IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~.
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~.
(3) REVISED.

CASE NO: 65286/2014

2/10/2014
DATE SIGNATURE

2/10/2014

In the matter between:

THE SOUTH AFRICAN RESERVE BANK Applicant

and

ACE CURRENCY EXCHANGE (PTY) LTD 1st Respondent

2nd to 71st RESPONDENTS as listed on Annexure "A" hereto 2nd to 71st Respondents

72nd to 79th RESPONDENTS as listed on Annexure "B" hereto 72nd to 79th Respondents

MARAIS ATTORNEYS N.O. 80th Respondent

JUDGMENT

Jordaan J:

INTRODUCTION

1 The Applicant, the South African Reserve Bank, ("the SARB") seeks an order in an urgent application extending the blocking period of an account at the Corporation of Public Deposits ("the CPD"), which account has been blocked by the SARB in terms of the Exchange Control Regulations ("the Regulations") under the circumstances set out below.

The Minister of Finance ("Treasury" by definition in terms of the Exchange Control Regulations) delegated certain functions and/or powers conferred upon the "Treasury" in terms of the Regulations, to certain officers and/or functionaries of the SARB (Regulation 22E), such as the deponent to the SARB's affidavit, a manager in the Financial Surveillance Department

2 An extension is sought in terms of the provisions of the Currency and Exchanges Act, 9 of 1933 ("the Act") until 31 December 2016 or such appropriate period as this Court seems fit.

3 This application, being brought on an urgent basis called for a judgement on an urgent basis. In order to produce a judgement as soon as possible I made liberal use of the heads of argument of all counsel concerned. All counsel also provided their heads in electronic form which was of great assistance to me.

RELEVANT COMMON CAUSE FACTS

4 The relevant common cause facts, (according to the applicant), include the following: (Where the Respondents differ with some of these facts will appear below from this judgement.)

4.1 ACE CURRENCY EXCHANGE PROPRIETARY LIIMITED (ACE), (the 1st Respondent) is an authorised dealer with limited authority to process travel-related foreign exchange transactions.

4.2 During the period 29 July 2011 to 11 October 2011 the Applicant issued "blocking orders" in respect of various banking accounts of ACE, totalling an amount of approximately R194 million ("the initial blocking orders").

4.3 The initial blocking orders were issued based on reasonable grounds op suspicion that the Regulations had been contravened by ACE.

4.4 In compliance with Court Orders (granted October/November 2011) giving effect to an arrangement between ACE and the SARB, the funds were transferred to the CPD account.

4.5 The arrangement was made to allow ACE to continue with its normal trading activities.

4.6 The first funds were transferred on 21 October 2011.

4.7 The initial blocking orders were uplifted by the the Applicant in compliance with the Court Orders.

4.8 The status of the funds transferred to the CPD account is *"blocked"*. The funds in the CPD account became subject to a separate (or *"fresh"*) blocking order. (It is *inter alia* in dispute is whether it was granted in terms of Regulation 22A or 22C).

4.9 The money was to be held and dealt with by the SARB in terms of the Regulations, subject to such rights as ACE and any other interested party might have in law to the money. (In terms of the Court Order dated 29 November 2011.)

Only the 72nd, 75th and 80th Respondents oppose this application. In Part 1 of this judgement I deal with the submissions made on behalf of the Applicant, in Part 2 I deal with the submissions on behalf of the 72nd and 75th Respondents who are Claimants claiming an interest in the blocked money, in Part 3 I deal with the submissions of the Claimants represented by the 80th Respondent (who are not individually cited as Respondents) and in Part 4 I deal with the reply on behalf of the Applicant, incorporating my findings.

PART 1. The submissions made on behalf of the Applicant.

THE COURT'S POWER TO GRANT EXTENSION

5 It was argued that a central issue to decide in this application is whether or not this Court is competent to grant an extension of the blocking period.

6 In terms of Section 9(2)(g) read with Section 9(2)(b)(i) of the Act read with Regulation 22A(3) and 22C(3), the period of blocking shall be a period not exceeding 36 months or such longer period as may be determined by a competent Court in relation to the money or goods concerned on good cause shown by the Treasury (i.e the SARB, the Applicant.)

7 It was pointed out on behalf of the Applicant by Mr Maritz that Regulation 22A makes provision for the attachment and blocking of *"tainted"* money, whereas Regulation 22C provides for the attachment and blocking of *"clean money"*. Regulation 22A(1)(a) and Regulation 22C(1) makes provision for the attachment of money or goods, whereas the blocking of accounts is provided for in Regulation 22A(1)(b) and Regulation 22C(2).

8 The effect of a blocking order is that any person is prohibited to withdraw or cause to be withdrawn any money which has been deposited in *"any account"*.

9 The date of commencement of the blocking period operative in respect of the CPD account is in dispute:

9.1 The Applicant claims that the blocking period commenced on 21 October 2011 and will lapse on 20 October 2014.

9.2 The Respondents contend that the commencement of the blocking period of the funds in the CPD account is determined with reference to the commencement of the blocking orders initially granted from which the funds in the CPD account emanated. Without attaching substantiating evidence, the Claimants alleged that they deposited money into two banking accounts of ACE, which accounts became subject to blocking orders on 29 July 2011 and 2 September 2011, respectively. The blocking of the funds (*"or money"*) lapsed on 28 July 2014, alternatively 2 September 2014.

10 The Claimants (Respondents) contend that an extension is incompetent in the present matter by virtue of the fact that the blocking of the *"money"* (to which they are allegedly entitled) lapsed by operation of law.

11 It was submitted on behalf of the Applicant that the fatal flaw that the Respondents make is that they fail to appreciate that the blocking order operates in respect of a specific *"account"*, and not to the *"money"* deposited in the account.

12 On behalf of the Applicant Mr Maritz referred to ***The South African Reserve Bank v Heystek & Others*** an unreported case 2012 JDR 2351 (GNP). A Full Bench of the North Gauteng High Court was

confronted with (so it was submitted) a similar set of facts and a similar issue had to be determined. The SARB issued blocked orders in respect of several accounts of the person suspected of having contravened the Regulations in terms of Regulation 22C on 4 January 2005. Subsequent to a request from that person, the SARB agreed to an arrangement in terms whereof funds in one of the blocked accounts (the trading account) were transferred to an investment account, whereafter the initial blocking order in respect of the trading account was uplifted and the new investment account became subject to a blocking order made on 9 February 2005. The arrangement was made to afford the person the opportunity to utilise his trading account and to continue with his trading activities.

13 The Court held as follows:

"I therefore find that on a proper interpretation of the regulations, an order issued in terms of regulation 22C(2)(a) [i.e. a blocking order] 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." [Counsel's emphasis] See par 148 of the judgement.

14 Thus, the blocking period in respect of the investment account commenced on 9 February 2005, and not on 5 January 2005. In the premises, the Court concluded that the 36-month period attendant or in relation to the investment account ought to have expired on 8 February 2008, and not on 4 January 2008. See par 149 of the judgement.

15 It was argued that the *ratio* in ***Heystek***, albeit granted in respect of a blocking order in terms of Regulation 22C (clean money), should *mutatis mutandis* be applicable to a blocking order issued in terms of Regulation 22A(1)(b) (tainted money). From what appears below I agree with this submission.

16 The Applicant contends that the blocking orders were issued in terms of Regulation 22A and/or 22C, whilst the Respondents contend that the blocking orders were issued in terms of Regulation 22A (tainted money) and not in terms of Regulation 22C (clean money).

17 It was argued on behalf of the Applicant that the Respondents misconstrue the Regulations. They confuse the *"attachment of money"* and the *"blocking of an account"*. This is illustrated by virtue thereof that the Respondents refer to the *"blocking order"* operative in respect of the CPD account on the one hand, but on the other hand contends that the transfer of the monies to the CPD account constituted an attachment of money made in terms of Regulation 22A (1) (a) (i).

18 It was argued thus, the contention of the Respondents that, for purposes of Regulations 22A, 22B and 22C, *"the artificial distinction between such 'money' and the account in which such money is held/transferred, contravenes the purpose and provisions of section 9 of the Act, and such distinction is clearly incorrect..."*, is untenable.

19 It was argued apart from the fact that the construction pleaded for by the Respondents is inconsistent with the authorities, such a

construction would also lead to absurdities as it would allow for the lapsing of the *"blocking status"* of the funds in the CPD account in a piecemeal fashion.

20 Mr Maritz argued on a proper construction of the Act and the principles enunciated in ***Heystek***, the period of blocking in respect of the CPD account commenced on the date that the CPD account became so blocked in respect of the funds transferred from ACE's previously blocked accounts, namely 21 October 2011.

21 Mr Maritz argued that the respondents are clearly confused between the legal concepts of **attachment of money** on the one hand, and **the issue of a blocking order in respect of an account**, in terms of the Exchange Control Regulations.

22 As appears from paragraphs 12 to 14 of the founding affidavit blocking orders were issued in respect of the 1st respondents' accounts at various banks, which blocking orders were in terms of an order of Court granted on 27 October 2011, uplifted.

23 He further argued that the blocking orders which had been issued were blocking orders issued in terms of both regulation 22A(1)(b) and 22C(2)(a) of the Exchange Control Regulations. No attachment was made in terms of Regulation 22A(1)(a) or Regulation 22C(1) of money standing to the credit of any of the 1st respondent's bank accounts.

24 The blocking orders were issued in terms of regulation 22A(1)(b) in respect of the 1st respondent's accounts for the reason that "tainted money" had been deposited into such accounts, being money in respect of which a contravention of the regulations had been committed or in respect of which an act or omission had been committed which Malherbe on reasonable grounds suspected to constitute a contravention of the regulations.

