IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 40330/2014

4/3/2016

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

29/2/16

In the matter between:

SAMUELE MORMILE	Applicant
And	
THE STATE PRESIDENT OF THE REPUBLIC OF SA	1st Respondent
NATIONAL MINSTER OF FINANCE	2nd Respondent
LEMECK MOLOBI	3rd Respondent

JUDGMENT

TOKOTA AJ

[1] Although the papers in this matter were not elegantly drawn the essence of the applicant's case is that he is seeking an order reviewing and setting aside the decision of the third respondent not to return to the applicant the money that was seized from him in terms Regulation 3(6) read with Regulation 3(8) of the Exchange Control Regulations. The nub of the grounds for review is based on the premise that the decision was procedurally unfair and that the third respondent failed to take into account relevant considerations.

[3] The first respondent, understandably, elected to abide the decision of the Court and the second and third respondent opposed the application.

[4] There were preliminary points that were taken by the respondents' First it is contended that there was a misjoinder and a non-joinder, and second, that the applicant's papers did not disclose a cause of action for review in his founding affidavit.

[5] As for the first point of non-joinder the applicant issued a third party notice in terms of the Uniform Rules of Court joining the South

African Reserve Bank as the fourth respondent (the Reserve Bank). Subsequent to that joinder Petrus Jacobus Delport, a manager in the Reserve Bank, filed an affidavit in which he confirmed that, in his capacity as a Senior Manager, he was an authorised official who took the decision which is now subject of the review.

[6] In my view it is not necessary to rule on the second point. Suffice it to say that I was able to glean the grounds of the review from the papers. It is necessary to set out hereunder the background.

[7] On 20 August 2013 the applicant, an Italian citizen, was travelling in a bakkie with his brother-in-law when he arrived at a Border Post called Ramatlabana. This Border Post is situated between Botswana and South Africa near Mahikeng.

[8] At the border post he met one Kagisho Matsutswa a junior customs inspector employed by South African Revenue Services (SARS). He was asked by the inspector whether he had anything to declare to which he responded in the negative. Matsutswa, together with one police constable, asked permission to conduct a search in the bakkie. The applicant raised no objection to that search. A bag

containing South African bank notes was found. The applicant claimed the bag and the money to be his.

[9] The applicant was then asked to complete a form in which the following appears: *"Where did you get this money/gold/securities from? (In other words what is the origin of the money?)*

The recorded answer is: "*A person he met at a coffee shop he exchanged his Euros for Rands with him.*"

[10] The total amount was R710 000.00. According Matsutswa the applicant explained that he was an Italian citizen and was in South Africa on holiday. He stated that the money was for his personal use while on holiday. He further explained that he had a clothing factory in Italy. He exchanged the Euros that he brought in Johannesburg with the assistance of his brother in law but not through a commercial bank.

[11] After the money was counted he was informed that in terms Regulation 3(6) of the Exchange Control Regulations the money would be seized and would be handed over to the Reserve Bank for further investigation. He was arrested, allegedly, for attempting to bribe officials

of SARS and SAPS. His brother-in-law was informed that he could leave. He appeared in the Regional Court the following day and subsequently released on bail on 26 August 2013.

[12] After the money was counted in his presence and was found to be R710 000.00 a sum of R25 000.00 was handed back to him. This was because in terms of section B.11(c)(i) of the Exchange Control Rulings *"visitors to the Republic, excluding foreign seamen, will be permitted, on their arrival in the Republic from countries outside the CMA, to import bank notes of CMA countries up to a total value of R25 000.00 per person to meet their initial expenses."*

[13] At the border post the applicant was given a letter which appears to be a standard letter which was prepared perhaps on 18 November 2010 because it does not have a date but this date appears at the top right corner of the letter. The letter is attached to the founding affidavit as one of the annexures. The attention of the court has not been drawn to anything regarding the contents thereof. Upon reading the letter it invites the applicant to make representations as to why the seized bank notes should be returned to him.

[14] It is now well established that "(i)t is not open to an applicant or a respondent to merely annex to its affidavit documentation and to request the court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essence of our established practice would be destroyed.[1] The respondent also did not deal with this letter but simply noted the contents of the paragraph attaching it. The letter is so important because it purports to invite representations and the applicant maintains that his *rights of natural justice have been impinged upon by the decision* to forfeit the seized money.

[15] In the absence of any explanation by any of the parties I will assume that the intention of the letter was to invite the applicant to make representations if so advised as to why the money should be returned to him. He has attached the letter. He failed to draw the attention of the Court to the portions thereof on which he relies for his cause of action.

