IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 27048/03

In the matter between: 30/6/2016

ANNE ELIZABETH MARY PRATT Applicant

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

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

30/06/16
DATE

SIGNATURE

and

FIRSTRAND BANK LIMITED Respondent

JUDGMENT

Tuchten J:

1 This urgent application arises from a transaction structured by the applicant (Ms Pratt) on advice given by Mr Versveld, an official of the respondent (FirstRand) in 2001. The dispute has, on separated issues decided in this Division against Ms Pratt, twice received the attention of the Supreme Court of Appeal on appeal. In each case the decision of the lower court was upheld. In addition, the Supreme Court of Appeal has on other issues relating to the present dispute denied Ms Pratt leave to appeal against decisions made in this Division. On 3

December 2015, this court finally determined the dispute by granting judgment in favour of FirstRand, ordering Ms Pratt to pay FirstRand R19 634 279,49 together with interest reckoned from 19 June 2007 and costs.

2 The present application is for an interdict precluding FirstRand from executing on its money judgment, pending the outcome of an action yet to be instituted to set aside the money judgment and all those judgments which preceded it. Ms Pratt asserts that FirstRand obtained its judgments by fraud.

3 In 2001, FirstRand lent Ms Pratt R25 million. The loan was a component in a wider transaction. The transaction was designed to enable the R25 million to be exported from South Africa. Reduced to its essentials relevant for present purposes, the transaction was structured as set out below.

4 As at 1999, Ms Pratt owned 20% of the shares in Anne Pratt and Nyasulu (Pty) Limited (APN), a South African company. 10% of the shares in APN were held by Ms Nyasulu.[1] The balance of the shares were subscribed for and held by Monument Trust Company Limited (Monument).

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[1] Described by Ms Pratt as her then empowerment co-shareholder.

5 On 29 January 1999, Mr John Rice, then Ms Pratt's accountant, presented the share certificate reflecting Monument's shareholding in APN to Standard Bank. In its capacity as an authorised dealer, a status conferred by the Reserve Bank, the share certificate was endorsed to reflect that the shares in question were held by a non-resident of South Africa.

6 in 2000, the Fast Track Trust, an Isle of Man trust, bought the 70% of APN's shares held by Monument for R700. These shares were then held by Fast Track in the name of its nominee. Ms Pratt appeared to the Supreme Court of Appeal to be an astute and successful businesswoman and at least a beneficiary of and perhaps the controller of Fast Track.

7 In 2000, Ms Nyasulu sold her 10% interest in APN to Ms Pratt and the name of APN was changed to Anne Pratt & Associates (Pty) Limited (APA).

8 In 2002, Ms Pratt became the sole member of Classy Living CC (CL). Ms Pratt either lent to CL or made available to it as her member's interest the R25 million lent to her by FirstRand.

9 In 2002 CL bought from Fast Track the latter's 70% interest in APA for R25 million. For reasons not explained on the papers, the designation by Standard Bank of the holder of the shares as at 1999 as a non-resident was afforded to Fast Track. No point was made of this at any stage of the litigation or before me.

10 At the request of Ms Pratt, the R25 million was then transferred from South Africa to a bank account held on behalf of Fast Track in Jersey.

11 As Ms Pratt makes plain in her founding affidavit in the present application, the purpose of the scheme was to enable her lawfully to take the money she had borrowed out of South Africa. There were provisions in the scheme for securities to be provided to FirstRand. Ultimately FirstRand was to get a transaction fee,[2] interest and repayment of the capital lent. Ms Pratt apparently hoped to benefit from what she hoped would be the fall of the rand against other currencies.

12 But things did not work out for Ms Pratt and in fact at a time crucial to Ms Pratt's investment strategies the rand relatively appreciated against other relevant currencies. She then decided to repatriate her investments, or some of them, and make use of the amnesties

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2 My description.

granted from time to time by the Reserve Bank to persons who had contravened the exchange control regulations.

13 But in relation to the R25 million which she had borrowed from FirstRand, Ms Pratt adopted a different strategy. She asserted that the transaction was one whereby capital or a right to capital had been directly or indirectly exported from South Africa in contravention of Exchange Control reg 10(1)(c). This, she claimed, rendered her loan agreement with FirstRand unenforceable with the consequence that she was not liable on the loan agreement. She accepted, though, that in principle she might be liable to FirstRand under the principles of unjustified enrichment.

