218 to 230 of the

record. The typed transcript thereof is annexed to the papers herein as Annexure "PJD 4". Delport's notes of the same meeting are at pages 231 to 233 of the record and the typed transcript thereof is annexed to the papers herein as Annexure "PJD 5".

[40] At this meeting and in accordance with the request made by the first respondent, it was agreed between Delport, the first respondent and his attorney that the money standing to the credit of the first respondent's personal account and the account of Mallfour Property (Pty) Ltd in respect of which a blocking order was issued on 4 January 2005, would be transferred to the credit of the first respondent's Money Market account at First National Bank with (account) number 62035316084, that Delport cause to be issued or issue an order prohibiting the withdrawal of the funds standing to the credit of that (Money Market) account in terms of the provisions of Exchange Control Regulation 22A and/or Regulation 22C, and that the order previously issued by Delport on 5 January 2005 in respect of the first respondent's personal account and the account of Mallfour Property (Pty) Ltd would be uplifted.

[41] Pursuant to this agreement reached at the meeting of 9 February 2005 Delport sent an e-mail to Jennifer Page at First National Bank on the self-same 9 February 2005 which stated that with effect from 10 February 2005 the blocking orders previously issued in respect of the applicant's personal account number 54860053460 and the account of Mallfour Property (Pty) Ltd number 62002673938 be unlifted and instructed that the credit balance on both accounts must first be transferred to the first respondent's Money Market

account with number 62035316084, and that the Money Market account by "*blocked*" in terms of Exchange Control Regulation 22A and/or 22C. Accordingly, on 9 February 2005, Delport issued an order to First National Bank in terms of which the bank was prohibited from withdrawing or allowing to be withdrawn or causing to be withdrawn any money standing to the credit of the first respondent's Money Market account number 62035316084.

[42] Jennifer Page of First National Bank confirmed to Delport by e-mail on 11 February 2005 that effect had been given to the instruction dated 9 February 2005 that the first respondent's Money Market account in which there was a credit of R184 822,76 had been "*blocked*" in terms of Exchange Regulation 22A and/or 22C.

[43] On a conspectus of all the information at the disposal of the Exchange Control Department as supplemented by the information obtained through the meetings held with the first respondent on 6 January 2005 and 9 February 2005 Delport wrote a letter to the first respondent during October 2005. On 2 August 2006 Delport received a letter dated 27 July 2006 from one C R van Staden from the firm of attorneys Routledge Modise Moss Morris purportedly writing on behalf of the first respondent, wherein they requested a meeting with him to finalise, settle, regularise or resolve the outstanding issues involving the first respondent. The said Van Staden had incidentally, previously been employed as a Deputy General Manager in the Exchange Control Department. Following upon this request a meeting was arranged and held on 16 August 2006 between Messrs C T Grove and Ellis of the

Exchange Control Department, appellant's attorney, Dr D H Botha and Mr Van Staden.

[44] Following up on this meeting Delport wrote a letter to Van Staden on 17 August 2006 in which he confirmed that the meeting of 16 August 2006 resolved that the Exchange Control Department would await the outcome of the first respondent's application for amnesty relating to the foreign exchange transactions involving the first respondent and Ms De Flamingh, and that once the outcome of the amnesty application(s) was known, a due process would be followed. Delport explained that by the due process he meant that the applicant would be given the opportunity to make further representations before any decision adverse to him would be taken.

[45] According to Delport he was subsequently told verbally that the applicant's amnesty application was unsuccessful.

CLOSER SCRUTINY OF ACCOUNTS IN ISSUE

[46] The manner in which the grounds of review were formulated, the overall picture given by the founding -, answering and replying affidavits, the correspondence exchanged between the parties in connection with this matter, the face-to-face meetings the parties had as well as the thrusts of argument in court from both sides necessitate in my considered view and finding, that the specific accounts in issue here be paid closer scrutiny or

attention as this exercise in my further view will go a long way towards ameliorating and simplifying the decision to be arrived at herein.

THE DAINFERN ACCOUNT

[47] First respondent registered a company with the name Dainfern in Jersey, USA, during 1992 and opened a bank account there in the names of the company at Standard Chartered Bank. The bank account was at all times under the first respondent's control and he had been the beneficial shareholder of the company at all times.

[48] The first respondent does not contest or deny that the records of the Exchange Control Department do not disclose any application in respect of the establishment of or his interest in the company. Neither did the first respondent's attorneys deal with the above situation which is clearly a contravention of the law(s) and/or rules in the myriad of correspondence it handled between itself and the relevant authorities.

[49] It is not in dispute that the above is a contravention of Regulation 6(2) and/or Regulation 7(1).

[50] It is also common cause that the first respondent deposited or caused to be deposited and/or withdrawn various amounts of money into or from the above account.

[51] The first respondent's defence to the above contravention is that he was under the impression that the moneys in this account was foreign currency which was not obliged to declare to the Treasury (see para 25.1.4 of his founding affidavit). In the same breath, in para 25.2.3 of the same founding affidavit he contradicts himself by stating that he was under the impression that where a South African resident receives money overseas, he has 30 days within which to repatriate the money back to South Africa.

[52] Suffice to state that he did not repatriate the money to South Africa or declare his dealing to the authorities. Consequently, the contravention of Regulation 6(2) in respect of this account is not in dispute.

THE SAMOWITZ TRANSACTION

[53] On 3 November 2000 the first respondent drew two cheques of R100 000 and R350 000 on the Mallfour account in favour of Mr J Samowitz. The explanation given for this transaction by the first respondent to the inspectors questioning him about same was that he had lent the money to Mr Samowitz and that Mr Samowitz had paid the money back by depositing it into the Dainfern Ltd account. His attorneys also confirmed this as well as stating that the loan was repaid into the Dainfern account and that money repatriated to South Africa soon thereafter. However nowhere or at no stage is proof of such repatriation shown.

[54] Accordingly, a contravention of Regulation 10(1)(c) involving R450 000 was proven.

[55] An amount of R126 000 involving the first respondent and the authorities was also in issue. The first respondent's explanation in respect of this amount was accepted. As such the above amount does not form part of the rationale for the decision taken against the first respondent. However, the first respondent did not give any explanation for being in possession of US $2 000 which he paid in cash to Mr Samowitz after he had already emigrated to Australia, which transaction is also a contravention of the Regulations.

THE DE FLAMINGH TRANSACTION

[56] On 29 September 2000 and 31 October 2001 Ms De Flamingh (*"De Flamingh"*) deposited R250 000 and R210 000 respectively into the first respondent's Mallfour account. On 16 November 2000 De Flamingh signed a Fedsure International Service Ltd investment application form presented to her by the first respondent in terms of which she intended to invest a sum of US $61 000 outside South African. On 31 March 2001 the first respondent sent a telefax to Standard Chartered Bank in Jersey instructing them to transfer an amount of US $61 000 from the Dainfern Ltd account to the account which had been opened for De Flamingh at HSBC Bank in Guernsey. In an e-mail dated 6 August 2001 sent by the first respondent, he confirmed to De Flamingh that he had managed to get the sum of US $61 000 to her off-shore account with a great struggle and irregularity, more-so as she was

unable to obtain a tax clearance and permission to take funds out of South Africa.

[57] Up to and until 28 February 2004 when the first respondent advised De Flamingh by e-mail to apply for amnesty in respect of this transaction, the US $61 000 had not yet been repatriated to South Africa. The above cancels or contradicts the first respondent's attorneys that the first respondent had agreed with De Flamingh to repatriate the US $61 000 within 30 days of its receipt into her off-shore account.

[58] The above confirms a contravention of Regulation 10(1)(c) either directly or as an accomplice of De Flamingh in the amount of R460 000, which is the Rand equivalent of US $61 000.