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[1] See Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others 1999 (2) SA 279 (T) at 324G; National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) (2009 (1) SACR 361 para 47; Von Abo v Govt of the RSA 2009 (2) SA 526 (T) para 97; Helen Suzman Foundation v President of the RSA 2015 (2) SA 1 (CC)

[16] Subsequently, there was an exchange of correspondence between applicant's attorneys and the Reserve Bank. There was a dispute about the amount seized which the applicant initially claimed was R710 000.00. He later conceded that it was infact R685 000.00.

[17] On 17 January 2014 the fourth respondent took a decision that the money seized be forfeited to the National Revenue. It appears from the letter dated 17 January 2014 that when making the decision, Mr Deport took into consideration the following:

(a) That the applicant failed to declare the money when he arrived at the border post;

(b) The applicant gave contradictory explanations about the origin of the money;

(c) The applicant could not produce exemption for bringing such money into the Republic;

[18] Mr Wits, who appeared for the applicant, in his written heads of argument submitted that; (a) in terms section 22 and 25 of the

Constitution the applicant has a right to choose the trade, occupation or profession freely and not be deprived of his property which includes his lawful monies; (b) that the applicant was never requested to present facts of undue hardship; (c) that the deprivation of his money was procedurally unfair; (d) that the respondent took into account irrelevant considerations; and (e) that the respondents acted arbitrarily.

{19] During oral argument Mr Wits emphasized the fact that the applicant was never requested to present facts regarding undue hardship and that there was procedural unfairness. On the other hand Mr Maritz SC for the respondents submitted that the question of hardship was considered by the Constitutional in **Armbruster v Minister of Finance 2007 (6) SA 550 (CC).** In that **case** the Constitutional Court said that once a person who faces forfeiture has made representations for the return of some or all of the money, the decision-maker is called upon to consider whether in all the circumstances forfeiture will cause injustice or hardship. That case concerned a violation of regulation 3(5) concerning the forfeiture of foreign currency after it has been seized in terms sub-regulations 3 or 4. Mr Maritz argued that no undue hardship had been caused by the forfeiture as the applicant is financially strong.

[20] The applicant made an affidavit explaining the origin of the money prior to the institution of these proceedings in which he said that he earned the money through the sales of carpets, cutlery and table cloths in Namibia. As can be seen in paragraph 9 above, he later said he got the money by exchanging his Euros in Johannesburg. In the form which he completed at the Border post he stated that he had declared the money. On the contrary in his affidavit he conceded that he did not declare the money. He further stated that he cashed a sum of R300 000 at Marula Mall in Windhoek.

[21] On the basis of the facts summarised above I find on probabilities that;

(a) the applicant entered the Republic being in possession of SA bank notes amounting to R710 000;

(b) there was no exemption by the Treasury to bring along that amount and therefore this was in contravention of regulation 3(1)(b);

(c) when arriving in the Republic he failed to declare that he was in possession thereof;

(d) R710 000 was seized and the applicant was handed back a sum of R25 000;

(e) the applicant was afforded an opportunity to make representations before a decision not to return the money was made;

(f) the applicant gave different versions as to how he came to possess the money;

(g) when the applicant made representations he included his personal circumstances;

(h) the applicant told Matsutswa that he was operating a clothing factory in Italy;

(i) he told his attorneys that he was a pensioner and that he had two sources of income namely 800 Euros monthly pension and 600 Euros per month being rental he receives from his property.

[22] Regulation 3(1)(b) *bis* provides:

Restriction on the export of currency, gold, securities, etc, and the import of South African bank-notes

(1) Subject to any exemption which may be granted by the Treasury or a person authorised by the Treasury, no person shall, without permission

granted by the Treasury or a person authorised by the Treasury and in accordance with such conditions as the Treasury or such authorised person may impose-

(a) ...

(b)...

(b) bis take any South African bank-notes into the Republic or send or consign any such notes to the Republic."

Regulation 3(6) provides:

(6) Every person who is about to enter the Republic and every person in any port or other place recognised as a place of arrival in the Republic, who is requested to do so by the appropriate officer shall-

(a) declare whether or not he has with him any South African bank-notes; and

(b) produce any such bank-notes which he has with him;

and the appropriate officer and any person acting under his directions may search such person and examine or search any article which such person has with him, for the purpose of ascertaining whether he has with

him any South African bank-notes and may seize any such bank-notes produced or found upon such examination or search unless either-

(i)the appropriate officer is satisfied that such person is, in respect of any South African bank-notes which he has with him, exempt from the prohibition imposed by sub regulation 1(b)bis; or

(ii)such person produces to the appropriate officer a certificate granted by the Treasury which shows that the importation by such person of any South African bank-notes which he has with him does not involve a contravention of that sub regulation.