25 It was argued the blocking orders were also issued in terms of Regulation 22C(2)(a) on the basis that the 1st Respondent was on reasonable grounds believed to have committed Exchange Control contraventions prior to 29 July 2011, and part of the funds standing to the credit of the 1st respondent's accounts may conceivably have been "clean money", being money not involved in a contravention, but which the applicant may in due course be entitled to forfeit in terms of regulation 22C read with 22B

26 Regulation 22A, as appears from its heading, deals with "**Attachment of certain money and goods, and blocking of certain accounts**". Regulation 22A provides for the attachment of money or goods. Regulation 22A(1)(a) provides for the attachment of money. Regulation 22A(1)(b), however, does not deal with the attachment of money or the blocking of money but authorises the issue of an order "by which any person is prohibited to withdraw or cause to be withdrawn ... any money in that account ... or to appropriate in any manner any credit or balance in that account, notwithstanding who

may be the holder thereof." Such an order is generally known in banking circles as "a blocking order". As a consequence of the order made in respect of the account, no person may withdraw, cause to be withdrawn, or appropriate in any manner any amount standing to the credit of the account, regardless of the amount and regardless of who may be the holder of the account.

27 Regulation 22C provides for both the attachment of "clean money" (money not involved or suspected to be involved in a contravention of the Regulations) and for the issuing of blocking orders in respect of accounts in which there is "clean money". Regulation 22C(1) provides for the attachment of money or goods. Regulation 22C(2)(a), however, provides for the issuing of a blocking order in respect of an account. It is significant and we emphasise that the wording of Regulation 22A(1)(b) is in all material terms identical to the wording of Regulation 22C(2)(a). Accordingly, whether a blocking order is issued in terms of Regulation 22A(1)(b) or in terms of Regulation 22C(2)(a) its effect is the same: the blocking order relates to the account itself, and no person may withdraw or cause to be withdrawn any money held in the account or appropriate in any manner any credit or balance in that account.

28 Regulation 22A(3)(a) of the Exchange Control Regulations provides that if money has been attached (which is not applicable in this case) that money, unless it is declared forfeit to the state, must be returned "to the person in whose possession it has been found or the person

entitled thereto" on a date not later than 3 years after the date on which the money has been attached (which did not happen in this case). The respondents, on the basis that they incorrectly contend that the money standing to the credit of the 1st respondent's accounts was attached, contend that as the blocking orders have allegedly lapsed, the money must be paid to the respondents in terms of regulation 22A(3)(a) on the grounds that they are allegedly the owners of attached money.

29 I was further pointed out that Regulation 22A(3)(b) provides that in the case of the issue of a blocking order under Regulation 22A(1)(b) the blocking order must be cancelled no later than 3 years after the date on which it was issued, unless the money standing to the credit of the account is forfeited before that date. Significantly, there is no provision that in the event of the cancellation or lapsing of a blocking order the money must be paid over *"to the person in whose possession it has been found or the person entitled thereto"*. Mr Maritz argued the reason is obvious: the issue of a blocking order does not deprive an account holder of possession of, or its contractual claim against the bank in respect of, the money standing to the credit of the account, and when the blocking order is cancelled, uplifted or lapses the account holder can then proceed to deal with the money standing to the credit of the account in terms of the contract between the bank and the account holder.

30 The blocking orders issued by Malherbe (who had the authority to do so on behalf of the Applicant) in respect of various bank accounts of the 1st Respondent was uplifted only after the amount standing to the credit of those accounts had been transferred to an account opened at the Corporation for Public Deposits.(CPD) When the blocking orders were uplifted after 27 October 2011 the 1st Respondents could then proceed to conduct business on the banking accounts, but could not disburse, appropriate or deal with the amount of approximately R194 million involved, as that amount had, by agreement with the 1st Respondent, been transferred to an account at the CPD, and which account is under the control of the applicant.

31 Mr Maritz emphasised that, even if the Respondents were correct in their contention that all relevant blocking orders have lapsed by effluxion of time, the consequence is not that the 1st Respondent or any of the other Respondents is entitled to payment of any amount which may have been deposited to anyone of the 1st Respondent's banking accounts and which may have been included in the aggregate amount transferred to the account at the CPD. No monies were attached, and therefore Regulation 22A(3)(a) does not apply. The account at the CPD is under the Applicant's control, none of the Respondents is the account holder in respect of that account, and no-one other than the Applicant is entitled to deal with the amounts standing to the credit of that account. It is only if the Respondents who have instituted action, and those respondents who may still decide to institute action, obtain an order against the Applicant for

payment of a specified amount that the applicant would be obliged to pay such amount to that Respondent.

32 It was argued that the averment that the Respondents were unaware of the movement of the funds into the CPD account up and until the launching of this application is simply untrue.

GOOD CAUSE:

33 The Applicant contends that good cause exists for the extension of the blocking period in respect of the CPD account as contemplated in Section 9(2)(g) of the Act. The Respondents contend otherwise.

34 It was pointed out that In general, the minimum requirement for *"good cause"* is that the person relying thereon must furnish an explanation sufficiently full to enable the court to understand how it really came about, and to assess his/her conduct and motives. See ***Silber v Ozen Wholesalers (Pty) Ltd*** 1954 (2) SA 345 (A) at 352H-353A.

The assessment takes cognisance of all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice, which may include prospects of success in the proposed action, the reasons for the delay, the sufficiency of the explanation offered, the *bona fides* of the applicant, and any contribution by any persons or parties to the delay. See ***Madinda v Minister of Safety and Security*** 2008 (4) SA 312 (SCA) para 10, p 316.

35 In context of Section 9(2)(g) of the Act, a matter of considerable importance in assessing *"good cause"* is the prejudice that a person affected by the blocking/attachment would suffer, should the extension be granted as requested by the SARB. That person should not be adversely affected. See ***Torwood Properties (Pty) Ltd v South African Reserve Bank*** 1996 (1) SA 215 (W) at p 231A-B.

Blocking vis-à-vis ACE, non Claimants

36 It was argued that at the outset, it is significant to note that the funds in the CPD account emanate from previously blocked accounts of ACE having been blocked for alleged contravention of the Regulations on the part of ACE. ACE filed a notice in this application stating that it abides by the decision of this Court. Thus, ACE claims no prejudice and does not contend that it would be adversely affected by an extension order.

37 Mr Maritz submitted that the cry-out from the Respondents should be evaluated in context. At best, they seem to have contractual claims against ACE. (This is disputed by the Respondents.) The SARB invited persons claiming to have an interest in the money at the CPD to provide it with information (on a voluntary basis) to assist the Bank in its investigation. It was argued it is common cause that the Applicant, time and again, explained to the persons who expressed an interest (including the Respondents) that the Applicant does not accept that these individuals have any proprietary claims against the

blocked funds. Any purported waiver by ACE cannot occur unilaterally and should be accepted by the appropriate persons (in whose favour any rights were purportedly waived).

Respondents' Arguments Evaluated by the Applicants

38 On behalf of the Applicant it was argued that in essence, the Respondents advance five grounds supporting their contention that the SARB has failed to show good cause for the extension:

39 The SARB failed to establish good cause *vis-à-vis* the Claimants:

It was argued this is irrelevant as the Applicant is not required to show good cause in respect of them on an individual basis. Any reliance on prejudice by them (their *"claims"* on their own version only constituting a minute portion of the value of the funds blocked), cannot be significant within the broader context. Moreover, they fail to explain to the Court how they would be prejudiced by an extension and how such an order would adversely affect their rights. Any reliance on prejudice would be premature, as the Applicant will be obliged to allow them an opportunity for representations concerning any proposed forfeiture. Should they decide to institute actions on the same basis as the 2nd to 79th Respondents, they would also be afforded the opportunity to have their claims ventilated in a court of law.

40 The SARB failed to conclude its inspection within the timeframe of 36 months:

Mr Maritz submitted that the Respondents conveniently fail to point out that they themselves took approximately five months to submit the information to the Applicant. Despite having received a voluminous amount of information by April 2014, not only from the Respondents, but also from the other individuals claiming an interest in the money, the Respondents expect the Applicant to process the information and finalise the investigation and any forfeiture steps in the same 5 month period. This is unrealistic.

41 The SARB is incapable of denying the Claimants' "entitlement" to the money.

Mr Maritz argued that this is the most untenable ground advanced by the Respondents:

41.1 He argued that in the event of the blocking order still being operative, an evaluation of any alleged *"entitlement"* would be premature. This is so because the blocking of the funds can only be set aside by a court of law in review proceedings. See ***Oudekraal Estates (Pty) Ltd v City of Cape Town & Others*** 2004 (6) SA 222 (SCA). Importantly, the decision of the Applicant to issue the CPD blocking order is not subject to any pending review proceedings. He argues that furthermore, the Respondents fail to appreciate that:

- the CPD blocking order was established in respect of money *"in respect of"* which the Regulations had been contravened.

- ignorance of the law is no excuse.

- blaming ACE offers no excuse. They themselves were contravening the Regulations. An example is a letter by Marais Attorneys submitted to the Applicant, in which it is declared that:

"Our clients came to South Africa with the main purpose to earn money to support their families in China".

41.2 It was further argued that even on the assumption that the blocking order has lapsed, the Applicant never acknowledged their claims and recorded that any alleged *"entitlement"* to the funds seems questionable for a number of reasons more fully explained in the Replying Affidavit. He also argues, any attempt to suggest that the Applicant represented to the Respondents that they would be entitled to the release of the funds once they have provided the information requested from them, is untrue, unsubstantiated and inconsistent with the evidence. Significantly, the Respondents neglect to point out to the Court that only two Claimants submitted complete responses to the SARB.