[59] Furthermore, from the documents available to the Exchange Control Department, it appears that De Flamingh paid the sum of R478 000 being the proceeds of an investment she had realised in Old Mutual Global Technology Fund on 8 December 2000, into the bank account of Mallfour. On 27 July 2001 Magnus Heystek International by telefax informed De Flamingh that the sum of R478 000 had not been invested as they were waiting for off-sure asset swaps to become available. The same telefax confirmed that the sum of US $61 000 had been deposited into De Flamingh's off-shore bank account. The sum total of the above facts is that the US $61 000 (R460 000 in S A currency) and the sum of R478 000 also mentioned here are not the same amounts and do not relate to the same transactions.

[60] On 13 September 2001 the amount of R478 000 was at the request of De Flamingh paid from the local bank account of Magnus Heystek International to Investec Bank Ltd.

[61] The source of the amount of US $61 000 held in the Dainfern Ltd account was not disclosed by the first respondent or declared in terms of Regulation 6(2), thereby constituting a transgression.

THE APPLICANT'S BROTHER

[62] The first respondent applied for and was granted permission to borrow a sum of £300 000 from his brother Wynand Gert Heystek. An amount of £60 000 was however, not paid to the first respondent but was paid to the credit of the foreign banking account of Dainfern Ltd. The circumstances of this aspect had not been disclosed and the first respondent did not disclose his interest in Dainfern Ltd or his control of this foreign banking account to the Exchange Control Department.

[63] For purposes of this appeal however, this foreign loan transaction was not relied upon in taking the forfeiture decision taken by Mminele as recommended to him on 4 February 2008.

[64] For completeness sake, Mminele approved the recommendation laid before him by Delport, Ellis and/or other appropriate functionaries on 4 February 2008 and then took the decision that the money standing to the

credit of the first respondent's Money Market account at First National Bank be forfeited to the State. The notice and order of forfeiture was subsequently published in the *Government Gazette* of 6 February 2008 and was sent by post and by facsimile to the first respondent.

[65] It is also so that the money was forfeited to the Revenue Fund under the auspices or control of the Minister of Finance, and not forfeited to the appellant.

ISSUE OF DISPUTE OF FACTS

[66] The parties herein are agreed that several disputes of fact arose as this matter was set out in the affidavits in the court *a quo*. However, they differ on which approach to follow in dealing with the disputes of fact.

[67] The appellant is of the view that in line with *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634, the disputes should be dealt with by this Court applying the facts as stated by the respondent together with those facts in the appellant's affidavits which were not admitted or not denied.

See also: *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd* 1982 (1) SA 398 (A) at 430-431.

[68] It is the appellant's case that the court *a quo* failed to properly apply the above established principle in certain material respects and chose rather to rely upon the first respondent's (applicants in the court *a quo*) allegations and submissions made on behalf of his behalf rather than upon allegations made under oath on behalf of the appellants (first respondent in the court *a quo*).

OVERVIEW OF GROUNDS OF REVIEW

[69] In *Union Finance Holdings Ltd v I S Mirk Office Machines (Pty) Ltd and Another* 2001 (4) SA 842 (W) the court emphasised the principle laid down or reiterated in numerous other earlier decisions, that an applicant must set out its cause of action as well as evidence upon which it relies upon in its founding affidavit.

[70] The grounds of review raised in the first respondent's founding affidavit and the supplementary founding affidavit, excluding the constitutional grounds in the court *a quo* which have been abandoned, were the following:

> "*20.2.1* *... the forfeiture decision falls to be reviewed and set aside in terms of sec. 6(2)(d) alternatively s. 6(2)(e)(iii), alternatively s. 6(2)(f), alternatively s. 6(2)(h) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') because in taking the forfeiture decision, ostensibly to punish me inter alia for alleged contraventions of the Regulations in respect of a transaction involving Ms De Flamingh, the first respondent failed to have regard to the fact that it had granted me amnesty ... in respect of that transaction before it unlawfully purported to reverse the decision.*

20.2.2 *The failure took place more than 36 months after the funds were frozen by the first respondent, purportedly in terms of Regulation 22A.*

20.2.3 *That the decision-maker AD Mminele had failed to furnish reasons for his decision."*

[71] In *Trinity Broadcasting (Ciskey) v ICA of SA* 2004 (3) SA 346 (SCA), Howie P dealt with the standard of reviewing administrative actions. At paras [19], [20] and [21] thereof he put it as follows:

> *"[19] Before dealing with the review grounds in issue, it is appropriate to refer to the standard of review of administrative action which must be applied in deciding this appeal. Section 33(1) of the Constitution (the Constitution of the Republic of South Africa Act, 108 of 1996) affords everyone the right to administrative action that is lawful, reasonable and procedurally fair. Section 33(3) demands the enactment of national legislation to give effect, inter alia, to that right. Such legislation exists in the shape of the Promotion of Administrative Justice Act 3 of 2000. Section 6(2) confers the power to review administrative action judicially if ...* [the court then sets out the provisions of sections 6(2)(f) and (h) ...]
>
> *[20] In requiring reasonable administrative action, the Constitution does not, in my view, intend that such action must, in review proceedings, be tested against the reasonableness of the merits of the action in the same way as in an appeal. In other words, it is not required that the action must be substantively reasonable, in that sense, in order to withstand review. Apart from that being too high a threshold, it would mean that all administrative action would be liable to correction on review if objectively assessed as substantively unreasonable: cf Bel Porto School Governing Body and Others v Premier, Western Cape, and Another 2002 (3) SA 265 (CC) at para [46]. As made clear in Bel Porto at para [89], the review threshold is rationality. Again, the test is an objective one, it being immaterial if the functionary acted in the belief, in good faith, that the action was rational. Rationality is, as has been shown above, one of the criteria now laid down in s 6(2)(f)(ii) of the Promotion of Administrative Justice Act. Reasonableness can, of course, be a relevant factor, but only where the question is whether the action is so unreasonable that no reasonable person would have resorted to it.*
>
> *[21] ..."*

[72] The rationality test is set out in section 6(2)(f)(ii) of PAJA, as follows:

> "*6(2) A court or tribunal has the power to judicially review an administrative action if –*
>
> *(f) the action itself -*
>
> *(ii) is not rationally connected to –*
>
> *(aa) the purpose for which it was taken;*
>
> *(bb) the purpose of the empowering provision;*
>
> *(cc) the information before the administrator; or*
>
> *(dd) the reasons given for it by the administrator.*"

[73] It is this rationality test with which we are concerned in our present case. In the application of that test, the reviewing court will ask : Is there a rational objective basis justifying the connection made by the administrative decision-maker between the material made available and the conclusion arrived at?

ALLEGED FAILURE TO TAKE RELEVANT FACTS INTO ACCOUNT

[74] After correctly stating the principle that a decision-taker must be fully apprised of the relevant facts and the possible alternative decisions that can be made at the moment of decision, the court *a quo* went on to find that the relevant facts relating to several of the transactions germane to the decision he was to take leading to and including the forfeiture decision, were not placed before the decision-maker, in this case, Mr A D Mminele ("*Mminele*").

[75] In the appellant's answering affidavit deposed to by Delport, the relevant facts relating to the transactions entered into by the first respondent and which amounted, according to him, to contraventions of the Exchange Control Regulations, were set out in detail in paragraphs 27 to 30. Each of these four paragraphs commences with the following words:

> *"The following facts appeared from the documents available to the Exchange Control Department, and which are included in the Record, and were taken into account in preparing the memorandum as appears from pages 260 to 265 of the Record 'the memorandum', and by Mr AD Mminele in taking the decision on 4 February 2008 to declare the money forfeit to the State."*

[76] My understanding of the above scenario is that Delport clearly alleged in the answering affidavit deposed on behalf of the appellant herein, that Mminele had taken the facts set out in those paragraphs into account when taking his forfeiture decision on 4 February 2008. Mminele deposed to a confirmatory affidavit in which he confirmed that he had read the affidavit deposed to by Delport and confirmed the allegations and facts made therein insofar as Delport referred to him.