14 As I have explained, Ms Pratt lost the argument and the Supreme Court of Appeal has affirmed the judgments of this court, all of which has resulted in the declaration of her liability to FirstRand in a substantial amount. But now she seeks to reopen the argument. She says that the earlier judgments were all induced by a fraud perpetrated upon the court by FirstRand. In the present application she asks that the equitable discretion vested in the courts to stay execution of its process be invoked in her favour pending an action which she says she will institute to set aside the judgments.

15 Regulation 10(1)(c) reads as follows:

> No person shall, except with permission granted by the Treasury and in accordance with such conditions as the Treasury may impose enter into any transaction whereby capital or any right to capital is directly or indirectly exported from the Republic.

16 it is important for present purposes to identify how the dispute between the parties was procedurally presented to the courts. By summons dated 25 September 2003, Ms Pratt instituted an action against FirstRand[3] for an order declaring the transaction *ab initio* null and void. She pleaded the components of the transaction; that she had been advised by Mr Versveld, an employee of FirstRand, to conclude the transaction;[4] that the purchase price for the shares was to the knowledge of FirstRand not based on an independent auditor's report and was significantly in excess of these shares' fair value; that the transaction was not concluded at arms' length; that the transaction was concluded and effected without Treasury permission; and that the transaction and its implementation were thus in contravention of reg 10(1)(c) and accordingly *ab initio* illegal and void.

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3 And one other defendant against which no relief was sought.

4 Ms Pratt did not allege that Versveld concluded the loan component of the transaction on behalf of FirstRand. It appears that other officials represented FirstRand in this regard.

17 FirstRand generally denied these central allegations and denied specifically that Versveld was employed to provide advice of the nature alleged. While admitting that Versveld did in fact provide advice, FirstRand denied that the loan agreement component of the transaction was entered into pursuant to Versveld's advice or that the loan agreement gave effect to the advice that Versveld did in fact give.

18 FirstRand went on to plead that it was an authorised dealer as defined in the Exchange Control Regulations and that as an authorised dealer FirstRand was, on behalf of the Treasury, authorised on behalf of the Treasury to approve the purchase of foreign exchange.

19 Of considerable significance for present purposes, FirstRand also pleaded that in terms of a specific ruling of the Treasury, ruling E5(c)(a), FirstRand was authorised to remit through normal banking channels the local sale or redemption proceeds of non-resident owned assets. Under ruling E5(c)(a), FirstRand asserted that it was accordingly permitted to conclude and implement the transaction.[5]

20 Ms Pratt replicated to FirstRand's plea. She specifically denied that ruling E5(c)(a) permitted FirstRand whether in its terms ("in fact") or in law to act in contravention of reg (10(1)(c).

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[5] FirstRand also joined by third party notice the firm of chartered accountants which had valued the shares, a matter of no consequence for present purposes.

21 FirstRand, as well as filing a plea, delivered a counterclaim for enforcement of the loan agreement component of the transaction or, in the alternative, a claim for the R25 million and interest based on unjustified enrichment.

22 On these pleadings, the onus was on Ms Pratt to prove the case she had pleaded. This was appreciated by the parties, as appears from the customary minute of their pre-trial conference on the file and by the learned trial judge before whom the matter came. I mention this because there is a suggestion in one of the judgments of the Supreme Court of Appeal that the parties had not appreciated where the onus in fact lay.

23 In January 2006, before the case was called in the trial court, something rather unusual, at least in my experience, took place. Leading counsel for FirstRand addressed his opponent, an eminent senior member of the Pretoria bar and leading for Ms Pratt, formally in writing. Counsel gave his opponent a written summary of the anticipated evidence of a witness, Mr Ribbens, whom FirstRand intended to called to give factual evidence "concerning the manner in which the Treasury in practice granted permissions or made exemptions."

24 The case came to trial before Mokgoatlheng AJ. When leading counsel for Ms Pratt opened the case, he informed the court that the parties had agreed that the result of the entire case, on the merits, was to depend on the determination of four identified issues. I shall call this the trial agreement. Quantum would therefore, if necessary, stand over for later determination.