42 <u>The SARB failed to explain the reasons for seeking the extension</u>:

It was submitted that the Applicant explained that the reason for the request for the extension is to allow the action of the 2nd to 79th Respondents to be properly ventilated in a court of law, but

simultaneously preserving the rights of the Treasury in terms of the Regulations. Mr Maritz argued it is therefore not surprising that these Respondents are not opposing this application. (With the exception of the 72nd and 75th Respondents.)

43 There has been no prosecution instituted by the SARB during the past 36-month period.

It was submitted that this is irrelevant as prosecution is no prerequisite for forfeiture.

Other Factors

44 Mr Maritz submitted that a significant factor weighing in the Applicant's favour of establishing *"good cause"* is that the Applicant is at this stage, and because of the abovementioned contraventions, of the view that there are good and substantial reasons for proceeding with forfeiture steps in respect of the money (or at least a substantial part thereof) in the CPD account.

45 Also, the CPD account did not come about as a result of *mala fides* on the part of the Aplicant, but in pursuance of a *bona fide* agreement with ACE (the 1st Respondent) to afford that company the opportunity to carry on with its trading activities, such as in the Heystek case.

THE "COUNTER-APPLICATION"

46 The Answering Affidavit contains prayers for declaratory and certain ancillary relief. Mr Maritz argued this constitutes a disguised counter-application which is incompetent.

47 The parties represented by the 80th Respondent *inter alia* claim that they are *"entitled"* to the release and return of the funds allegedly deposited by them into ACE's banking accounts, without setting out a proper basis in law for such purported "entitlement".

It was submitted that the decision of ***Taylor-Coryell Madagascar Syndicate Ltd v Madagascar Oil Development Co Ltd*** 1910 (WLD) 265. is authority for the proposition that unsubstantiated prayers may be struck out by virtue of an application to strike out in the absence of a proper basis in the pleading.

48 The Applicant applied to strike out prayers 113.1.1 to 113.6.

It was argued should the Respondents wish to claim repayment of the money from the Applicant, they would have to institute actions against it.

PART 2: The submissions made on behalf of the 72nd and 75th Respondents.

On behalf of the 72nd and 75th Respondents it was argued that essentially two issues have to determined. Firstly the issue relating to the lapsing of the blocking orders, and secondly, whether the Applicant has shown good cause for the relief it seeks

THE LAPSING OF BLOCKING ORDERS.

49 The Applicant contends that the CPD account has been subject to a blocking order as from 21 October 2011, and that the 36 month period envisaged by Section 9(2)(g) of the Act will expire on 20 October 2014.

50 The 72nd and 75th Respondents contend that 4 of the 9 blocking orders issued have already lapsed (or were uplifted), and therefore cannot be extended.

51 The first issue therefore relates to whether or not the statutory time period relating to the monies currently held in an account at the CPD can be extended.

52 It was pointed out that in terms of Section 9(2)(b) of the Act, any regulation made by the Governor General may provide for the blocking, attachment and obtaining of interdicts for a period as referred to in Section 9(2)(g) of the Act.

53 In terms of Section 9(2)(g) the period referred to in Section 9(2)(b)(i) shall not exceed 36 months "*or such longer period - ... as may be determined by a competent court in relation to the money or goods concerned on good cause shown by the treasury*". [counsel's underlining]

54 In terms of Regulation 22A (3) (a) the Treasury is obliged to return "*any money or goods attached*" to the person in whose possession the money was found, or the person entitled thereto, on a date not later than the period referred to in Section 9(2)(g), as from the date on which such money or goods have been attached. [counsel's underlining]

55 In terms of Regulation 22A (3) (b) the Treasury is obliged to cancel any blocking orders issued at the end of the three year period.

56 In the Notice of Motion, the Applicant seeks the extension of the 36 month period for "*the order granted in respect of Regulation 22A/22C in respect of an account at the Corporation for Public Deposits ...*"

57 In the Founding Affidavit, the Applicant requests the Court to "*extend the period for which the blocking order will remain operative to 31 December 2016*".

58 The Applicant contends that the blocking order in terms of which it seeks an extension, came into effect when an amount of approximately R194 million was transferred to the account at the CPD.

59 The Applicant states that during the period 27 July 2011 to 11 October 2011 blocking orders were issued in terms of the Exchange Control Regulations, in respect of various accounts held by Ace Currency Exchange at various commercial banks.

60 It was argued that the blocking orders could only have been issued in terms of Regulation 22A.

61 In the Replying Affidavit, the Applicant contends that the blocking orders were issued in respect of both Regulations 22A (1)(b) and 22C (2)(a).

62 It was argued as convoluted as Regulation 22C (2)(a) may be, it still requires reasonable grounds, which, according to the 72nd and 75th Respondents the Applicant has not set out. They argue that the Applicant's interpretation of Regulation 22C (2)(a) is flawed.

63 The Applicant alleges that the amounts held in accounts at the various commercial banks, in respect of which blocking orders had been issued, were transferred to an account at the CPD as from 21 October 2011.

64 The Applicant accordingly calculates the three year period as from 21 October 2011, suggesting that a new blocking order came into effect as from such date.

65 The Applicant states that the account at the CPD "*became subject to a new blocking order issued in terms of regulation 22A/22C ...*".

66 It was argued that no details are provided as to when the blocking order was issued, how the blocking order was issued, or who issued a blocking order. It would be rather strange for the Applicant to issue a

blocking order in respect of an account under its control. Subsequent allegations contained in the Founding Affidavit appear to contradict the suggestion of a new blocking order having been issued.

67 The Applicant alleges that the orders granted, in terms of which monies were transferred to the account at the CPD, came about by way of agreement between the parties to an application "*with the understanding and on the basis that the funds transferred from the various accounts of ACE to the account at the CPD would be subject to a blocking order as contemplated in Regulation 22A/22C* ...".

68 The Applicant also states that the CPD account "*has effectively been subject to a blocking order*" from 21 October 2011.

69 The Applicant also states that in terms of an Order of Court made on 14 October 2011, it was agreed that "*an amount of approximately R194 million be transferred from the blocked accounts to an account at CPD which would then be blocked by the SARB*". It was argued that the draft order referred to, annexure "C" to the Founding Affidavit, does not make any reference to the account at CPD being blocked by the Applicant.

70 The Applicant alleges that the agreement to transfer the amounts held in the 4 commercial banks to an account at CPD was made to assist ACE in overcoming difficulties with the operation of its normal trading activities.

71 The Applicant contends that the status of the monies in the account at the CPD are "*funds in an account which is blocked in terms of Regulations 22A/22C, and which emanate from the previous blocked accounts of ACE, to be held subject to the rights of unidentified individuals by or on whose behalf those funds may have been paid into ACE's banking account.*"

72 The Applicant alleges that the blocking order on the CPD account was created pursuant to the various Court orders referred to in the Founding Affidavit, and such blocking order will cease to be operative on or about 20 October 2014.

73 It was argued it accordingly appears that whilst the Applicant contends that a new blocking order was issued, it simultaneously contends that the new blocking order was created by the various Court Orders granted.

74 It was argued that the Court Orders make no reference to a new blocking order, but merely refer to the monies being transferred to the account at the CPD, and to be dealt with "*in terms of the Exchange Control Regulations*".

75 It was argued no documentary evidence was attached to the Applicant's Founding Affidavit indicating the issuing of any blocking orders in respect of the monies held in the account at CPD. Despite being invited to produce the blocking order in respect of the CPD

account, the Applicant has declined to do so. The only inference that can be drawn is that it does not exist.

76 Despite the clear challenges to the alleged blocking of the CPD account in the Answering Affidavit, in the Replying Affidavit the Applicant does not categorically state that a blocking order was issued in terms of the CPD account. The Applicant rather states that the monies held in the blocked accounts were transferred to the CPD account, where after the blocking orders on the blocked accounts were uplifted.

77 The Applicant then states that the monies that were transferred to the CPD account is under the Applicant's control. It is for that reason that the 72nd and 75th Respondents submitted that it would be strange for the Applicant to issue a blocking order over its own account.

78 The Applicant referred to the Answering Affidavit in the Ma Cheng application, which does not assist the Applicant, but reinforces the argument that no blocking order was issued in respect of the CPD account.

79 The Applicant in fact suggests that the monies held in the CPD account are blocked funds emanating from the previously blocked accounts. It was argued that such contention is in conflict with the Applicant's argument relating to blocking orders being particular to an account, and not the monies held in such account.

80 It was argued if the ordinary evidentiary and onus rules are applied, the Court must find that there is no blocking order to be extended.The period of 36 months, in respect of 4 of the 9 blocking orders that were issued, expired prior to the launching of the Applicant's application.

81 The Applicant suggests that "*the Claimants*" (the respondents) do not understand a blocking order, as it is an account that is blocked, rather than the monies in the account. The true objective of a blocking order is the preservation of monies, and this was achieved by transferring monies from the accounts of ACE to the CPD account. It was argued there is no evidence of a new blocking order being issued.

82 The 4 blocking orders have accordingly either lapsed, or been uplifted, and it is not competent to seek or order the extension of a lapsed or non-existent blocking order.

83 The Applicant contends that the Court has the power to extend the period of blocking in respect of the CPD account in terms of Section 9(2)(g) of the Act, even in the event of the Court finding that the period of blocking has already lapsed. It was argued there is no basis for such contention. Section 9(2)(g) of the Act does not contemplate the extension of a time period after the lapsing of the limited time period of 36 months. Section 9(2)(g) of the Act only envisages a period exceeding 36 months, if so determined by a Court, which in turn, clearly envisages an application for a longer period being sought from the inception of the blocking order.