[77] The first respondent did not, in his replying affidavit, deny that the facts as set out in paragraphs 27 to 30 of the answering affidavit had been taken into account by Mminele.

[78] The court *a quo* found in paragraph 7.3.7 of its judgment that there is a contradiction between the allegations made by Delport and Mminele. To arrive at this decision the court *a quo* selectively quoted from and relied upon only a part of paragraph 2.2 of Mminele's affidavit. It is my considered view and finding that the court *a quo* ought to have had regard to the entirety of paragraphs 27.1, 28.1, 29.1 and 30.1 of the answering affidavit, as confirmed by Mminele in paragraph 2.2 of his confirmatory affidavit. It is my further view and finding that the court *a quo* erred in concluding that the only facts which were disclosed to and known to Mminele and taken into account by him were those set out in the summary prepared by Delport and Ellis and the annexures thereto.

[79] Accordingly, it is my finding that the court *a quo* erred in its finding made in paragraph 8.3 of the judgment that Mminele in his confirmatory affidavit was only prepared to state that he considered the memorandum and the annexures thereto and only confirmed the denials made by Delport, thereby failing to have regard to the allegations made by Delport in paragraphs 27.1, 28.1, 29.1 and 30.1 of the answering affidavit, which in my considered view, were expressly and unequivocally confirmed by Mminele in paragraph 2.1 of his affidavit.

[80] It is my further finding that the court *a quo* erred in its finding in paragraph 7.3.2 of the judgment that the facts relating to the Samowitz translation were not brought to Mminele's attention, thereby not having been taken into account by him when took his decision to declare the money forfeit

to the State. It is my finding that the facts in this case point to uncontested allegations existing in paragraph 27.1 of the answering affidavit, as confirmed by paragraph 2.1 of Mminele's affidavit, that Mminele did take into account all the allegations about this account as set out in paragraphs 27 to 30 of the answering affidavit as also reiterated in the memorandum. On the Samowitz account alone, Mminele's forfeiture decision would have been justified.

[81] For the sake of completeness and clarity, Mminele's confirmatory affidavit reads as follows, especially paragraphs 2 and 3 thereof –

> "2.1 *I have read the applicant's founding and supplementary affidavits and the first respondent's answering affidavit deposed to by Petrus Jacobus Delport. I confirm the allegations made by Delport insofar as he has referred to me and to this affidavit and confirm the correctness of the denials made by him on behalf of the first respondent.*
>
> 2.3 *I specifically confirm that when I took the decision on 4 February 2008 as is reflected in the Notice published in the Government Gazette and annexed as annexure 'F' to the application, I had regard to and considered the content of the memorandum and annexures thereto as appears from page 260 of the record.*
>
> 3.
>
> *I deny that any valid grounds exist for reviewing and setting aside my decision that the amount of R194 113-66 standing to the credit of the applicant in Money Market account number 62035316084 be forfeited to the State. I accordingly request that the application for the relief relating to that decision be dismissed with costs.*"

[82] In paragraph 7.3.4 of the judgment the court *a quo* found that Mminele took into account and relied upon an Exchange Control Ruling in relation to the foreign loan the first respondent had obtained from his brother Wynand

Gert Heystek. From what I have already stated above and what is contained in paragraphs 27 to 30 of the answering affidavit the court *a quo* ought to have found that this (foreign loan transaction between brother and brother) was not taken into account against the first respondent when the forfeiture decision was arrived at and taken.

[83] In paragraph 7.3.7 of the judgment the court *a quo* held that Delport had put up an untruth or a fact unbeknown to the first respondent before the decision-maker in regard to the application for amnesty which had been made by the first respondent. The facts in this matter are that Delport had been informed that the first respondent's application for amnesty had been refused. It is apparent that the appellant was not aware of the content of the letter from the Amnesty Unit dated 30 March 2006 before he could see it attached to t his application as an annexure.

[84] The abovementioned regardless, Delport had informed the first respondent at a meeting on 6 January 2005, in response to a contention by the first respondent that he had received amnesty, that the Amnesty Unit was precluded by section 10 of the amnesty law from granting amnesty in this instance because he (first respondent) was already under investigation by the Exchange Control Department at the time.

[85] It is so that the first respondent had received the letter from the Amnesty Unit during 2006. However, in his representations made on 3 December 2007 did not refer to this document but merely stated that it was in respect of the De Flamingh transaction –

> "... *in respect of which* [he] *applied for amnesty which was granted, but then withdrawn for reasons which are as yet not clear.*"

[86] The inescapable conclusion that can and should be reached is that if the grant of amnesty was subsequently withdrawn, then the logical conclusion is that that amnesty had in the end result been refused. Furthermore, amnesty in these circumstances would have been in respect of criminal prosecution.

[87] It is the first respondent's case that he, in his capacity as facilitator in respect of a transaction involving De Flamingh, applied for amnesty, that this application for amnesty was approved in October 2004, but was subsequently withdrawn in March 2006. The first respondent further contended that the Amnesty Unit, after having granted amnesty to him, was *functus officio* and could not validly reverse its previous decision. By this he submitted and contended that the amnesty granted to him in respect of the De Flamingh transaction was valid and effective unless and until reviewed and set aside, and further that the appellant was not entitled to take into account the De Flamingh transaction in deciding upon the forfeiture of the funds in the blocked account.

[88] Ostensibly or apparently, the motivation for the above view by the first respondent was his contention that the Amnesty Unit which granted him amnesty and later withdrew it, was a unit of the appellant.

See: Para 9 of first respondent's supplementary affidavit at page 153 of the record.

[89] The correct facts is that the Amnesty Unit is an independent body established in terms of section 22(1) of the Exchange Control Amnesty and Amendment of Taxation Laws, 2003 (Act 12 of 2003) as amended ("*Amnesty Act*"). As an autonomous body, the Amnesty Unit would have had a direct and substantial interest in the question whether the amnesty purportedly granted to the first respondent in October 2004 was valid and effective. This shines the spotlight on the question whether or not the court *a quo* was entitled to adjudicate that issue in the absence of the Amnesty Unit as a party to the proceedings. This makes me arrive at a conclusion that the application in the court *a quo* should have been adjudicated on the basis that no valid amnesty existed. That is also so *stricti iuris*. As held in *Jacquesson v Minister of Finance* 2006 (3) SA 334 (SCA) Exchange Control Regulations do not contemplate a criminal conviction or criminal prosecution as a pre-requisite to precede forfeiture. Amnesty is aimed at indemnification from criminal prosecution only.

[90] The Exchange Control Amnesty and Amendment of Taxation Laws 12 of 2003 ("*the Amnesty Act*") provides in section 8 thereof that a facilitator who

applies for amnesty must apply jointly with the instance or person he is facilitating for – in this case, De Flamingh – on a prescribed form submitted by that facilitator. In the De Flamingh case the first respondent (Heystek) applied for the amnesty as a facilitator on behalf of De Flamingh but did not do so jointly with De Flamingh. Worse still, this was not done on the prescribed form submitted by or on behalf of De Flamingh.

[91] Section 9(4) of the Amnesty Act empowers the Amnesty Unit to grant approval in respect of a facilitator –

> "... *to the extent that a facilitator ... complies with section 8.*"

[92] The first respondent did not comply with section 8 of the Amnesty Act. Consequently the appellant's contention and submission that the Amnesty Unit therefore correspondingly lacked the power or jurisdiction to deal with and/or approve the amnesty application cannot and was not gainsaid.