25 The four issues are in summary and to the extent presently relevant expressed in the following four questions:

25.1 Did the transaction fall within the ambit of reg 10(1)(c)?

25.2 If so, was permission for the transaction granted by the Treasury?

25.3 If not, did the transaction contravene reg 10(1)(c)?

25.4 If so, did the contravention result in the nullity of the agreements which constituted the transaction?

26 Counsel for Ms Pratt then opened her case by addressing the court. In anticipation of the evidence of the witness foreshadowed to be called by FirstRand, counsel for Ms Pratt recorded their objection to

the admissibility of the evidence to be presented but accepted that the evidence might be led and the issue of admissibility decided at the end of the case.

27 Counsel for Ms Pratt then closed her case without calling any evidence.

28 On behalf of FirstRand, the anticipated witness, Mr Ribbens, then gave evidence. He was the only witness to testify at the trial. Mr Ribbens was the official at FirstRand in charge of exchange control and the person with whom the general manager: exchange control in that department of the Reserve Bank liaised in relation to any issue not dealt with through the normal day to day structures of their respective banks. Mr Ribbens testified that the Reserve Bank issued rulings from time to time which were not made available to the general public. Instead these rulings were given to the Reserve Bank's "authorised dealers". These authorised dealers were financial institutions which the Treasury had empowered to effect transactions in relation to foreign exchange generally, including the export of rands from South Africa to other jurisdictions.

29 The general effect of Mr Ribbens' evidence was that the Reserve Bank[6] identified categories of transactions which it regarded as worthy of its permission such as is contemplated in reg 10(1)(c). If an authorised dealer regarded a transaction put up to it by a client as one falling within the scope of such a ruling, the authorised bank was empowered then by the Reserve Bank to give effect to it, provided it did so through normal banking channels. In a case where the authorised dealer did *not* regard the proposed transaction as falling within the scope of a ruling, and only in such a case, the proposed transaction was reported to the Reserve Bank and scrutinised at a meeting of a committee established for this purpose. The latter process is considerably more cumbersome and time consuming than the former. The Reserve Bank did not deal directly with the public but only through authorised dealers. The Reserve Bank issues to its authorised dealers a document called the exchange control manual, which is a general guide, both to authorised dealers and the public, on exchange control rulings.

30 There was a rulings committee convened by the exchange control department of the Reserve Bank on which representatives of authorised dealers served. At the meetings of this committee, the content of rulings both existing and proposed were discussed. Matters

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6 The terms Treasury and Reserve Bank appear throughout to have been used interchangeably. I shall do the same.

requiring attention at a higher level could be escalated to a liaison committee consisting of representatives of the banks and the Reserve Bank. At meetings of this latter committee, typically, issues were discussed, rulings were made and guidance given. In addition, bank officials could contact the Reserve Bank by telephone, typically for guidance on more simple issues. Where a new instrument came onto the market, Mr Ribbens might have a brief telephone discussion with a senior official in the Reserve Bank and obtain guidance. Or a bank might make a formal application and treat the outcome of such an application as a precedent for future conduct.

31 I interrupt this narrative to point out that the administrative decision making involved in the conferring or withholding of permissions required by the regulations takes place in a manner markedly different from that in which administrative decisions normally are made. The authorised dealer is not the agent or delegate of the Treasury to make the required administrative decision. A representative of the Reserve Bank does not in the first instance apply his mind to the facts of the proposed transaction. Instead, the authorised dealer is required to interpret the mind of the Treasury, as it were, to divine whether the proposed transaction does or does not fall within the ruling.

32 The justification for the system is that foreign trade between South African residents and the rest of the world simply would not be possible if every proposed transaction enjoyed the individual attention of the decision makers within the Treasury. Because this is so, blanket permissions are granted in advance in the way I have described to balance the competing considerations of exchange control on the one hand and the efficient operation of South Africa's commercial, industrial and financial systems on the other.