84 It was argued it is trite that a period that has lapsed, cannot be extended after the lapsing of such period, as the relevant period would have ceased to exist.

85 The Applicant relies primarily on the matter of ***The South African Reserve Bank v Heystek & Others*** in support of its contention that the blocking order commenced afresh as from when the monies were transferred from the 4 commercial banks into the account held at the CPD.

86 In ***Heystek*** the Court held that a forfeiture decision that was made after the period of 36 months in respect of certain blocking orders, was not made out of time, on the basis that the blocking order related to the account to which monies was transferred by agreement, and was therefore only made when the monies were transferred from the accounts initially blocked to the Money Market account.

87 In ***Heystek*** the Court expressly found that a new blocking order was issued by the South African reserve Bank by way of a written instruction.

88 It was argued the ***Heystek*** matter is distinguishable from the present application, as in ***Heystek*** the parties that agreed to the transfer of monies from the blocked accounts to a Money Market account were the interested parties, whilst in this matter, the interested parties were not a party to an agreement to transfer monies from the blocked accounts to the account of the CPD.

89 It was argued ***Heystek*** is further distinguishable, in that in this matter, there is no documentary or other proof of any blocking order being issued against the account of the CPD.

90 It was contended it would in any event make a mockery of the purpose of Section 9(2)(g) of the Act if the 3 year limitation could simply be extended by the transfer of monies from one account to another, at which stage the 3 year period would then commence afresh. It could never have been the intention of the legislature to allow for the extension of such period simply by the transfer of monies from one account to another.

GOOD CAUSE

91 The Applicant contends that the period of 3 years ought to be extended, so as to enable the Applicant to preserve the *status quo* in the interim.

92 The Applicant contends that the extension will not cause any prejudice to the Respondents as the amounts would remain preserved until such times as the actions instituted have been adjudicated. It is argued such contention ignores the fact that if the blocking orders are not extended, the Applicant will be obliged to return the monies transferred to the CPD account to the accounts from which such monies were transferred, or at the very least, cannot exercise any control over such monies.

93 As appears from the Applicant's Founding Affidavit, ACE has indicated that it does not have any right to the monies standing to the credit of the blocked accounts, and stated that the monies did *"not belong to"* Ace Currency Exchange. It was contended that in the circumstances, if the monies were transferred back to the accounts held by ACE with the 4 commercial banks, ACE would be obliged to repay such amounts to the depositors of the amounts. In the circumstances, the Respondents would be deprived of a quick and easy resolution, rather than being forced to pursue costly and lengthy litigation.

94 The Applicant contends that the alternative is that a decision will have to be taken by 20 October 2014, by the Applicant, as to whether or not to declare the monies held in the account at the CPD forfeit to the State. Such conduct will not deprive the Respondents of their entitlement to claim repayment of the amounts forfeited, as they will be entitled to launch an application for the review of the forfeiture decision.

95 It was argued that the Respondents will be prejudiced. They are currently out of pocket, and there is no reason why they should continue to be in such a position while the Applicant drags its feet. The extension sought would simply delay finality, as the Applicant has already indicated that once the actions have been adjudicated in a Court, the Applicant will then make an election as to whether or not to proceed with forfeiture steps against the monies held at the account with the CPD.

96 On the Applicant's own version, it does not require the extension. The Applicant alleges that "*at this stage*" it is of the view that there are good and substantial reasons for proceeding with forfeiture steps in respect of the money, or at least a substantial portion thereof, in the CPD account.

97 In the Applicant's Heads of Argument, it is stated that the Applicant is of the view that there are good and substantial reasons for proceeding with forfeiture steps.

It was submitted that the application ought to be dismissed with costs.

Part 3: The submissions on behalf of the 80th Respondent:

98 On behalf of the 80th Respondent's Claimants it was argued as follows:

99 The Applicant requests an extension of time in terms of section 9(2)(g)(ii) of the Act. The 80th Respondent opposes such request and requests as well additional relief if the court finds against the Applicant. There are three pertinent questions for the court to deal with.

100 The first question is, is the present application by the Applicant brought within the 36 month period in terms of section 9(2)(g) of the Act. If this question is answered in the affirmative, the second question

arises being: has the Applicant shown good cause for the extension of time in terms of section 9(2)(g)(ii) of the period in section 9(2)(g).

101 It was submitted that if the answer to both the first and second questions are in the affirmative, the relief as sought by the Applicant must be granted. If however the answer to the second question is in the negative, the application has to be dismissed as prayed for in prayer 113.1 - 113.1.1 in the 80th Respondent's Answering Affidavit.

102 If the answer to the First Question is in the negative, the application also has to be dismissed as prayed for in prayer 113.1 - 113.1.1, but then a third question arises being: What additional relief is required to give effect to the Regulations and Act, specifically Regulation 22A(3) and 22B(2) (and 22C(3) if applicable), as read in light of section 9(2)(b) and 9(2)(g) of the Act, as relates to the return of money or goods to persons in whose possession it has been found or the person entitled thereto after the expiry of the period in section 9(2)(g).

103 **<u>The Applicant's Application to strike out</u>**

In limine the Applicant brings an application to strike out the additional relief as requested by the 80th Respondent. It was argued on behalf of the 80th Respondent that Uniform Rule 6(15) provides that a court may strike matter out that is scandalous/vexatious/irrelevant, but only if it is satisfied that the Applicant will be prejudiced in his case if it is not granted.

104 Scandalous matter has been defined as allegations that are abusive/defamatory; vexatious matter as allegations that have intention-to-harass/intention-to-annoy; irrelevant matter as allegation that do not apply or contribute to a decision in the matter, as per the commentary in Erasmus and the cases referred to therein.

105 The Applicant does not complain in its Replying Affidavit that such matter is scandalous/vexatious/irrelevant, but merely that paragraph 6 thereof states that such "constituted a disguised counter-application which is incompetent for present purposes". Since Uniform Rule 6(7) makes provision for the bringing of counter-applications as set out in opposing affidavits, this complaint of the Applicant is not valid. In any event, it is clearly not a counter-application, but merely additional relief if the answer to the first question is in the negative, and that it pertains to the third question. The Applicant therefore fails to set out any grounds upon which such matter can be held to be scandalous/vexatious/irrelevant, and such application should be dismissed on that ground alone. In this regard I was referred to ***Securefin Ltd v KNA Insurance and Investment Brokers (Pty) Ltd [2001] 3 All SA 15 (T)*** at ***29-31.***

106 It was submitted the Applicant does not in its Replying Affidavit, or Notice to Strike Out, set out any prejudice that it will suffer if the matter as requested is not struck out. It is clear from the prayers that such pertains to the additional relief under the Third Question and therefore

does not prejudice the Applicant in his case, since the Applicant requires affirmative answers to the First and Second Questions for its application to succeed. In any event, if such application to strike is upheld then the prayer of the 80th Respondent requesting "dismissal" of the application of the Applicant will also be struck out, and such a result is absurd.

107 It was argued the Applicant's counsel raises a point in this regard stating that unsubstantiated prayers may be struck out in the absence of a proper basis for pleading, and mentions a case of ***Taylor-Coryell***. It was argued it is clear that the case is not applicable since the basis for the prayers are indeed mentioned in the answering affidavit.

108 I was requested to dismiss with costs the application by the Applicant to strike out prayers 113.1-113.6.

109 **Good cause**

It was argued the onus to show good cause is on the Applicant. The court has to consider various factors to determine whether good cause has been shown, and such is not limited to a strong case against the 1st Respondent, but also includes the prejudice to the 80th Respondent's Claimants and their ownership, as well as the Applicants awareness to apply for an extension and the failure to do so, and which ever other factors may be relevant. I was in this regard referred to ***TORWOOD PROPERTIES (PTY) LTD v SOUTH AFRICAN RESERVE BANK 1996 (1) SA 215 (W)*** at 227E-G and

230A-E &231A/B-F (confirmed on appeal in ***SOUTH AFRICAN RESERVE BANK v TORWOOD PROPERTIES (PTY) LTD 1997 (2) SA 169 (A).***

110 It was argued it is clear that the money does not belong to the 1st Respondent since the 1st Respondent has abandoned any right to the money. The Banks where the accounts are held have also not claimed any right thereto. A large portion of the money does belong to the 80th Respondent's Claimants since the original deposit slips as held by the 80th Respondent has been shown to the Applicant. The Applicant is furthermore not claiming ownership to these funds.

111 It was pointed out that the Applicant specifically states that it is the 1st Respondent who contravened the Act, and was found in possession of fraudulent documentation, and therefore any prosecution would be that of the 1st Respondent and not of the 80th Respondent's Claimants. It was argued that the Applicant makes broad sweeping statements of contraventions by *"most of these matters "...claimant concerned contravened..."*, but does not specify the 80th Respondent's Claimants to be among those, and the fact of the matter is that the claims of such 80th Respondent's Claimants do not represent the majority of the claims.

112 It was argued that the Applicant, despite clearly being aware of the fact that the prescription period lapsed or the time lapse was close,

and further despite on its own version having the relevant documentation more than 5 months ago, failed to take steps to bring this matter to finality. The 80th Respondent has been in contact with the Applicant, and provided documentation to it, from September 2011 in respect of the funds of the 80th Respondent's Claimants, being more than 3 years ago. The Applicant only brought these proceedings for an extension after being informed by the 80th Respondent that the time period for it to take action, the 36 months, has lapsed. The Applicant has further failed to disclose that it had received the documentation from the 80th Respondent, and that such co-operation has been ongoing for more than 3 years. Such non-disclosure indicates that the Applicant is *mala fide* in the bringing of this application, especially in light of the vague reasons given by the Applicant as to good cause.