[93] The statutory prescripts herein are peremptory. Section 10 of the Amnesty Act deals with certain specified circumstances where an Amnesty Unit may not grant approval. Specifically, section 10(3) thereof stipulates that the Amnesty Unit shall grant approval in terms of section 9 in respect of a facilitator –

> "... *only where that facilitator submits the application jointly with the amnesty seeker as contemplated in section 8(a).*"

[94] It is one of the reasons why I find that the Amnesty Unit was precluded as a matter of law or *stricti iuris*, and also lacked the authority, to approve the first respondent's application for amnesty, albeit in that representative capacity.

[95] The first respondent had placed reliance on the decision in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) where in paragraph [31] the court qualified the general statement made in paragraph [26]. Paragraph [26] is one of those the first respondent is relying on. The court found as follows –

> "*Thus the proper enquiry in each case – at least at first – is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of the consequent acts. If the validity of the consequent acts is dependent on no more than the factual existence of the initial act then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court.*"
>
> "*But just as some consequences might be dependent for validity upon the mere factual existence of the contested administrative act so there might be consequences that will depend for their legal force upon the substantial validity of the act in question.*"

[96] At paragraphs [36] and [38] the court went further and held as follows –

> "*[36] It is important to bear in mind (and in this regard we respectfully differ from the court a quo) that in those cases in which the validity of an administrative act may be challenged collaterally a court has no discretion to allow or disallow the raising of that defence : the right to challenge the validity of an administrative act collaterally arises because of the validity of the administrative act constitutes the essential prerequisite for the legal force of the action that follows and*

ex hypothesis the subject may not then be precluded from challenging its validity."

"[38] It will be apparent from that analysis that the substantive validity or invalidity of an administrative act will seldom have relevance in isolation of the consequences that it is said to have produced – the validity of the administrative act might be relevant in relation to some consequences, or even in relation to some persons, and not in relation to others – and for that reason it will generally be inappropriate for a court to pronounce by way of declaration upon the validity or invalidity of such an act in isolation of particular consequences that are said to have been produced."

[97] It is true no proceedings have been brought to review and set aside either the grant of the amnesty or the subsequent declaration by the Amnesty Unit that the purported grant of amnesty was unlawful. Nevertheless, it is my considered view and finding that the appellant herein was entitled to rely upon the substantive invalidity of the grant of amnesty to the first respondent. More-so, as held in *Jacquesson v Minister of Finance* 2006 (3) SA 334 (SCA) the grant of amnesty is wholly irrelevant to moneys that were attached (account blocked) and forfeited to the State. While it might be desirable for a criminal conviction to precede a forfeiture, a valid forfeiture is not dependent upon a criminal conviction.

[98] There are pre-set procedures in the Amnesty Act on how a declined application may be dealt with. Furthermore, it cannot be disputed that proceedings before the Amnesty Unit established in terms of the Amnesty Act are *quasi-judicial* in nature. Section 21 of the Amnesty Act provides that a person aggrieved by a decision of an Amnesty Unit may lodge an objection whereupon and/or whereafter the matter must then be referred to a panel for

purposes of reconsidering the application. Anybody still dissatisfied with the decision of the panel may the appeal against it to the Income Tax Appeal Court.

[99] It is a well-established principle that want of jurisdiction in judicial or *quasi judicial* proceedings has the effect of nullity without the necessity of a formal order setting the proceedings aside.

See: *Vidavsky v Body Corporate of Sunhill Villas* 2005 (5) SA 200 (SCA) at [13] and [14].

[100] My assessment of the amnesty issue in the light of the above authority and the circumstances prevailing in this matter is that the Amnesty Unit did not, in March 2006, withdraw the amnesty it previously purportedly granted to the first respondent, but had upon reflection come to realise that the amnesty purportedly granted to the first respondent was invalid *ipso iure* and *ab initio*, consequently having been of no force or effect. It is my further view that the Amnesty Unit may not have found or deemed it necessary to apply to a court of law to review and set aside its own invalid and ineffective or unenforceable grant of approval in respect of the first respondent's amnesty application.

[101] The Amnesty Unit did advise the first respondent of his right to object to its declaration that no valid amnesty had been granted to him. He did not lodge any objection, neither did he appeal to the Income Tax Appeal Court.

[102] The first respondent has also annexed the letter relating to the amnesty issue to his founding affidavit. The same letter was one of the annexures to the memorandum presented to Mminele to take into account or consideration when he made his decision whether to declare the moneys forfeit. Mminele was thus accordingly aware of the first respondent's version that his amnesty was granted and then withdrawn. Therefore, at the time Mminele took the decision to declare the amounts in the first respondent's Money Market account, the attitude of the Amnesty Unit was in front of him – that there was no valid amnesty in place.

[103] Even if it were to be said that the proceedings before the Amnesty Unit were not *quasi*-judicial but merely administrative, on the principles laid down in the *Oudekraal Estate's* matter above, the decision to approve the first respondent's application for amnesty taken in October 2004 would not have had to depend for its validity merely upon the factual existence of an application for amnesty by the first respondent, but upon the substantive validity of that that application. As stated above in the *Oudekraal Estate* case, since the valid approval of the amnesty application was dependent for its validity upon the substantive validity of the application and not merely upon the factual existence of the application, the consequential act (i.e. the approval of the application) was similarly invalid and did not give rise to any enforceable legal consequence.

AUDI ALTERAM PARTEM PRINCIPLE

[104] When arguing its case in the court *a quo* the first respondent contended that there was no proper observance of the *audi alteram partem* principle or rule in that. although he was given an opportunity to make representations to Delport. he was not given that opportunity to make representations to Mminele, the ultimate decision-maker.

[105] In *President of the RSA v South African Rugby Football Union (SARFU)* 2000 (1) SA 1 (CC). the court had to do with a decision by the President of the Republic of South Africa to appoint a commission of enquiry in terms of the Commissions Act 1947 (Act 8 of 1947) as amended. At [38] to [41] the court held that:

> "*[38] It is clear that under our new constitutional order the exercise of all public power. including the exercise of the President's powers under s 84(2). is subject to the provisions of the Constitution, which is the supreme law. If this is not done. the exercise of the power can be reviewed and set aside by the Court. ...*
>
> *[39] The Judge relied on the discussion of 'unlawful abdication of power' in Baxter's Administrative Law. Baxter identifies the following three ways* [through] *which power can unlawfully be abdicated: when an office-bearer unlawfully delegates a power conferred upon him or her; when an office-bearer acts under dictation; and when an office-bearer 'passes the buck'.*
>
> *[40] The third category, 'passing the buck', contemplates a situation in which the functionary may refer the decision to someone else. However. as Baxter points out. if the final decision is taken by the properly empowered authority. there is no objection to taking the advice of other officials.*
>
> *[41] When contemplating the exercise of presidential powers. there can be no doubt that it is appropriate and desirable for the President to consult with and take the advice of Ministers and advisers. ... Similarly.*

> *where the President acts as head of State, it is not inappropriate for him or her to act upon the advice of the Cabinet and advisers. What is important is that the President should take the final decision."*

[106] It is not a legal requirement for the proper application of the *audi alteram partem* principle that the affected person should be afforded the opportunity to make representations directly to the decision-maker. All that is required is that he be afforded an opportunity to make representations directly to the decision-maker should he so wish and the decision-maker would under those circumstances be obliged to take his representations into account. It is my considered view and finding that the first respondent has indeed been afforded opportunities to make representations. The bulgy correspondence as well as the other face-to-face meetings with the decision-maker's lieutenants in my view adequately bears this out.

See also: *Radio Pretoria v Chairman, ICASA and Another* 2003 (5) SA 451 (T) at 464-465.