33 No doubt, this system is open to criticism. But to criticise it would be otiose in the context of the present case. There was no constitutional attack on the system in any of the courts before which different aspects of the present dispute served. Nor was there any constitutional attack before me. So the system must be taken, warts and all, as reflecting existing law.

34 To continue with the thrust of the evidence of Mr Ribbens: exchange control in relation to the rand holdings of non-residents within South Africa was abolished on 13 March 1995, ie before the time when the transaction presently under scrutiny was considered. Mr Ribbens testified about how ruling E5(c)(a)[7] was understood and applied by

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[7] Section E of the exchange control rulings deals with transactions with non-residents.

FirstRand. A non-resident entity was broadly defined as one in which 75% or more of its capital or voting power was held by non-residents.

35 In relation to shares held by a person or entity claiming to be a non-resident, an authorised dealer would ensure that the funds to pay for the shares have been brought in from outside South Africa or emanate from a non-resident rand account. The dealer would scrutinise the sale agreement and get a valuation certificate, preferably from a chartered accountant registered in South Africa. In such a case, the dealer has permission from the Reserve Bank to enter into transactions exporting funds derived from the sale of such shares without further reference to the Reserve Bank.

36 A most important step in practical terms is that once the authorised dealer is satisfied that these requirements have been met, the share certificate in relation to the shares in question is stamped "non-resident endorsed". Such a stamp is treated as proof that the shares in question are held by a non-resident. The existence of the stamp allows the non-resident at any time in future to sell the shares and export the capital derived from such a sale out of South Africa.

37 Ruling E5(c)(a) reads:

> The local sale or redemption proceeds of non-resident owned assets in South Africa may be regarded as remittable through normal banking channels. Such proceeds may also be freely used in the common monetary area by non-residents for investment and other purposes and may accordingly be credited to non-residential accounts.

38 This must be read with ruling E5A(1)(a), which reads:

> The attention of Authorised Dealers is also drawn to the provisions of, *inter alia*, Exchange Control Regulation 10(1)(c). In this regard it is essential that all securities related transactions, between a resident and a non-resident immigrant whereby capital or any right to capital is directly or indirectly exported from the Republic, especially those which have cross-border flow implications, are carefully scrutinised and documentary evidence such as broker's notes validated trade advices, sighted in order to ensure that such transactions are conducted at arms length and in market related prices. In the case of any doubt on the part of the Authorised Dealer, concerned the proposed transaction is to be referred to the Exchange Control Department of the South African Reserve Bank.

39 The argument for Ms Pratt in the trial court was that there was no evidence that FirstRand carefully scrutinised the transaction. But Mr Ribbens testified that as a matter of practice within FirstRand, the

crucial component of the transaction was that FirstRand was presented by Ms Pratt with the relevant share certificate duly stamped (by Standard Bank, it will be recalled) to reflect the holder of the shares as a non-resident.

40 The mechanics of the transaction were that CL, the purchaser of the shares in APA, applied to FirstRand to buy from FirstRand foreign currency (US dollars, as it happened) to pay the purchase price for the shares into the account of a company nominated by Fast Track trust called Falcon Management Ltd in a bank in Jersey in the Channel Islands.

41 The argument was then made, and lost, on behalf of Ms Pratt that the evidence of Mr Ribbens was inadmissible. There was no cross-examination of Mr Ribbens. No further evidence was adduced on either side.

42 On this evidence, Mokgoatlheng AJ concluded that the transaction was indeed one falling within the purview of reg 10(1)(c). The first of the four questions was therefore answered in favour of Ms Pratt. But the second question was, crucially, answered against Ms Pratt. Mokgoatlheng AJ found that the evidence before him established that permission as contemplated in the regulation had been granted. After

the other questions were disposed of, an order issued, dismissing Ms Pratt's summons.

43 The order of Mokgoatlheng AJ went on appeal to the Supreme Court of Appeal. On 12 September 2008, under case no. 416/07, Ms Pratt's appeal was dismissed.[8] During the course of the judgment, the Supreme Court of Appeal observed that, having regard to the incidence of the onus of proof, the absence of evidence of any failure to grant permission should have been fatal to Ms Pratt's case and that the evidence of Mr Ribbens in relation to the blanket permission conferred on authorised dealers through the relevant rulings had given rise to a rebuttable inference of fact that permission for the transaction had in fact been granted.