No female shall be searched in pursuance of this sub regulation except by a female.

(7)...

(8) All South African bank-notes seized under sub regulation (6) or (7) shall be forfeited for the benefit of the National Revenue Fund: Provided that the Treasury may, in its discretion, direct that any notes so seized be refunded or returned, in whole or in part, to the person from whom they were taken, or who was entitled to have the custody or possession of them at the time when they were seized.

[23] I now deal with points raised in argument on behalf of the applicant.

A: The Applicant's rights in terms section 22 of the Constitution of the Republic of South Africa Act, 1996.

Although this point was not argued orally Mr Witz did not indicate if he had abandoned it.

[24] Section 22 provides that every citizen has the right to choose his/her trade, occupation or profession freely. I fail to understand how this constitutional right can assist the applicant. In my view it is irrelevant for the determination of the merits of this case. The submission is therefore without substance.

B: The Applicant's rights in terms section 25 of the Constitution

[25] In **Armbruster's** case *supra* the applicants challenged the constitutionality of regulation 3(5) on the basis that it violated their rights as entrenched in section 25 of the Constitution. Regulation 3(5) like regulation 3(8) is also a forfeiture regulation. The High Court's finding (per Prinsloo J) held that the deprivation of property in question was pursuant to the Act as a law of general application and was therefore not arbitrary. This was confirmed by the Constitutional Court. With regard to deprivation I can put it no better than Mokgoro J where she said: *"The purpose of the law giving rise to the deprivation is to prevent violations of*

currency exchange control regulations, and the unlawful removal of foreign currency from South Africa. It aims to deter not only the person affected but also others. The connection between the purpose of the deprivation, the property and the person deprived could hardly be closer. In all probability, the person who is in unlawful possession of the currency is the owner or carries the property at the owner's behest. Even though it is true that the owner could possibly be deprived of all the currency in his or her possession at an airport, there is in this case sufficient reason for the deprivation. Ordinarily, arbitrariness would be out of the question."

[26] On the facts of this case the applicant has not shown that the deprivation was arbitrary more particularly because he gave conflicting versions.

C: Was the deprivation procedurally unfair;

[27] At the Border post the applicant was given a standard letter requiring him to make presentations and to consult with legal advisers in this regard. He gave the documents to his lawyers and thereafter a series of letters were written to the respondents on his behalf. This culminated in the letter of 17 January 2014 by Mr Deport in which he stated that after considering the applicant's representations a decision was taken not to return the money to him. His lawyers did not write back

and contest that he had not been afforded an opportunity to make representations. Instead review proceedings were instituted. I therefore find that the submission has no merit and that the applicant was indeed afforded an opportunity to present his case before a decision was taken.

D: <u>Did Mr Deport take into account irrelevant considerations and did he ignore the relevant ones:</u>

[28] No facts were pleaded to demonstrate that Mr. Delport took into account irrelevant considerations. Accordingly this contention has no basis. In his letter of 17 January 2014 Mr Deport set out his reasons for the decision and stated that he took into accounts his representations.

I am therefore not persuaded that Mr Delport took into account irrelevant considerations.

<u>Did the respondents act arbitrarily</u>?

[29] Here again I could find no facts which were pleaded in support of the contention. It is very unhelpful to the Court if a party simply regurgitate the grounds of review as set out in the PAJA without

substantiation. In any event by its very nature an act of forfeiture of ones money is harsh. But once it is established, as in this case, that the person has contravened the regulations the question of arbitrariness does not arise. The applicant admitted that he did not declare the money; he did not have a permit from the Treasury. He was refunded the money which in law he was entitled to possess. I therefore find that the deprivation was not arbitrary.

[30] In the result I make the following order:

The application is dismissed with costs.

TOKOTA AJ

ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING: 1 FEBRUARY 2016

DATE OF JUDGMENT:

Applicant's Legal Representatives: M Witz

Instructed by Bove Attorneys.

Third and Fourth respondents' Legal Representatives: N G D Maritz SC

E Muller

Instructed by Gildenhuys Malatjie Inc.