113 It was argued there has in any event been no benefit obtained by the 80th Respondent's Claimants since it is common cause that such money has not left the country for China. It is undisputed that the 1st Respondent made false representations to the 80th Respondent's Claimants, and that they paid such money into the 1st Respondent's accounts on the basis of such representations. It is in fact the 80th Respondent's Claimants, and probably the other Respondents, who have suffered prejudice due to the wrongdoings of the 1st Respondent, and are now being stopped by the Applicant from obtaining the return of their money. In this regard I was referred to ***SOUTH AFRICAN RESERVE BANK v TORWOOD PROPERTIES (PTY) LTD 1997 (2) SA 169 (A)*** (supra) at 179B-F.

114 It was argued that the Applicant merely requests a large extension of time being 2 years and 2 months to "*allow the actions of the plaintiff's*" to be ventilated, but which are not court actions in respect of prosecution as envisaged in section 9(2)(g)(i), and without substantiating such period of time, and merely stating that it will be under pressure otherwise to make a decision. It was argued the grounds are vague, and do not constitute good cause.

115 It was argued that the Applicant's counsel's contention that because the Applicant is preserving the rights of the 2nd to 79th Respondents, such Respondents have not opposed and stated that *"it is therefore not surprising that these Respondents are not opposing this application"* should be rejected. It was submitted that the real reason for such Respondents not opposing is the fact that there has been no service on such Respondents, as is clear from the service affidavits by the 80th Respondent of its Notice of Opposition on the other Respondents at the addresses provided by the Applicant in its Notice of Motion, that such Respondents are not at the addresses provided by the Applicant and therefore have no notice of this application, and such is the clear reason for not opposing. It was submitted it is even clear from the 72nd and 75th Respondents answering affidavit that proper service has not been effected.

116 It was pointed out that the Applicant has not instituted any prosecution against the 1st Respondent or the 80th Respondent's Claimants,

despite more than 3 years lapsing since steps were taken in respect of the various funds.

117 It was submitted that the answer to the second question should be in the negative since no good cause has been shown.

118 **The time period limitation**

It was argued that the 36 month period in terms of section 9(2)(g) of the Act was intended to prescribe a limit, as an objective matter of law, to the period for which an attachment or blocking could endure. This pertains to "tainted" and untainted/clean money or goods, regardless of whether such is attached or blocked, and the object of such is the money/goods. I was referred to ***South African Reserve Bank v Khumalo v and Another 2010 (5) SA 449 (SCA)*** at 453 E – H and 455 A and 456 A – C.

119 It was argued in this matter the money blocked is "tainted" money (but not money belonging to a person that contravened the Act and the Regulations) and therefore Regulation 22A applies. Where the Treasury is of the view that the money forfeited or attached will be too little to cover all the contraventions, it can then attach or block in this regard "clean" money, and in such a case Regulation 22C applies, which Regulation (so it was argued) clearly does not apply to this matter. It was argued that it is further clear that whichever

Regulation finds application in this matter such Regulations are subject to the time limitation as set out in Section 9(2)(g) of the Act.

120 It was argued to interpret such Regulations so as to go beyond the time limit prescribed by the Act, and as held by the Full Court in **Heystek** (supra) at par148 (and par 136&144-149), would be incorrect and would negate the limitation in the Act. In fact this is exactly what the Full court did in that instance, whereby it incorrectly interpreted the Act and Regulations by misreading such and looking at the common law position as to blocking and attachment, and not the actual wording of the Act and Regulations, and the principles of statutory interpretation whereby the actual Act and Regulations are scrutinised. The Applicant makes the same mistake in law, by interpreting a statute by reference to the common law, and not to the statute as such.

121 It was argued that in any event ***Heystek*** can be distinguished from the present matter due to the following.

- In ***Heystek*** the court found that the account was blocked in terms of Regulation 22 (2) (a) and that Regulation 2 A was never applicable to the matter. In this matter the relevant orders were made under Regulation 22 A (1) (b) and not 22 C, due to the preconditions not being met for Regulation 22 C to be applicable.
- In Heystek there was a forfeiture order made in terms of Regulation 22 C. In this matter no forfeiture order has been made.

- In ***Heystek*** the tainted money was paid overseas and the SARB blocked untainted money found in his possession and his account, and therefore Heystek was the person in possession thereof. In this matter the 80th Respondent's Claimants are the persons entitled thereto, and the money was found in the possession and account of the 1st Respondent.
- In ***Heystek*** such person failed to set out an entirely truthful and complete version of events. \in this matter it is the Applicant who failed to set out an entirely truthful and complete versions of events.
- In ***Heystek*** the application was one of review of the forfeiture decision, in terms of Section 9(2)(d)(i). In this matter the application is one for extention of the period provided for in Section 9(2)(g)(ii) of the Act.
- In ***Heystek*** it was common cause that he contravened the Regulations. In this matter it was only common cause that the 1st Respondent contravened the Regulations, but not the other Respondents, including the 80th Respondent's Claimants.
- In ***Heystek*** the court dealt with untainted money in an unspecified amount. In this matter the court is dealing with tainted money in a specified amount.

122 It was argued that the purpose of section 9(2)(b)(i) and section 9(2)(b)(ii), from the wording of the Act, is to enable the SARB to exercise control over money or goods of a person who is suspected to be involved in a contravention within a limited period (3 years),

and only to provide an extension in two specific scenarios in section 9(2)(g) (i) and (ii).

123 It was argued that the proper approach to the interpretation of a statute has been restated by the Supreme Court of Appeal to be the process of attributing meaning to the words in legislation (or some other statutory instrument), having regard to the context provided by reading the particular provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Such process is an objective process, and not a subjective one. In this case the context of Regulations 22A-C, specifically Regulation 22A as applicable in this matter, is found in Section 9(2)(b) and s9(2)(g) of the Act, effectively allowing the exercise of control (be it by attachment/ blocking/ interdicting/ forfeiture/ return) over money/goods within a limited period of time of 36 months. I was referred to ***Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)*** at 603E-604C.

124 It was further submitted that the purpose of Regulation 22A-C is to regulate the methods by which the Applicant may exercise control over money or goods of a person suspected to be involved in a contravention by way of either attachment/blocking/interdicting or combination of such methods, so that it may investigate such contravention and determine within the limited period of time being 3 years, whether to either forfeit such money or goods, or to return such money or goods to either the person in whose possession it was found

or who is entitled thereto consequent upon such investigation, and/or to cancel or uplift the orders made to exercise control accordingly.

125 When the submission was made that ***Heystek*** was wrongly decided I drew counsel's attention to the Doctrine of Precedents, the decision being a full bench decision of this court to which to my understanding I am bound, even if I hold the opinion that it is wrong. Counsel then argued as follows: A court is only bound by a superior court if there is a judgment on a legal question by such superior court. Both this court and the court in ***Heystek*** would be bound by the judgment of the Supreme Court of Appeal in ***Khumalo.*** In this instance the court in ***Heystek*** specifically found that Regulation 22A did not apply, but that Regulation 22C applied and the forfeiture order was made in terms of such regulation and was made within the 36 month period. The legal question therefore related to forfeiture within the 36months and dealt with a different Regulation, and whereby the particular regulation applicable in this matter was specifically excluded by the court in ***Heystek***. This court is therefore not bound by the decision in ***Heystek***. However, this court is bound by the decision in ***Khumalo*** and the court in ***Heystek*** was also bound thereby, but failed to apply it whereby the legal question as to the duration of the exercise of control in Regulation 22A-C was specifically stated to be limited by the provisions of Section 9(2)(g) to a period of at most 36 months, being a statutory time limit, and only to be extended as provided in such section. Reliance was placed on ***Credex Finance (Pty) Ltd v Kuhn 1977 (3) SA 482 (N)*** **per** at 485A-D and ***Blaauwberg Meat***

Wholesalers CC v Anglo Dutch Meats (Exports) Ltd 2004 (3) SA 160 (SCA) at 167J-168D.

126 It was argued that the time limit in the Act of 3 years obviously applies to any control exercised by the Applicant over such money or goods, regardless of the method used, be it attachment or blocking. It was submitted that such time period begins to run from the moment one of these methods of enforcement is used to control money or goods. This accords with the interpretation of the relevant sections in the Act and Regulations as set out in ***Khumalo.***

127 It was further argued that if Regulation 22A, 22B and 22C are considered in context, and further considered subject to the provisions of section 9 of the Act, it is clear that such object to which the attachment and/or blocking, as well as forfeiture or return, is applicable are in fact the "money or goods." The artificial distinction between such "money" and the account in which such money is held or transferred, contravenes the purpose and provisions of Section 9 of the Act, and such distinction is, so it was argued, clearly incorrect when considered in the correct context.

128 It was argued that as per the Applicant's own admission in its founding affidavit, the first blocking orders in respect of the money/funds in the accounts of the 1st Respondent commenced on 29 July 2011. Further on 2 September 2011 blocking orders were issued in respect of other accounts of the 1st Respondent into which the 80th

Respondent's Claimants paid the money as reflected by the various deposit slips. The Applicant sought to justify that the 36 month period only commenced from when the funds were transferred from the banking account of the 1st Respondent to the CPD on or about 21 October 2014 and in terms of a new blocking order pertaining to such account, and as such the initially blocking orders and actions taken in respect of such money are of no application. In the Replying Affidavit the Applicant admits that the object of the blocking order on the account was "in respect of money in respect of which the Regulations has been contravened", and that the extension sought "relates to money that was transferred". It was argued the object is clearly the money and not the account.