44 The case then resumed in this Division in relation to FirstRand's counterclaim for payment. On 7 April 2010, some 19 months after the dismissal of her appeal, Ms Pratt gave notice of her intention to amend her plea to the counterclaim to allege that FirstRand devised and implemented the transaction *with the fraudulent intention of* circumventing reg 10(1)(c) and that the transaction was for this reason void. The amendment was opposed but on 27 July 2010 was allowed

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8 The judgment of the SCA was reported as *Pratt v First Rand Bank* [2008] ZASCA 92

on application by Goodey AJ. FirstRand then replicated that the issue was *res judicata.*

45 The issues raised by the amendment and the replication were once again separated (in this instance against the opposition of Ms Pratt) and came before Fabricius J, who upheld the *res judicata* point. The learned judge considered that the issue raised by the amendment was whether permission had been granted and that this issue had been before and had been decided against Ms Pratt by Mokgoatlheng AJ. Once again, the issue went to the Supreme Court of Appeal. Once again, the argument went against Ms Pratt. On 11 September 2014, under case no. 696/13,[9] the appeal was dismissed and the reasoning of Fabricius J was upheld. This date is important because it was then, at the latest, that Ms Pratt must have known, and therefore did know, that the existence of the order of Mokgoatlheng AJ was an insuperable bar to her entitlement to ventilate the allegation that FirstRand had devised and implemented the transaction with the fraudulent intention of circumventing reg 10(1)(c). But of course the notice of amendment of 7 April 2010 shows that by that date, at the latest, Ms Pratt was ready to run a fraud defence. The delay of nineteen months, though, between the order of Mokgoatlheng AJ and

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9 Reported as *Pratt v FirstRand Bank Limited* [2014] ZASCA 110

the notice of amendment introducing the fraud defence remains unexplained.

46 But Ms Pratt took no steps to attack the validity of the order of Mokgoatlheng AJ. Instead, shortly before the resumed hearing once again in this Division before Fabricius J on the merits of the counterclaim (which translated to a trial of the quantum of FirstRand's claim for payment), Ms Pratt applied to amend her plea to the counterclaim to plead yet another variant of her fraud defence. On 3 November 2015, leave to amend was refused, as was leave to appeal the refusal of the amendment, both in this Division and, on 23 February 2016, in the Supreme Court of Appeal. Ms Platt then applied for a stay of the quantum trial pending a petition to the Supreme Court of Appeal. The application for a stay was dismissed by Fabricius J. On 3 December 2015, Fabricius J adjudicated the counterclaim and found for FirstRand in the sum of R19 634 279, interest and costs. Ms Platt presented no evidence in relation to the counterclaim. Ms Pratt applied for leave to appeal the quantum order and, later, for a postponement of her own application for leave to appeal the quantum order. Both the application for postponement and the application for leave to appeal the quantum order were dismissed by Fabricius J on 30 March 2016. The present application was launched on 13 April 2016.

47 From quite soon after she concluded the transaction, Ms Pratt formed the view on advice she received that the transaction was unlawful. This view ripened into a belief that Versveld and (it must inevitably follow) other officials of FirstRand had known the transaction was unlawful for want of the requisite blanket permission under reg 10(1)(c) but had nevertheless put her, Ms Pratt, into the transaction. The motive for their so doing was said by counsel for Ms Pratt in reply to be the desire to earn the transaction fee for FirstRand.

48 In the present application, Ms Pratt relies, as became clear during argument, on two documents which came to her knowledge, she says, after Mokgoatlheng AJ gave judgment. I shall deal with them both below. But for present purposes, I need to say that the one document, a minute of a meeting, was probably in FirstRand's possession at all material times and should probably have been discovered.[10] The second such document, a report by accountants KPMG, is one which was, according to FirstRand, never in FirstRand's possession.[11]

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10 I come to these conclusions because the direct assertions to this effect in the founding affidavit were not traversed at all in the answering affidavit.

11 I say this because FirstRand directly denied having been in possession of the KPMG report and counsel for Ms Pratt accepted for present purposes that Ms Pratt's case had to be argued on the footing that this denial was true.