[107] In *Hofmeyr v Minister of Justice and Another* 1992 (3) SA 108 (C) the court formulated the rule regarding the above as follows at 117F-G:

> *"It is well established that a discretionary power vested in one official must be exercised by that official (or his lawful delegate) and that, although where appropriate he may consult others and obtain their advice, he must exercise it in favour of someone else; he must not, in the words of Baxter Administrative Law (at 443), 'pass the buck' or act under the dictation of another and, if he does, the decision which flows therefrom is unlawful and a nullity."*

[108] The above formulation was confirmed recently in *Minister of Environmental Affairs and Tourism v Scenematic Fourteen* 2005 (6) SA 182 (SCA) at paragraph [20].

[109] Our higher courts have also consistently ruled that if the functionary relies on the advice of another he must at least be aware of the grounds upon which the advice was given. It does not necessarily mean that the functionary would be expected to read every word or every application. He may also not have to rely on the assistance of others. Merely because he was not acquainted with every fact on which the advice was based would not mean that he would have failed properly to exercise his discretion.

[110] Accordingly, it is my finding that the forfeiture decision taken by Mminele was justified on the facts known to Mminele as placed before him by Delport and others, and taken into account by him. The court *a quo's* decision to review and set aside the forfeiture decision on this ground (i.e. failure to take relevant facts into account) sound and is not the appropriate one.

ALLEGED FAILURE TO FURNISH REASONS FOR THE DECISION

[111] Section 5(1) of the Promotion of Administrative Justice Act 3 of 2000 ("*PAJA*") provides that any person whose rights have been materially and adversely affected by an (administrative) action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action, request that the administrator concerned furnish

written reasons for the action. Correspondingly, section 5(2) provides that the administrator to whom the request is made must within 90 days after receiving the request give that person adequate reasons in writing. Section 5(3) provides that if an administrator fails to furnish adequate reasons for an administrative action it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason.

[112] On 25 February 2008 the first respondent's attorney addressed a letter to the Manager of the Exchange Control Department in which he advised that the first respondent reserves the right to take the matter on review. The letter further stated that –

> "*We will shortly be consulting with our client.*
>
> *In the interim we would be grateful to receive reasons for rejecting our client's submissions and representations.*"

[113] The Exchange Control Department responded by letter dated 5 March 2008 stating that they would revert once they had had the opportunity to discuss the contents of the first respondent's attorney's letter with the Executive General Manager responsible for the decision, i.e. Mminele.

[114] It is not clear from the papers when the Exchange Control Department received the first respondent's attorney's letter dated 25 February 2008. However, if it is assumed for purposes of argument that the letter was

received on the same date, i.e. 25 February 2008, then the 90 day period within which those reasons should have been furnished would have expired on or about 27 May 2008.

[115] However, the first respondent launched the review application on 7 May 2008, well before the 90 days had elapsed or expired. To be precise, 21 days before the expiry date of 27 May 2008.

[116] From the first respondent's letter dated 25 February 2008, which is attached to his founding affidavit as Annexure "H", at page 96 of the papers herein it is clear that the first respondent was aware that the decision of forfeiture was taken by the Executive General Manager of the Exchange Control Department of the appellant.

[117] The abovementioned fact makes it difficult for one to understand why in the notice of motion in respect of the review proceedings the appellant, and not the specific administrator who took the decision, was called upon to dispatch such full reasons as he can give for making the above decisions. Rule 53(1)(b) of the Uniform Rules of Court stipulates that the notice of motion must call upon the functionary to dispatch the record of the proceedings sought to be corrected or set aside –

> "... *together with such reasons as he is by law required or desires to give or make* ..."

In this instance, the first respondent chose to call upon the appellant, which did not take the decision, to furnish only such reasons as he can give (my underlining).

[118] The appellant contends that it furnished full and comprehensive reasons in its answering affidavit.

[119] I have initially perused all the papers filed of record herein, including the answering affidavit and the confirmatory affidavits of the various divisions or departments involved in this matter, which includes that of Mminele. I am satisfied that the reasons for the decision taken by Mminele to declare forfeit the moneys standing to the credit of the first respondent in the Money Market account were fully and adequately set out in the appellant's answering affidavit and other annexures annexed thereto.

[120] In *Commissioner, South African Police Service v Maimela* 2003 (5) SA 480 (T) the court on appeal dealt with a decision given before PAJA came into operation, as well as with the provisions of the Constitution, that every person has a right to be furnished with reasons in writing for an administrative action. The court specifically held that the reasons for the various decisions in that specific case were set out in the answering affidavit in a clear, intelligible and informative manner, that what the appellants stated in the answering affidavit constituted their reasons for the decisions, and that the appellants were bound by the reasons given in the answering affidavit.

[121] At page 485J to 486 the court put it as follows –

> "*The adequacy of reasons will depend on a variety of factors, such as the factual context of the administrative action, the nature and complexity of the action, the nature of the proceedings leading up to the action and the nature of the functionary taking the action. Depending on the circumstances, reasons need not always be full written reasons: the briefest pro forma reasons may suffice.*
>
> *Whether brief or lengthy, reasons must, if they are read in their factual context, be intelligible, and informative. They must be informative in the sense that they convey why the decision-taker thinks (or collectively think) that the administrative action is justified.*"

[122] At page 487G and further the court continued as follows –

> "*Section 33 of the Constitution (as it read until 30 November 2000) was not explicit as to whether an administrative decision-maker was obliged to furnish reasons in the absence of a request (see s 5 of PAJA however). When interpreting s 33(c), it must be borne in mind that the right to be furnished with reasons is very wide: it applies to every person whose rights or interests are affected by any administrative action. In many instances the persons affected may not be interested in the reasons. The practical interpretation of s 33(c) is that reasons must be furnished to affected persons who assert the right to be furnished with reasons. The purpose of s 33(c) is not to oblige administrative decision-makers to furnish, without a request, reasons for every single administrative action taken in this country ...*
>
> *A person entitled to reasons can, as the respondents did in this case, request reasons by means of serving a Court application on the relevant decision-maker. Such a procedure carries the risk of an adverse costs order if the reasons are furnished within a reasonable time after service of the application. What a reasonable time is will depend on the facts of each case. It was not argued for the respondents that the reasons furnished in the answering affidavits were not furnished within a reasonable time. There is no basis for holding that the reasons in this case were not furnished within a reasonable time.*"

[123] Similarly, as in the above case, in our present case, time of furnishing of reasons never arose as an issue. The appellants also did not make a serious issue of the fact that the review proceedings were launched with 21 days still to run before the period allowed for them to furnish reasons for Mminele's decision could expire.

WHETHER DECISION REVIEWABLE IF DECISION-MAKER ERRED IN ANY RESPECT IN FACT OR IN LAW

[124] It is the appellant's contention that the first respondent's argument in the court *a quo*, that if the first respondent is able to demonstrate that Mminele erred in any respect whatsoever in fact or in law in the taking of the decision, then the decision falls to be reviewed and set aside as a matter of course, is untenable. The first respondent's counsel's heads of argument records this aspect as follows at paragraphs 2.6 and 2.7 of their Practice Notice –

> "2.6 *The appellant has to overcome each ground of review to succeed.*
>
> 2.7 *If any one ground of review is upheld on appeal then the appellant does not succeed.*"

[125] It is my considered view and finding that the first respondent have set the bar too high. The correct approach in my view is that this Court should consider all the relevant facts which were placed before Mminele and those facts which he took into account in reaching his decision, which set out in the

answering affidavit and the confirmatory affidavits, and then consider, having regard to any errors or omissions he may have made, whether the first respondent has succeeded in establishing that he was not justified in coming to the decision he did.