129 It was submitted that that the Applicant is effectively trying to increase the period as provided for in the Act by moving such money or funds from one account to another. Such action is clearly *ultra vires* and *mala fide.* (Counsel quoted *verbatim.)* It was argued that the Applicant's argument is not only highly technical but also clearly artificial and incorrect in light of the provisions of \section 9(2)9b)(i), read with Section 9 (2) (g) since the interpretation of the Regulations, specifically Regulation 22 A – C, cannot be interpreted and applied so as to exceed or circumvent the time limitation provided for in the Act.

130 It was argued that the time period of 3 years therefore started to run on the date of the first blocking order being 29 July 2011, and expired on 28 July 2014. Alternatively, and at the very least, such started to

run on 2 September 2011 in respect of the money to which the 80th Respondent's Claimants are entitled, and expired on 1 September 2014.

131 It was submitted that as a result the answer to the first question must also be answered in the negative (due to the fact that the period lapsed on 28 July 2014, alternatively 1 September 2014), with the results as set out above, and in respect of the application of such the third question dealt with below.

Additional relief

132 It was argued since the time period of 36 months has expired, the only power that the Applicant has left in terms of the Regulations is to repay or return such money or goods.

133 The Applicant is clearly *functus officio* in any other respect except to repay the money or goods, and to cancel the relevant orders.

134 It was pointed out that the court in *Khumalo* summarised the relevant Regulations as follows at paragraph 8 of the judgment:

"[8] For present purposes it suffices to record the following in regard to the regulations:

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

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

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

- Regulation 22B deals with the procedures necessary to obtain forfeiture of both tainted and untainted moneys and goods."

135 It was argued is also clear from the facts that the blocking orders in this matter were issued in terms of Regulation 22 A(1)(b), since there has been no forfeiture in terms of Regulation 22B and the preconditions applicable to the application of Regulation 22C have not been met. It is possible that Regulation 22A(1)(a)(i) is also applicable since the transfer of the money to the CPD account controlled by the Applicant can be interpreted as an attachment.

136 The return of the money is governed by the provisions of Regulation 22A(3)(a). It was submitted that the relevant sections however do not specifically provide for the return of money or goods that have merely been blocked or interdicted, specifically where such money has been transferred to an account which does not belong to the person in whose possession such money or goods have been found or the persons otherwise entitled thereto. This is therefore were the *lacuna* is to be found in respect of the return of such money or goods to the person either in whose possession such money has been found or to the persons entitled thereto, since the mere uplifting or cancellation of the relevant order does not result in the return as envisaged in the Regulations, specifically in respect of persons entitled thereto.

137 It was argued that the 80th Respondent's Claimants have shown their entitlement to the money as per the deposit slips, in that it has the originals of such deposit slips, and has provided such proof to the Applicant more than 7 months ago. Given the further fact that the 1st Respondent (in whose possession it was found) has waived any rights it may have had to such money as paid into its bank accounts, the only result is that the 80th Respondent's Claimants are "persons entitled thereto" as provided for in the Regulations.

138 It was also argued that the right or entitlement of the 1st Respondent is obviously a statutory right in terms of Regulation 22 A (3) to obtain the return of the money that was found in its possession. Such possession would naturally presume entitlement as well. However, a party may

unilaterally waive a statutory right, as confirmed by the Appeal Court, where no public interest is involved. In this matter the right waived is one of return as a person in whose possession the money was found, and therefore as a person entitled thereto. This waiver means that it is open for other persons, like the 80th Respondent's Claimants (and the 2nd to 79th Respondents) to show that they are the persons entitled thereto, and such proof is naturally by way of proof of payment in the first place as provided in the form of the deposit slips. Even without the waiver, such 80th Respondent's Claimants have shown that they are indeed the persons entitled to the money on the basis of the deposit slips. The bald allegation in the heads of Applicant's counsel that no substantiating evidence as to the deposits has been provided, is to be rejected in light of the undisputed fact that the original deposit slips were provided and shown to the Applicant. The Applicant furthermore loses sight of the fact that it has a responsibility in terms of the regulations, specifically Regulation 22 A (3), to return the money over which it has exercised control, to the persons entitled thereto, upon expiry of the relevant period, and in certain instances even prior to such expiry, thereby nullifying the argument of Applicant's counsel that any evaluation of an "entitlement" at this stage would be premature. The further argument that such blocking of money can only be set aside by a court of law in review proceedings, as apparently supported by the ***Oudekraal*** case, is also without basis since Regulation 22A(3)(b) provide the power to the Applicant to cancel such order (also provided in Regulation 22B(2). Reference was made to ***SA***

Eagle Insurance Co Ltd v Bavuma 1985 (3) SA 42 (A) at 49G-I&50C.

139 It was argued that a negative inference should be drawn against the Applicant due to its refusal to deal with such entitlement, even though confronted by the evidence before the court and which it had in its possession months ago (and direct contact), and where it is now merely trying to skirt the issue and its responsibility of repayment in terms of the Regulations, despite admitting that the 80th Respondent's claim is based on the original deposit slips. The contention that the Applicant does not accept the "entitlement", especially in light of the fact that the 1st Respondent waived any entitlement and no other person is mentioned as being entitled or even joined as being entitled, clearly stands to be rejected as baseless and a bald denial.

140 It was submitted that the alleged contravention of Regulation 10 was not raised in the Founding Affidavit, and can therefore not be raised at this point in time. However, it is clear that the 1st Respondent was indeed an authorised dealer and listed as a bank in terms of the rules (and the responsibility to comply rests on such authorised dealer, as stated by the Applicant), and therefore this alleged ground of the Applicant holds no water. In any event, the time period to take any steps has lapsed since the 36 months have passed, and the only action that can be taken by the Applicant is the repayment or return of such money.

141 It was further argued that the Applicant for the first time in its Replying affidavit raises allegations of alleged contraventions on the part of the other respondents, but since a basis has not been laid in the Founding Affidavit, and in terms of the basic principles of final relief the ***Plascon Evans*** rule is applicable. The allegations of the Respondents are to be considered together with the admitted allegations of the Applicant. Such allegations by the Applicant in its Replying Affidavit stand to be rejected. It is trite that the purpose of a Replying affidavit is to provide proof to dispute the allegations in the Answering Affidavit, but the Applicant fails to do this. Annexure AA merely states that the Applicant does not agree with the interpretation of the 80th Respondent as to the lapsing of the time period, and further that it is denied that an official at the Applicant acknowledged ownership of the 80th Respondent's Claimants to a part of the funds, but nowhere is ownership disproved. Annexure BB does not substantiate the allegations by the Applicant that only two of the 80th Respondent's Claimants filed complete responses, and yet nowhere is entitlement of the 80th Respondent's Claimants disproved.

142 It was argued that the following words *"or in respect of which an order has been issued or made under paragraph (b) or (c)"* should be read into Regulation 22A(3)(a) directly after the words "return any money or goods attached under paragraph (a) of sub-regulation (1), so as to give effect to the clear purpose of the Act, and as further set out in the wording of Regulation 22B(2), so that such money is returned to the

persons entitled thereto. Counsel referred to ***RENNIE NO v GORDON AND ANOTHER NNO 1988 (1) SA 1 (A)*** at 22E/F-G – I.

143 It was argued that the interest requested would naturally be covered by the phrase in Regulation 22A(3)(a) being *"money or goods accrued therefrom".*

144 It was argued that a punitive costs order must be made against the Applicant due to the clear *mala fides* of the Applicant in the manner in which it presented this application and dealt with the substantial allegations of the 80th Respondent.

145 It was also submitted that the additional relief is clearly provided for in the Regulations, and is further necessary in this instance to give effect to such Regulations, and therefore the orders, or alternative orders, as per prayer 113.2-113.6 should be granted.

146 As a result the answer to the Third Question is clearly also in the affirmative, so as to give effect to the Regulations, and the relief therefore requested by the 80th Respondent should be granted.

147 I was requested to dismiss the application by the Applicant with punitive costs, and the relief as requested by the 80th Respondent should be granted.

Part 4: The Applicant's Reply, incorporating my findings.

148 Mr Maritz argued that the Respondents' answering affidavits do not raise a real, genuine and bona fide dispute of fact in regard to the issue whether a blocking order was issued in respect of the account at the CPD. He referred to ***WIGHTMAN V HEADFOUR(PTY) LTD AND ANO 2008(3) SA 371 SCA*** at page 375 par [13]. He submitted that is so as they have no personal knowledge and raise no basis for disputing that they blocking order was issued. In fact the 80th Respondent expressly admitted in his answering affidavit that a fresh blocking order was issued. This submission is correct.

149 In reply to the arguments raised on behalf of the 72nd and 75th Respondents the following was argued:

150 Despite the decision in ***HEYSTEK***, it was contended that a blocking order issued in terms of Regulation 22A(b) relates to money because the order issued in terms of that Regulation is an order by which any person is prohibited from withdrawing *"any money in that account or not more than an amount determined by the Treasury"*. It was submitted that the same words do not appear in Regulation 22C. This is clearly incorrect, as the almost identical words "*any money held in any account or not more than an amount of it determined... by the Treasury"*, also appear in Regulation 22C(2)(a), being the Regulation providing for the blocking of an account in which it is "clean money".