49 The action which Ms Pratt says she intends to bring is one for *restitutio in integrum*. Where it is brought on the ground that the other party has suppressed a document, the party seeking *restitutio* must show that the suppression was fraudulent, that the document was not available to the applicant before judgment sought to be set aside and that production of the document would have led to a different result. Where the applicant knows of the true position before judgment is granted against her, she cannot thereafter succeed in a claim for *restitutio*.[12]

50 The document in question is a minute of the fortieth meeting of the exchange control liaison committee held on 3 March 1999. A representative of First National Bank of Southern Africa Ltd, a predecessor of FirstRand, attended the meeting. The material which according to Ms Pratt is relevant, indeed decisive, of her dispute with FirstRand, is contained in item 6(c) of the minute. Item 6 is headed "New Matters". The item reads:

> Several schemes involving the movement of funds by individuals, in terms of the Individual Investment Allowance, which ultimately find their way back into a South African Company were referred to your Department for consideration. The Control's replies stated that Regulation 10(1)(c) was being contravened. However as indicated to you

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12 *Port Edward Town Board v Kay and Another* 1994 1 SA 690 D

in many instances these would not be detected by Authorised Dealers as they are being structured in such a manner as to circumvent Regulation 3(1)(f) and other Excon requirements. Audit firms and the legal fraternity are advising clients on the relative structuring.

The Control undertook to address the professional forums on these issues. Has this been done or is it still your intention to approach the relative bodies?

At this stage a large number of their members appear to be unsure of your stance in this regard. (B.C.T. McLeod - Nedcor Bank Limited).

Mr McLeod gave a brief explanation of the point raised. The main thrust was that certain professional firms are advising their clients on how to use these schemes. It was felt that Exchange Control should make their views known at the various forums that they attend. Various comments from the forum acknowledged the problem within the banking sector and also the fact that it is difficult to convince Authorised Dealers' customers that the various schemes are not permissible. The Chairperson advised that the individual allowance facility was not introduced to enable the movement of funds on this basis and is not what the Minister of Finance intended when the facility was granted. He advised that the matter had been taken up with the Law Society and that it will be taken up with SAICA. The Control will also bring these schemes to the attention of the Minister of Finance and SARS. The Authorised Dealers were requested to ensure that their side of any arrangements in this regard be kept above-board. Any individual requests to participate in any of the so called schemes will be and should be declined since it was not the intention of the Minister of Finance to create a mechanism for individuals to exit more than what is permitted.

51 Ms Pratt finds significance in this minute in that it deals, so she says, with what she calls "loop structures'. I find no reference to loop structures in the minute. It seems to me that what was being addressed was the case of South African residents who were using their "individual investment allowances" to invest in South African companies. The connection of this minute to the present transaction seems to me tenuous. The minute appears to be no more than a discussion between high officials as to the purposes for which individual investment allowances were being sought to be put. There is no suggestion that the expressions of views were ever translated into a ruling. Nor is there any indication that ruling E5A(1)(a), which I quoted in paragraph 38 above, was ever qualified, let alone amended.[13]

52 The suggestion on behalf of Ms Pratt appears to be that the phrase "at arms length and in market related prices" is to be read conjunctively. But this submission raises a myriad of difficulties for Ms Pratt. Her particulars of claim in terms raised the issue that the transaction was *neither* at arms' length nor at a market related price.

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[13] In a very terse answer to one of the relevant paragraphs in the founding affidavit (para 96 at p433), it is suggested by FirstRand that the characterisation by Standard Bank of the shares disposed of in the transaction as held by a non-resident was an example of what the minute deprecates.

But Ms Pratt's counsel decided not to take the point and instead confined the case on the merits to the four questions.

53 Furthermore, it is incontestable that Ms Pratt was advised at an early stage that the transaction was a "blatant contravention" of reg 10(1)(c). This appears from a lengthy written opinion dated 28 July 2003 given to Ms Pratt by a partner in a firm of attorneys. The contravention, the opinion said, started

> ... with the use of travel allowance money which was donated by you to the offshore trust, to in turn fund the acquisition of 70% of the issued share capital of the SA company when it was formed, at a relatively nominal consideration of R700 ... .