[126] In *Minister of Law and Order v Dempsey* 1988 (3) SA 19 (AD), the learned judge held as follows at 35C-F –

> "*There is one observation which I wish to make arising from the description of the grounds for review in the Northwest Township case. It relates to what Colman J referred to as 'a failure to direct his thoughts to the relevant data', and it is this: unless a functionary is enjoined by the relevant statute itself to take certain matters into account, or to exclude them from consideration, it is primarily his task to decide what is relevant and what is not, and, also, to determine the weight to be attached to each relevant factor. (Johannesburg City Council v The Administrator, Transvaal, and Mayofis 1971 (1) SA 87 (A) at 99A.) In order not to substitute its own view for that of the functionary, a Court is, accordingly, not entitled to interfere with the latter's decision merely because a factor which the Court considers relevant was not taken into account, or because insufficient or undue weight was, according to the Court's objective assessment, accorded to a relevant factor. A functionary's decision cannot be impeached on such a ground unless the Court is satisfied, in all the circumstances of the case, that he did not properly apply his mind to the matter.*"

[127] The gist of the above quotation is in my view, of equal application to our present appeal.

[128] In assessing the merits of the first respondent's review of the decision, the first respondent relied upon as grounds those that are set out in paragraph 44 of the founding affidavit and in the supplementary founding affidavit at paragraphs 6 to 9. It is in their context that the reasons furnished by Mminele

should be considered. The question of the proportionality of the amount forfeited in relation to the amounts involved in the contraventions is adequately addressed in the answering affidavit.

[129] Paragraph 44 of the founding affidavit reads as follows –

> "*44. I have been advised and respectfully submit the forfeiture decision falls to be set aside on one or more of the following grounds:*
>
> *44.1 The forfeiture decision was unlawful because I had not contravened any provisions of the Regulations. Accordingly, the jurisdictional pre-requisite for the exercise of any power of forfeiture under Regulation 22B was absent.*
>
> *44.2 The forfeiture decision was, in any event, ultra vires Regulation 22B because*
>
> *44.2.1 the fund which I held in the FNB account were wholly unrelated to any of the alleged Exchange Control Regulation contraventions of which the first respondent alleges I am guilty, and*
>
> *44.2.2 the forfeiture took place more than 36 months after the funds were frozen ... purportedly in terms of Regulation 22A.*
>
> *44.3 The forfeiture decision falls to be reviewed and set aside in terms of s. 6(2)(d) alternatively, s. 6(2)(e)(iii), alternatively, s 6(2)(f), alternatively s. 6(2)(h) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') because in taking the forfeiture decision ostensibly to punish me inter alia for alleged contraventions of the Regulations in respect of a transaction involving Ms M T de Flamingh, the first respondent failed to have regard to the fact that it had granted me amnesty in terms of the Exchange Control Amnesty and Amendment of Taxation Laws Act 12 of 2003 ('Amnesty Act') in respect of that transaction before it unlawfully purported to reverse the decision.*

44.4 For reasons which are set out in the constitutional challenge to the Regulations, the particular regulations relied upon by the first respondent as the source of my alleged exchange control contraventions, namely Regulations 3(1)(c), 6(2), 7(1) and 10(1)(c), are unconstitutional and invalid. Accordingly, there was no lawful basis for an order against me in terms of Regulation 22B and the forfeiture decision was ultra vires.

44.5 For the reasons which are set out in the constitutional challenge to the Regulations, Regulation 22B is, itself, unconstitutional and invalid. So the forfeiture decision purporting to have been taken in terms of Regulation 22B was ultra vires.

Alternatively, if Regulation 22B is not itself unconstitutional and invalid, having regard to what I have set out above, the forfeiture decision amounts to a disproportional and arbitrary deprivation of my property and was accordingly inconsistent with section 25(1) of the Constitution, ultra vires Regulation 22B and invalid.

In the course of my personal and business activities, I have occasion to travel outside the country and would like to be able to draw on my funds to do so without unconstitutional control or interference from the first respondent."

[130] An allegation was made by the appellant, which was not gainsaid or contradicted convincingly, that in oral argument in the court *a quo* on behalf of the first respondent, Mminele and the appellant were criticised for not having dealt with issues raised in argument but which were not raised in the founding affidavit. That, in my view, is odd.

[131] In *Minister of Law and Order v Dempsey (supra)* at 37H-J the court stated the following –

> *"It cannot be expected of a respondent to deal effectively in an opposing affidavit with unsubstantiated averments of mala fides and the like without the I specific facts on which they are based being stated. So much the more can it not be expected of a respondent to deal effectively with a founding affidavit in which no averment is made, save a general one that a detention is unlawful. And if Trengove JA is correct, this is indeed what a respondent will be obliged to do. Unlike other statutory functionaries, he will in effect be obliged to disclose the reasons for his decision and be compelled to cover the whole field of every conceivable ground for review, in the knowledge that, should he fail to do so, a finding that the onus has not been discharged may ensue. Such a state of affairs is quite untenable."*

[132] In the peculiar circumstances of this case, when all is considered, it is my considered view and finding that the court *a quo* erred in finding that Mminele had failed to furnish reasons for his forfeiture decision. I reiterate that such reasons are contained or form part of the answering affidavit. The appellant cannot be penalised for not issuing or executing a stand-alone document purporting to be containing reasons for Mminele's decision because the first respondent prevented it from doing so by launching the review application 21 days before the expiry of the allowable 90 day period to do so. Furthermore, the presumption of having made or taken a decision without good reason cannot be invoked among others for the above reasons.

[133] The court *a quo* correctly found that the presumption that no good reason existed could properly be rebutted if reasons were furnished in the answering affidavit. Consequently its conclusion at the end of the day that no reasons were contained in the answering affidavit does not rhyme with the facts and reality in this case. It is my finding, as I have already found elsewhere in this judgment that what had been stated by Delport, in the

answering affidavit, especially paragraphs 27 to 30 thereof and which was confirmed by Mminele in fact constitute the reasons for the latter's decision.

[134] If and when those allegations are taken into account, the reasons for the forfeiture decision become clear or obvious. It is my considered view that the conclusions arrived at by the court *a quo* were based on fallacious factual bases, arguments as well as misinterpretation of the Exchange Control Regulations. What the first respondent believed did not amount to contravention of the regulations were in my view and finding actually proven to be so by the appellant.

FORFEITURE DECISION MADE OUT OF TIME

[135] In paragraph 9.1 of its judgment located at pages 943 to 944 thereof, the court *a quo* found as follows –

> "*9.1 The applicant also relied on Section 9(2)(g) of the Act that the first respondent was obliged to return the relevant amount to the applicant within 36 months unless the amount was forfeited before that date* (sic). *The forfeiture took place more than 36 months after the funds were frozen by the first respondent. The applicant contends that the attachment or blocking order was made on or prior to 4 January 2005 and the forfeiture was made on 8 February 2008 ...*"

[136] The court *a quo* misconstrued the prescripts applicable here. Attachment of goods or moneys are governed by Regulation 22A of the Exchange Control Regulations. This regulation was never applicable to this

case. Regulation 22C deals with the issuing of a blocking order in respect of an account. On a proper interpretation of Regulation 22C(3)(b) read with Regulation 22A(3), unless the money standing to the credit of or in an account that was blocked is declared forfeit within a period of 36 months after the issuing of the blocking order, that blocking order should be uplifted or cancelled or withdrawn and I believe, can *ipso iure* be recorded as having been uplifted.

[137] It is clear that the court *a quo* regarded 4 January 2005 as the date of the blocking order on or to the account in issue here, which is the Money Market account. From its reasoning my understanding of the court *a quo's* judgment on this aspect is that it concluded that the blocking order issued on 4 January 2005 in respect of the Magnus Heystek International Account No. 62109939753, the Mallfour Property (Pty) Ltd account number 62002673938 and the first respondent's personal bank account number 54860053460 other than the bank account identified in paragraph 1 of the notice of motion, namely Money Market account number 62035316084, was an order which blocked the money in those accounts, and that the very same money that was blocked on 4 January 2005 was then transferred to the Money Market account but remained blocked under the original blocking order of 4 January 2005 as amended by further blocking order that was made on 9 February 2005 in respect of the Money Market account.