The reason why the blocking order which prohibits the withdrawal of money from an account can relate either to all the money in the account or to only some of the money in the account, is that in terms of Regulation 22A the blocking order can only prohibit the withdrawal of "tainted money" from the account, and there may also be "clean money" (money not involved in a contravention) in that account. In terms of Regulation 22C, which permits the issue of a blocking order in respect of an account in which there is "clean money", the amount of quite clean money" which is prohibited to be withdrawn from the account is determined by deducting from the amount involved in a contravention any amount which may have been preserved or recovered under Regulation 22A, and if there is a shortfall, any attachment of money or blocking of an account in terms of Regulation 22C can only relate to the amount of the shortfall, and not more. For example, if R10,000,000 was involved in a contravention, and a blocking order has been issued in respect of an account in which there is R6,000,000 of the amount involved in the contravention ("tainted money"), there is a R4,000,000 shortfall. If there is another account in which there is "clean money", or if there is also "clean money" in the same account in which the "tainted money" was deposited, then a blocking order can be issued in respect of such account in terms of Regulation 22C(2), prohibiting the withdrawal of an amount up to R4,000,000 d of "clean money". I agree with these submissions.

151 The court order which was granted in the MA/CHENG application on 29 November 2011 expressly provides that in the monies paid to the

account at the CPD "are to be held and dealt with by the sixth Respondent in terms of the Exchange Control Regulations". This can only be done in terms of Regulations 22A, 22B and 22C.

152 It was contended that the new blocking order was not issued "pursuant" to the orders granted in the MA/CHENG application, as the court orders do not refer to the issuing of a blocking order, and the blocking order was accordingly not issued in terms of any court order. The words "pursuant to", as used by the Applicant, means "in accordance with", or "following upon". In the affidavit deposed to on behalf of the Applicant by Malherbe he explained how it came about and was agreed that the amounts standing to the credit of several of the 1st Respondent's accounts would be transferred to a new account, that the various blocking orders issued would then be uplifted, and a blocking order would be issued in respect of the new account. This is precisely what was provided for in the various orders granted in the MA/CHENG application. Malherbe further states in that affidavit that it was the understanding and agreement that the monies transferred to the CPD account and the CPD account itself would be held and dealt with in terms of Regulation 22A, 22B, and 22C. These submissions are clearly correct.

153 It was submitted that the Applicant is entitled to the relief as claimed in the notice of motion, and that the 72nd and 73rd Respondents, jointly and severally with the 28 persons represented by the 80th

Respondent,, should be ordered to pay the costs of the application, such costs to include the costs of two counsel.

154 In reply to the arguments raised on behalf of the 80th Respondent Mr Maritz argued as follows:

155 It was argued that although 1st Respondent had contravened the Regulations, the other Respondents claimed not to have done so and to be innocent. I agree with Mr Maritz that this is irrelevant, as it is the money which must be "tainted", irrespective of who, as a fact, contravened the Regulation. The Applicant referred to ***FRANCIS GEORGE HILL FAMILY TRUST v SOUTH AFRICAN RESERVE BANK AND OTHERS 1990 (3) SA 704 (T)*** at 710 in fin, and to paragraph [172] in ***HEYSTEK***, where the court pointed out with reference to the ***OILWELL*** decision in the SCA, that *mens rea* is not a requirement for the application of Regulation 22.

156 It was submitted that the 80th Respondent in oral argument no longer advanced the argument and contention raised in the answering affidavit that his clients are the owners of any of the funds in the CPD account, and obviously could not do so in the light of clear SCA authority to the contrary, to which was referred in the Applicant's main argument. Counsel for the 80th Respondent, however, persisted in arguing that his clients are "entitled" to the money on the grounds that the blocking order issued in respect of the CPD account had allegedly lapsed, and that it therefore followed, so he argued, that his clients

were entitled to repayment of the amounts which they had deposited into the banking account of the 1st Respondent. He relied in this regard on the provisions of Regulation 22A(3)(a) which provides that, if **attached money** has not been forfeited within three years it must at the end of a period of three years be returned "*to the person in whose possession it has been found or the person entitled thereto*". He argued that Regulation 22A(3)(b) which relates specifically to what must become of a blocking order at the expiry of three years, must be read as if it also included these words. I agree with Mr Maritz that the fallacy in the argument is that, even if these words were read in, the Regulation does not create any entitlement. To the extent that money must be returned to the person "*in whose possession it has been found*", the identification of that person is an issue of fact, and as a fact none of the money was found in the possession of any of the clients of the 80th Respondent. Insofar as money must be returned to "*the person entitled thereto*", the entitlement is a matter of fact and law, but does not arise from the Regulation itself. The entitlement could be based on common law or other legal principles, but the entitlement must exist or be established before the person can claim the return of the money. This does not mean, as was argued on behalf of the 80th Respondent, that the Applicant is seeking to interpret the Regulations in accordance with the law of contract. The meaning of and interpretation of the Regulations as to what becomes of money in a blocked account when the blocking order is cancelled, is one thing; the question as to who is entitled to the money in the blocked account is

an entirely separate issue and has nothing to do with interpretation of the Regulation. The Respondents have not established any entitlement to payment of any part of the amount standing to the credit of the CPD account, even if, as they contend, the blocking order issued in respect of the CPD account has lapsed.

Furthermore, if Regulation 22A(3)(a) and (b) are considered, it is clear that the President in making the Regulations intended to distinguish between two scenarios, the one being the obligations on the Treasury upon the expiry of the 36 month period after of an attachment of money or goods, and the other being the obligations of the Treasury upon the expiry of the 36 month period after the issuing of a blocking order in respect of an account. If these words are to be "read in" in subparagraph (b), the distinction will be removed, thereby rendering subparagraph (b) redundant. The "reading in" is not necessary, there is clearly no *lacuna* in the Regulation, and the test as stated in ***RENNIE*** referred to on behalf of the 80th Respondent's simply does not apply. It was submitted that the reason for the provision in Regulation 22A(3)(b) that the blocking order must simply be cancelled upon the expiry of a three year period is that the issue of a blocking order does not deprive an accountholder of possession of, or his contractual claim against the bank in respect of, the money standing to the credit of the account, and when the blocking order is cancelled, uplifted or lapses, the accountholder can then proceed to deal with the money standing to the credit of the account in terms of the contract between the bank and the accountholder. The Applicant is the account

holder in respect of the account at the CPD, and if the blocking order were to be cancelled, were to lapse, or were to be uplifted, it as the account holder could then proceed to deal with the money standing to the credit of the account. Whether the Applicant is required to pay any part of the money standing to the credit of the CPD account to any of the Respondents, is dependent upon the Respondents first establishing a lawful entitlement to payment of a specified amount **as against the Applicant.** In this regard, counsel for the 72nd and 75th Respondents was entirely correct in conceding during argument that if the present application were to be refused, the consequence would be that the monies would remain in the CPD account under the control of the Applicant. I agree with these submissions.[1]

157 On behalf of the Applicant it was stressed that the importance of and necessity for updating the order which the Applicant seeks is that, if the period is not extended and the blocking order were to lapse on or

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[1] In subsequent correspondence between counsel for the 80th Respondent and counsel for the Applicant (which was also forwarded to me) the 80th Respondent's counsel states that the submission that he no longer advanced that the 80th Respondent's claimants are the "owners" of the funds in the CPD account is not correct. He says he recalls that he did advance ownership when arguing good cause in his heads and as repeated in court, but did not rely on ownership for the purposes of the Act, because he said that it is the "entitlement" that is the issue in the Act and such entitlement was evidenced by the original deposit slips. That he argued this is in dispute, but I do not think it would be proper for me to go into this dispute at this stage. I do however not think much turns thereon.

Counsel for the 80th Respondent also indicates in the said correspondence that in respect of his argument that certain words should be read in, reference is made to Regulation 22A(3)(b). It should be a reference to Regulation 22A(3)(a).

about 20 October 2014, then the deputy Governor of the Applicant would no longer have the power to declare all or any of the money standing to the credit of the CPD account forfeit to the state, as any forfeiture order in terms of Regulation 22B must be made within three years after the date on which the blocking order was issued in respect of the account. I agree. This is clear from the ***HEYSTEK*** as well as the KHUMALO matters.

158 It was argued on behalf of the 80th Respondent that the ***KHUMALO*** decision was to the effect that each and every action which might be contemplated or taken in terms of Regulations 22A, 22B, and 22C must be taken within a period of 36 months reckoned from the date on which the first action is taken. After perusing the decision I agree that this is not the ratio or the effect of the judgement. As appears from the headnote and the judgement itself, the matter was concerned with the validity of a warrant of attachment issued under Regulation 22C(1). Khumalo contended that the warrant of attachment was invalid because the period for which it was to operate was not stated in the warrant, and further that Regulation 22C(1) was itself *ultra vires* because it did not contain the 36 month period referred to in section 9 (2) (g) of the Currency and Exchanges Act. In the appeal it was held that the default position was that the period for which the order would operate, if no time limit was stipulated in the order itself, was regulated by statute and that the notice lapsed three years after it had been issued. See the last line of paragraph 11 and to paragraph 14 of the judgement: *"All it means is that these orders may not last longer than*

the prescribed limit" and *"the default position is regulated by statute and the notice lapses after three years"*

I agree with Mr Maritz's submission that therefore each and every order issued in terms of Regulation 22A or 22C (whether for attachment of money or goods, or for the blocking of an account), unless the order itself specifies a shorter period, remains valid for a period of three years from the date on which the particular order was issued. This is precisely what the court decided in ***HEYSTEK***. The ***KHUMALO*** judgement was delivered before the ***HEYSTEK*** judgement, and the court in the appeal in the ***HEYSTEK*** matter was aware of the ***KHUMALO*** judgement. There is no conflict whatsoever between the two judgements.