54 One does not know why eminent senior counsel and his junior decided at the trial before Mokgoatlheng AJ to abandon a point which Ms Pratt now presses with such enthusiasm. Nor does one know why the allegation that Mr Rice, then Ms Pratt's own accountant, had overvalued the shares was not pressed. The veil which shrouds communications between legal advisor and client has not been lifted. It is not suggested that counsel were incompetent or gave no proper attention to their brief.[14] It is not suggested that counsel were not authorised to conclude the trial agreement. Counsel for FirstRand

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[14] The very idea of such a thing in the present circumstances is absurd.

have cited authority for the proposition that once the matter has been placed by a lay client in the hands of counsel, the lay client is bound by decisions such as these when made by counsel. I need not refer to such authority because counsel for Ms Pratt accepted that such was the position.

55 As I have said, one does not know why the trial agreement was concluded. Nor does one know why the decision was made to run a case such as this without calling the plaintiff herself. One does not know why, almost as curiously, the 'no arms' length, not market related' point was abandoned - if Ms Pratt believed in the point as she says she does. This is particularly so because counsel for Ms Pratt were in a position to extract from Mr Ribbens, if the point were good, a concession that would have made the case for her. By the time the trial agreement was concluded, Ms Pratt was very well informed on exchange control matters and the proprieties of what she calls loop transactions. The irresistible inference is that at the time of the trial already Ms Pratt knew the point was bad. What has changed since then? Nothing that I can see.

56 I turn to the KPMG report. This report was commissioned by the Reserve Bank to investigate Ms Pratt's complaints that the transaction had been illegal. During January 2004 Ms Pratt participated in the

KPMG investigation. She says that she believed that KPMG had compiled a report of their investigation. Indeed it had; the report was handed to the Reserve Bank in 2004. But, Ms Pratt claims, she only obtained a copy of the report in March 2016.

57 The report reflects a number of interviews with officials who worked in FirstRand's foreign exchange department at the relevant time. Several of them took the view that the transaction fell into a grey area or was against the spirit of the law. Versveld himself discussed the transaction with some of his colleagues. His view was that the transaction was not in conflict with the regulation.

58 Ms Pratt asserts that the content of the KPMG report shocked her and that the report confirmed her belief that FirstRand had contravened reg 10(1)(c). She claims that the report constitutes proof that FirstRand had withheld from the trial before Mokgoatlheng AJ its knowledge that the transaction contravened the regulation.

59 I do not agree. The report shows nothing more than that officials within FirstRand held different opinions on the subject. The issue always was whether the blanket permission conferred by the Reserve Bank through ruling E5A(1)(a) applied to the transaction. Nothing in the KPMG report persuades me that the officials within FirstRand who

were actually involved in the transaction, including Versveld, held the view that the blanket permission did not apply to the transaction.

60 The system applied by the Reserve Bank, which requires that officials within authorised dealers use their own discretions in interpreting and applying Reserve Bank rulings framed in general terms, inevitably leads to a situation where the opinions of officials on particular transactions can differ. Nothing in the KPMG report, viewed in the context of the factual matrix, persuades me that even if the report had been introduced in evidence the result of the trial before Mokgoatlheng AJ would have been any different.

61 As I see it, Ms Pratt faces an insurmountable difficulty. She has not suggested that she is not bound by the trial agreement. The trial agreement identifies one of the crucial issues as being whether the transaction was effected with the requisite permission. On Ms Pratt's own reasoning, she had to prove that the officials of FirstRand involved in the transaction *knew* that ruling E5A(1)(a) did not cover the transaction. There was simply no evidence to that effect.