[138] By virtue of the principles enunciated by the "*Plascon-Evans*" rule and on a proper interpretation of the Regulations as well as the facts set out in the appellant's answering affidavit, which the first respondent is bound to accept in accordance with the "*Plascon-Evans*" rule, the blocking order related to the Money Market account was only made on 9 February 2005. I have set out the entire chronology of events relating to the blocking of accounts herein in paragraphs 28 to 41 of this judgment and will thus not repeat same. The 36 months period attendant or in relation to the Money Market account ought to have expired on 9 February 2008. The forfeiture order in respect of this account was made on 8 February 2008 which is prior to the expiry of the 36 months as set by the regulations.

[139] There appears to have been a difference of opinion or misunderstanding of the terms "*blocking*" and "*freezing*" of funds or accounts. The first respondent consistently contended that his bank accounts had been frozen. This comes out clearly, as an example, from paragraph 34 of his founding affidavit which reads as follows:

> "*34. On Monday, 3 January 2005 after returning from holiday I tried to use my credit cards. They were all declined. I then established that all my money accounts in South Africa had been frozen. There were approximately nine of them. A cheque account, a savings account, two credit card accounts and three or four company bank accounts.*"

[140] When one looks critically at the appellant's answering affidavit as read in conjunction with the first respondent's replying affidavit, one cannot help it but have a feeling that the first respondent did not set out an entirely truthful and complete version of events in his founding affidavit. For example, he did not refer therein to the agreement reached on 7 February 2005 that the money standing to his credit in his personal and Mallfour Property (Pty) Ltd accounts, in respect of which a blocking order had been issued on 4 January 2005, would be transferred to the credit of his Money Market account, that an order would be issued prohibiting the withdrawal of or blocking the Money Market account and that the order previously issued in respect of his [first respondent] personal account and the Mallfour account would be uplifted. The blocking order in respect of the Money Market account was issued for the first time on 9 February 2005.

[141] The order which was issued by Delport on 9 February 2005 was not an order attaching or blocking any specific money but was an order that the Money Market account be "*blocked*" irrespective of the amount thereof or therein that was a credit in that account. At the time of the blocking of the Money Market account, the credit balance therein was R184 822,76. In the notice of motion the credit in this account is given as R194 113,66, the increase being ascribed to interest that was added between the date of blocking and the date of forfeiture.

[142] It is thus clear that there was no blocking of any specific amount of money. The account(s) was [were] blocked. The forfeiture order was made in terms of Regulation 22C and not 22A as contended by the first respondent. The effect of such an order was that there was a prohibition against the withdrawal of any or all of the money standing to the credit of the account, irrespective of what the amount might be.

[143] In the court *a quo* the first respondent played "*shifty foot work*" when he somersaulted from the allegations in his founding affidavit or what could be understood about what was contained therein, when in the oral arguments it was submitted on his behalf that in fact it was money which was blocked and not the account. I cannot disagree with the appellant's submission and contention that this was an opportunistic submission that was made in an attempt to weave out of nothing an argument that the blocking order in respect of the money was made on 4 January 2005 and thus had to be cancelled on 4 January 2008 if a forfeiture order had not been made in between.

[144] In *S J Coetzee Inc and Others v Louw N.O. and Others* 2002 (5) SA 602 (T) at [15] and [16], the court accepted that the common law position is that when a customer of a bank deposits money in the bank, a relationship of debtor and creditor comes into being between the bank and the account holder.

[145] In *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd* 1995 (4) SA 510 (CPD) it was held among others that the relationship between a banker and a customer is a contractual one and the reciprocal rights and duties included in the contract are to a great extend based upon custom and usage.

[146] At 531J of this case the court held as follows:

> *"In a current account where the account reflects a credit balance, the customer is the creditor and the bank his debtor. The customer does not own the cash in the bank. What flows from this is that whenever the bank is required by its customer to pay money to that customer or, on his instruction, to a third party, the bank pays out with its own money and not with the money of the customer. The bank then recovers the money paid out by debiting the customer's account. For the sake of completeness, it should be noted that, although the money deposited in the bank ceases to be the customer's money, he nevertheless has a 'special property or interest' in the money reflected in his bank account."*

See also: *Absa Bank Beperk v Jansen van Rensburg* 2002 (3) SA 701 (HHA) at 709A-B.

S v Graham 1975 (3) SA 569 (AD) at 577C-F.

[147] That is the reason why in the *S J Coetzee Inc v Louw N.O.* case (*supra*) it was said that in other words the bank simply borrows the money so deposited and becomes the owner thereof.

[148] I therefore find that on a proper interpretation of the Regulations, an order issued in terms of Regulation 22C(2)(a) is an order which relates to an account and not the specific money in that account. This is in contrast with an

attachment order made in terms of Regulation 22A(1)(a) or 22C(1) which constitutes an attachment of specific amounts of money. Regulation 22A(3) which is also applicable *mutatis mutandis* to money attached or a blocking order made in terms of Regulation 22C provides separately for the return of money attached and the cancellation of a blocking order relating to an account. The issue of the validity of Regulation 22C(1) as read with section 9(2)(g) of the Currency and Exchanges Act 9 of 1933 also came up for decision in *South African Reserve Bank v Khumalo* 2010 (5) SA 449 (SCA). The court *a quo* therein ruled them invalid because they failed to incorporate specific time limits on the duration of attachment as set out in the Act. On appeal, the SCA held that had it been the legislature's intention to have spelled out in the regulations what was a relatively complicated formulation of the different time periods that pertain to the duration of attachments in s. 9(2)(g) of the Act, it would have done so. It further held that it appeared that the legislature had intended only to prescribe a limit to the duration of an attachment and not also the content of the regulations. Regulation 22C(1) had to be read in the light of the purpose of section 9(2) of the Act, including the limit to the duration of attachment of goods and money. The court ruled that the court *a quo* had erred in finding that Regulation 22C(1) was invalid.

[149] In the light of the above it is my considered view and finding that the issue of the forfeiture order issued by Mminele on 8 February was not *ultra vires* and/or invalid. It is my further finding that this forfeiture was not made out of time in relation to the 36 month period set out in the prescripts.

LACK OF FOUNDATION FOR AND ERRORS IN THE ORDERS GRANTED

[150] The appellant contends that the court *a quo* granted an order that was not sought in the notice of motion without any amendment of the latter having been sought and granted. The first respondent on the other hand contends that the decision-maker, Mminele, was an employee and official of the South African Reserve Bank (the appellant) and made the decision in issue herein in his capacity as such, albeit under delegated authority. The first respondent however concedes that –

> "... 15.3 *While it may perhaps have been more correct to have referred to 'the decision of Mr Mminele, the Executive General Manager responsible for the Exchange Control Department of the first respondent, acting as a designated functionary of the second respondent'*".

he still contends that the description used by the court *a quo* is clear and innocuous enough.

[151] The review and setting aside order sought in paragraph 1 of the notice of motion was directed at a decision allegedly or purportedly made by the appellant.

[152] After the appellant had delivered the record as well as its answering affidavit, it ought to have been clear or rather was clear to the first respondent that the forfeiture decision which was being assailed was a decision taken by Mminele, not by the appellant, and that in taking that decision, Mminele had acted, not as a representative of the appellant, but as a designated and

authorised functionary of the Minister of Finance. The proper approach in such circumstances in my view should have been to amend the prayers in the notice of motion so that they reflect the correct position.

[153] Furthermore, from the record and the answering affidavit it was clear that the money forfeited was not going to the appellant, but to the National or Consolidated Revenue Fund which is under the control or auspices of the Minister of Finance.

[154] The order granted by the court *a quo* was for an order reviewing and setting aside the decision of Mr Mminele representing the first respondent.