It was submitted on behalf of the 80th Respondent that the court in ***HEYSTEK*** specifically found that Regulation 22A did not apply. This submission is clearly wrong. As appears from the judgement at paragraphs 29 and 30, the initial blocking orders were issued in terms of Regulation 22A and/or 22C, in respect of several accounts. By agreement the money standing to the credit of the blocked accounts was transferred to a money market account held by Heystek, a new blocking order was issued in respect of the money market account, and the blocking orders issued in respect of the other accounts were uplifted. It was common cause when Heystek brought the review application that all the money in the money market account was "clean money", and that the monies involved in the contraventions of the

Regulations had been taken out of the country before the initial blocking orders were issued (this is also clear from the analysis of the transactions which appears in the judgement). Accordingly, on the facts it was common cause between the parties that Regulation 22A did not apply, and that the blocking order issued in respect of the money market account was a blocking order in terms of Regulation 22(C)(1). Where the Court in paragraphs 136 and 142 stated that Regulation 22A was never applicable to the case, it was not making a finding on an issue in dispute, but was merely stating a common cause fact.

I must agree with Mr Maritz that the submission on behalf of the 80th Respondent that ***HEYSTEK*** is not applicable, is distinguishable, and can simply be ignored, is devoid of any merit. Part of this untenable argument was that ***HEYSTEK*** concerned a review of a forfeiture decision, whereas the present application is concerned with an extension of the 36 month period. It is well established that in deciding whether a court is bound by decision of a higher court, regard must be had to the *ratio decidendi* of the higher court's decision, i.e. to the issues which the court was called upon to decide and did decide, and not to the relief sought or granted. As appears from paragraph 137 of the judgement, the court *a* quo had held that the blocking order related to the money in the account and not to the account itself, and that the period of 36 months in respect of the blocking order was to be reckoned from the date on which the first blocking order was made on the first of several accounts. The court held that because the forfeiture

order had been made more than 36 months after that date, the issue of the forfeiture order was *ultra vires*. As appears from paragraph 148 and 149 of the judgement on appeal, the court held that the blocking order was an order issued in respect of a specific account and not in respect of the money, that the 36 month period had accordingly commenced only on the date on which a blocking order was issued in respect of Heystek's money market account, that the forfeiture order was made within 36 months after that date, and that the making of the forfeiture order was accordingly not *ultra vires*. The ratio of the decision was therefore that a blocking order (an order prohibiting the withdrawal of money from an account) relates to the account and not the specific money in that account, and that the blocking order remains valid in respect of that account for 36 months, during which 36 month period the power to issue a forfeiture order in respect of the money in the account in terms of Regulation 22B may be issued. As already pointed out, the provisions of Regulation 22A and of Regulation 22C, insofar as they provide for the issue of a blocking order, are in all material respects the same, and the same legal principle and ratio which applies to a blocking order issued in respect of an account in terms of Regulation 22C applies in respect of a blocking order in respect of an account issued in terms of Regulation 22A.The blocking order which was issued in respect of the account at the CPD, which blocking order was issued no earlier than 20 October 2011, has accordingly not yet lapsed, and will lapse at the earliest on 20 October

2014. After perusing the decision I am in full agreement with these submissions.

159 It was argued on behalf of the 80th Respondent that, even though Malherbe (who made the founding affidavit on behalf of the Applicant) states that he issued the blocking order in respect of the CPD account in terms of Regulation 22A and/or 22C, it could not have been issued in terms of Regulation 22C, because, so it was argued, it is a precondition for the applicability of Regulation 22C that there must first have been either an attachment or order a forfeiture under Regulation 22A. I agree with mr Maritz that this argument is devoid of merit. Mr Maritz argued that this argument displays a lack of understanding of the Regulations and of all the decisions relating to those Regulations. For example, in ***HEYSTEK***, the money in the money market account was all "clean money", and there had been no attachment or forfeiture of "tainted money" in terms of Regulation 22A, and there was no blocking order in terms of Regulation 22A in respect of any account in which there was "tainted money". As is apparent from the analysis of the transactions in the judgement, all the money involved in the contraventions had been taken out of the country. Nevertheless, the court found that the blocking order issued in terms of Regulation 22C(2) and the subsequent forfeiture of the money in the money market account in terms of Regulation 22B was valid. Regulation 22C (1), which provides for the attachment of money, in the first part deals with the position "*when the Treasury has, under Regulation 22B forfeited to the State money or goods referred to in Regulation*

22A(1)", and the proceeds are less than the amount involved in the contravention. In the second part, following upon subparagraph (b), it deals with the position "*when no money or goods have been forfeited for the State under the said Regulation 22B."* Regulation 22C(1) then provides that in either of these two cases "clean money" may then be attached. Regulation 22C(2) provides that if an attachment order could have been made under Regulation 22C(1), then a blocking order may be made in respect of an account in which there is "clean money" with a view to the recovery of the difference between the amount involved in the contravention and any amount of "tainted money" which the Treasury may recover under Regulation 22A(1) read with Regulation 22B.

I agree that in practical terms, this means the following: if an amount of R10,000,000 is involved in the contravention, and an amount of R6,000,000 of the "tainted money" has been recovered (for example by attachment or by the issue of a blocking order in respect of an account in which the "tainted money" was held, and a subsequent forfeiture of the attached money or the money in that blocked account), or the recovery thereof has been secured by attachment of money or the blocking of an account, there is a shortfall of R4,000,000 between the amount involved in the contravention and the amount of "tainted money" recovered or secured in terms of Regulation 22A. In those circumstances and attachment of "clean money" in terms of Regulation 22C(1) would be competent. It then follows that because an attachment of "clean money" could be made, a blocking order in

respect of an account in which there is "clean money" is competent in terms of Regulation 22C(2). The purpose of such a blocking order is to secure the future recovery, by way of forfeiture under Regulation 22B, of the shortfall, being the difference between the amount involved in the contravention and the amount recovered under Regulation 22A.

160 It was argued on behalf of the 80th Respondent that the Applicant admitted that the 80th Respondent's claim is based on "the original deposit slips ". Mr Maritz argued that this submission is wrong. In the replying affidavit it is stated that "*insofar as the allegations are contrary to what is stated in the founding affidavit and hereinafter, the allegations are denied.*" It is furthermore set out in this affidavit why the claim to the funds based upon deposit slips is questionable. It is pointed out that the original deposit slips did not disclose the details of the relevant depositors, and that numerous of the Chinese individuals relied on the same deposit slips, with the result that the aggregate of the claims initially submitted exceeded the amount standing to the credit of the various accounts. It is significant that the Respondents, on their own version, merely exhibited the original deposit slips to the Applicant at its offices, provided the Applicant with copies, and then retained the originals. The same originals were then used by other claimants on the same basis. Mr Maritz argued it is furthermore not true, as was submitted on behalf of the 80th Respondent, that the clients of the 80th Respondent gave their full cooperation to the Applicant and furnished all the information which it required, with a view to establishing their entitlement to a part of the funds in the CPD

account. As appears from the email annexed to the Applicant's replying affidavit, the 80th Respondent on 4 March 2014 furnished to the Applicant a list of 26 clients *"who were not forthcoming with the additional information as requested by the Reserve Bank"*. When the names of the 26 persons listed in this email are compared with the names of the 28 clients on whose behalf the 80th Respondent opposes the application it is clear that the 26 persons who were not forthcoming with the additional information as requested by the Reserve Bank are 26 of the 28 persons who seek to oppose this application. Mr Maritz submits, and unfortunately I have to agree that this is a serious adverse reflection on the *bona fides* of the opposition to the application by the 80th Respondent.

161 The 80th Respondent sought a punitive cost order against the Applicant. This was based upon the following allegation made in paragraph 54 at page 108 in the 80th Respondent's answering affidavit:

"The actions of the Applicant, as well as the deliberate non-disclosure of the above facts within its knowledge to the above honourable court, and its attempt to circumvent the provisions of the act as to the limitation on the time period of 36 months clearly shows that the Applicant is mala fide in bringing this current application, and requesting such relief as per the application."

These allegations and the request for a punitive cost order were persisted in, notwithstanding the content of the replying affidavit to the 80th Respondent's answering affidavit, and the replying affidavit to the answering affidavit of the 72nd and 75th the Respondent's, and notwithstanding the oral notice given to the 80th Respondent and repeated in open court by Applicant's counsel, that it would seek a punitive cost order against the 28 persons represented by the 80th Respondent on the grounds of the making of and the persistence in these allegations. Mr Maritz submitted that under these circumstances it is particularly insulting and vexatious of the 80th Respondent to seek a punitive cost order against the Applicant, and this conduct is a further basis for the making of a punitive cost order against the 80th Respondent's clients. The Applicant submits that the court should display its disapproval of the conduct of the 80th Respondent, as a representative of his 28 clients, by ordering them, (the clients) jointly and severally, to pay the costs of the application on a scale as between attorney and client.

162 From what was said above it is clear that the following order is appropriate:

1 The period of 36 months is extended in terms of Section 9 (2)(g) of the Currency and Exchange Act, 9 of 1933, for which the order granted in terms of Regulation 22A/22C in respect of an account at the Corporation for Public Deposits (being the account referred to in the orders granted on 14 October 2011, 27 October 2011 and 29

November 2011 by Gauteng Local Division of the High Court, Johannesburg, under case no. 34779/2011,) and shall remain valid and operative, to 31 December 2016.

2 The 72nd and 75th Respondents is ordered to pay the costs of this application on a party and party scale, jointly and severally, the one paying, the other to be absolved.

3 The Claimants represented by the 80th Respondent are ordered to pay the costs of this application on a scale as between attorney and own client, the one paying, the other to be absolved.

4 The costs referred to in orders 2 and 3 above shall include the costs of 2 counsel.