62 But even if one accepts for the sake of argument (which I do not) that Versveld and the other officials knew that ruling E5A(1)(a) did not cover the transaction, Ms Pratt for present purposes and her allegedly

proposed action for *restitutio* would still have to prove that FirstRand fraudulently concealed that evidence from the trial court. So she has to prove a double fraud: firstly, conclusion of the transaction in the knowledge that the transaction was not covered by ruling E5A(1)(a); and, secondly, a fraudulent concealment of that knowledge from the trial court. The furthest counsel for Ms Pratt could go in that latter regard was the submission that there rested on FirstRand a duty to call witnesses to testify on its behalf in the trial who would give this damaging evidence. Counsel suggested that this duty of self-incrimination arose from the fact that FirstRand is a powerful institution. I do not agree. There is no fraud in electing not to call a witness who might harm your case, whether you are an accused person in the criminal courts or a financially powerful institution.[15]

63 In the general comment on rule 45A, which provides, as does the common law, that a court may suspend the execution of its order for such period as it may deem fit, Erasmus, *Superior Court Practice* (looseleaf ed) observes, with reference to authority, that a court will grant a stay of execution where real and substantial justice requires it or, put another way, where injustice will otherwise be done. The discretion must of course be exercised judicially but is not otherwise limited. The same author points out that in particular circumstances,

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15 It is unnecessary for present purposes to determine whether this general proposition applies, inevitably, to organs of state which have constitutional obligations.

it may be appropriate in exercising the discretion to borrow from the requirements for an interlocutory interdict. As Ms Pratt has formulated the relief she seeks in the form of such an interdict, I think it would in this case be appropriate to do so.[16]

64 There are other factors to which I think I should have regard in determining whether an injustice would be done if the interim interdict sought by Ms Pratt did not issue. The first is that for the last thirteen years, Ms Pratt has had what I might call a Rolls Royce ride through the highways of the South African legal system. After a multitude of hearings, FirstRand has won an order for payment which is no longer subject to any appeal.

65 And then Ms Pratt has been less than forthcoming about her financial position. She says that she will suffer harm if the order for payment is carried into execution because execution against her assets would be monetarily and emotionally devastating to her and to those whom she supports professionally and personally.

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16 The factors influencing the grant or refusal of an interim interdict pending a review in the constitutional era were set out by my brother Fabricius J in *Afrisake NPC and Others v City of Tshwane and Others*, a judgment delivered in this Division on 14 March 2014 under case no 74192/2014.

66 But she had the benefit of the R25 million which FirstRand lent to her. What has she done with the money? Why are the capital sum and its proceeds over the last thirteen years not available for repayment? What and where are Ms Pratt's assets and what are they worth? Ms Pratt does not provide answers to any of these questions.

67 Allied to these concerns is the fact that the money judgment is attracting interest and because of the large amount involved, increasing at a prodigious rate. If Ms Pratt's assets are not presently sufficient to cover the judgment, then there is a risk that if I interdicted execution and FirstRand were ultimately successful, the practical value of the judgment would be eroded by an ultimate inability to satisfy it.

68 Ms Pratt says that she has known for years that she was the victim of a fraud perpetrated by FirstRand. Why did she not bring the action for *restitutio* at the latest when the Supreme Court of Appeal affirmed the *res judicata* ruling of Fabricius J? She claims that the KPMG report precipitated her actions in this connection. But years ago she could have instituted her action and required Reserve Bank officials to testify and produce documents, including the KPMG report, under subpoena. She did not need to go through the intricate amendment process. She could simply have issued summons for *restitutio*. That

she did not do so suggests to me that the present application is purely strategic, yet another attempt to string out the legal process.

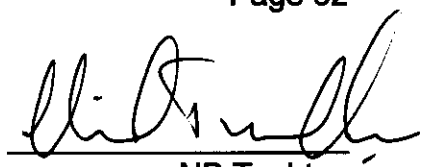
69 I am reinforced in this conclusion by the fact that even today, Ms Pratt has not instituted her action for *restitutio*. And the last of the factors which I weigh is that my refusal to grant an interdict will not close the door on what Ms Pratt says is her quest for justice. Nothing prevents her from paying to the extent of her financial resources what the courts have said she owes, instituting her action and recovering what she has paid, with interest, if and when she is ultimately successful.

70 So, borrowing from the requirements for interim interdicts, I find that Ms Pratt has made out a weak case, at best, on the merits and that the balance of convenience is against her. I am thus far from satisfied that the refusal of an interdict will result in an injustice.

71 I make the following order:

1 The application is dismissed.

2 The applicant must pay the respondent's costs, including the costs consequent upon the employment of two counsel.



NB Tuchten
Judge of the High Court
30 June 2016

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