[155] It is common cause that Mminele never took the decision as a representative of the appellant (first respondent in the court *a quo*). The relief claimed should have been against Mminele. The problem is he was not cited as a party in this application. Although the Minister of Finance was cited as a party herein, i.e. as the second respondent, no specific relief was sought from it. As correctly conceded by the first respondent, the papers would have been in order if Mminele was cited in his capacity as a designated and authorised functionary of the Minister of Finance under whom the Treasury resorts.

[156] It is my considered view and finding that the court *a quo* erred in granting this order under these circumstances where it is common cause that the appellant was not at the time and had never been in possession of the amount declared forfeit and where it was common cause that the amount

after the publication of the forfeiture notice was or was to be disposed of by being deposited to or in the National or Consolidated Revenue Fund which is within the Treasury, which in turn is under the control of the Minister of Finance.

[157] Correspondingly, the order by the court *a quo's* order that the appellant pay back to the first respondent the amount forfeited in the sum of R194 113.66 with interest thereon at the rate of 15.5% from the date of forfeiture, i.e. 8 February 2008 is also invalid. As decided among others in the *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* case (*supra*), a forfeiture decision, until set aside, remains valid. Furthermore, as a matter of law, *mora* interest can only be claimed from the date on which the decision to forfeit the funds is set aside, which would be the date of judgment. The setting aside of the forfeiture decision in this case was not and could not have been retrospective to 8 February 2008.

COSTS

[158] The court *a quo* ordered the appellant to pay the costs of the application, including the costs of three counsel. From a perusal of the affidavits and the annexures thereto, it is clear that a large portion of the papers in this application was devoted to the constitutional challenge which the first respondent only abandoned at the commencement of the hearing herein or in any event, after heads of argument had already been served and filed.

[159] The court *a quo* granted a cost order against the first respondent in favour of the second respondent (Minister of Finance) whose interest only lay in the constitutional challenge to the Exchange Control Regulation irrespective of the outcome of the application. The first respondent is now also submitting that that court should have ordered the first respondent to pay the appellant's costs thereat relating to the constitutional issues.

[160] When one looks at the rationale for the court *a quo's* cost order in favour of the second respondent, one would be hard-pressed to disagree with the appellant's submission.

[161] What complicates the issue further is the fact that, whereas the engagement of three counsel may have been warranted in relation to the substantial, complex and far-reaching constitutional issues raised in the application, one would have expected that after the constitutional challenge was abandoned, there would have been no justification for the employment of three counsel.

[162] It is so that during argument counsel for the first respondent intimated that they would not be averse to the order in the court *a quo* granting costs of three counsel in favour of the first respondent being amended to read "... *including the costs of two counsel* ...".

[163] It is a fact that as at the time heads of argument were settled in respect of this matter, three counsel would still have been justified, more-so that the appellant submitted that it had reserved and retained a third and separate counsel to come and argue the constitutional challenge. This aspect needs to be taken into account when a ruling is made at the end.

CONCLUSION

[164] The court *a quo's* decision to review, set aside the decision made or taken by Mminele to declare forfeit to the *fiscus* the amount of R194 113,66 standing to the credit of the first respondent's Money Market Bank account number 62035316084 was based on the trial judge therein having been persuaded that, among others, -

- The decision-maker, Mminele, was not apprised or sufficiently apprised of all the relevant facts before he took the decision;

- The decision Mminele took to declare the money forfeit to the State was taken outside the time parameters of the Exchange Control Regulations;

- When taking that decision Mminele failed or neglected to furnish reasons – be they sufficient or acceptable in the circumstances – for his decision; and

- The funds declared forfeit were not derived from or during contravention(s) of the Exchange Control Regulations.

[165] The other grounds upon which the court *a quo* based its decision were that he was first granted amnesty for the De Flamingh contravention, which amnesty was later withdrawn for unacceptable or unlawful reasons or grounds; that should the first respondent's application for review not be granted, it would amount to serious injustice and undue harshness for him, which aspects are some of the safeguards embedded in and protectable under our Constitution, as well as the fact that no *nexus* existed between the money forfeited and the other grounds.

[166] It is my considered view and finding that the appellant has adequately and convincingly demonstrate or proved to this Court of appeal; that the first respondent did contravene various Exchange Control Regulations in his dealings with or in several of his internal and off-shore bank accounts.

[167] The appellant has also convinced this Court that when the decision-maker (Mminele) took the decision he was fully apprised of the facts that were germane to the taking of such a decision; that decision was taken well within the 36-month deadline within which it was supposed to be taken, failing which the account in issue would have had to be unblocked; and that Mminele's reasons for taking the decision were adequately set out in the appellant's answering affidavit as further elucidated in his confirmatory affidavit.

[168] The appellant has also in my view and finding proved that the account in issue in the forfeiture order – the Money Market account of the first respondent – was only blocked in terms of Regulation 22C on 9 February 2005, thereby rendering the forfeiture order dated 8 February 2008 well within the 36-month time limit permitted by the regulations.

[169] The appellant has also successfully demonstrated that the forfeiture order in issue here was restricted to the blocking of the account itself irrespective of the amounts that may have been therein as these two aspects are, as shown above, governed by different provisions of the regulations.

[170] The appellant has in my further view, also proved that the order of the court *a quo* deviated from what was sought in the notice of motion and that that occurred without any application to amend the prayers sought being made and granted by the court *a quo*. The appellant was also ordered in the court *a quo's* judgment to return the forfeited moneys to the first respondent despite a well known fact or a fact that ought to have been well known to the first respondent that the funds were forfeited to and paid into the Consolidated or National Revenue Fund which is in the Treasury under the Minister of Finance, who, although cited by the first respondent as the second respondent, was never asked to do anything.

[171] In the circumstances, it is my further considered view and finding that the appellant should succeed with its appeal against the whole of the judgment and order granted or issued by the court *a quo* in its favour and against the appellant on 12 January 2010.

[172] Where criminal sanctions are envisaged for a contravention of the Act or Regulations, *mens rea* is a pre-requisite. However ordinary contravention of the Regulations or any failure to comply with any provisions of Regulation 22 does not require *mens rea*. As held in *Oilwell (Pty) Ltd v Protec International Ltd and Others* 2011 (4) SA 394 (SCA) –

> *"It is therefore unlikely that any of the relevant parties had mens rea and, consequently, committed any crime, because the criminalisation of contraventions of, or failures to comply with, any provision of the Regulations in reg 22 requires mens rea, as was held by Rumpff CJ in S v De Blom 1977 (3) SA 513 (A) ... However, this does not mean that a contravention of the Regulations requires mens rea; it means only that in its absence the relevant parties may not be punished 'criminally'."*

ORDER

[173] The following order is made:

173.1 The appeal is upheld;

173.2 The order issued or granted by Potterill AJ in the court *a quo* on 12 January 2010 is hereby set aside and substituted with the following order –

173.2.1 *"The application is dismissed with costs, such costs to include the costs of three (3) counsel."*

N. F KGOMO
JUDGE OF THE NORTH AND SOUTH GAUTENG
HIGH COURT, PRETORIA

I agree:

G. WEBSTER
JUDGE OF THE NORTH AND SOUTH GAUTENG
HIGH COURT, PRETORIA

I agree:

A.M.L PHATUDI
JUDGE OF THE NORTH AND SOUTH GAUTENG
HIGH COURT, PRETORIA

COUNSEL FOR THE APPELLANT ASSISTED BY	ADV N G D MARITZ SC ADV K W LÜDERITZ SC
COUNSEL FOR THE FIRST RESPONDENT ASSISTED BY	ADV ANDRE GAUTCHI SC ADV N KONSTANTINIDES SC ADV D LUNDSTRÖM
DATE OF ARGUMENT	13 JUNE 2012
DATE OF JUDGMENT	JULY 2012