IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 68087/2017

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

12/12/19 .....
DATE SIGNATURE

In the matter between:

HOUTBOSPLAAS (PTY) LTD First Applicant

T B S ALPHA BELEGGINGS (PTY) LTD Second Applicant

and

NEDBANK LIMITED Respondent

JUDGMENT

MOTHLE J

Introduction

[1] It is common cause that for several years and prior to 2001, the two companies, Houtbosplaas (Pty) Ltd and TBS Alpha

Beleggings ("the applicants") were holders of accounts with the respondent, Nedbank Limited (Nedbank). In the period 20 January 2017 to 7 July 2017, Nedbank placed restrictions on the applicants' accounts, with the result that the applicants were denied access. According to Nedbank, the reason for the restriction of access placed on the accounts was to compel the applicants to provide information of its shareholders for verification purposes required in terms of the Financial Intelligence Centre Act, 38 of 2001 ("*FICA*") read with the Regulations published on the 20 December 2002, in terms of FICA.

[2] The applicants contend that Nedbank acted unlawfully in placing the restriction to access the accounts and claimed the amounts of R66,814.68 and R114,288.63 plus interest respectively, as compensation for the loss of the interests on their investments, incurred as a result of the restriction, including a punitive cost order. The rate of interest is 10.25% calculated from 8 July 2017 until date of final payment.

[3] Nedbank opposes the claim but does not dispute the calculation of the amounts claimed.

FICA

[4] Before dealing with the background facts in this matter it is apposite to briefly deal with the object of FICA. The Act establishes a Financial Intelligence Centre, with authority to combat money laundering activities and financing of terrorist and related activities. Further, it imposes certain duties on institutions and other persons who might be used for money laundering purposes and the financing of terrorist and related activities, to provide for customer due diligence measures including, with respect to beneficial ownership and persons in prominent positions, as well as to provide for a risk-based approach to client identification and verification.

[5] In order to achieve this objective, FICA provides in section 21 that financial institutions (including banks) which engages with a prospective client to enter into a single transaction or to establish a business relationship; to establish and verify the identity of that client. In the case of juristic persons, the identities of its members or shareholders. Where as in this case, a relationship had already existed prior to the enactment of FICA, and the financial institution had established a business relationship with the client before FICA took effect, s 21 (2) provides that the bank

may not conclude a transaction in the course of that business relationship, unless it has taken the prescribed steps to establish and verify the identity of the client including, in the case of companies, the identities of the shareholders.

Background

[6] Prior to the enactment of FICA, the two Applicant companies had already established a business relationship with Nedbank. The provisions of s21(2) became applicable. Nedbank was obligated to verify the identity of the shareholders of the applicants. The shareholding in each of the two applicants is held by four registered Trusts, each holding ordinary and preferential par value shares. The one preferential par value share in each company was held by Judge Kees van Dijkhorst, a Judge of this Court, who is on retirement from active service, and is the sole director in each of the two applicant companies. I will return to the details of the shareholding.

[7] In mid-November 2016, Nedbank requested from Judge van Dijkhorst, documents of the applicants' shareholders to verify the identities thereof, in particular copies of the Trust deeds and letters of authority of the Trusts that held shares in the applicants. Judge van Dijkhorst was of the view that for

purposes of verification of the identities of the shareholders of the applicants, he was not obligated to disclose the Trust deeds as these were confidential. In particular, he refused to provide the Trust deed of Hettie van Dijkhorst Trust; but was prepared to show it to the officials of Nedbank and to allow them to take photographs if necessary.

[8] Nedbank officials saw the Trust deed but did not take the photographs as invited because, as they allege, the Trust deed was either not complete or not completely legible. In December 2016, Judge van Dijkhorst provided Nedbank with copies of letters of authority for all four Trusts. In the same month, the applicants' auditors also provided copies of three of the four Trust deeds to Nedbank. Nedbank did not receive the Trust deed of Hettie van Dijkhorst Trust.

[9] After writing letters of demand to Judge van Dijkhorst to submit a copy of the Hettie van Dijkhorst Trust deed without success, Nedbank in January 2017, restricted access to both banking accounts and declined to honour any transactions on those accounts. The applicants then terminated the mandate of Nedbank on 20 January 2017 and demanded that the investments held with Nedbank should be transferred to new

accounts opened with another bank, ABSA. Nedbank refused, maintaining that the very closure of an account is a business transaction referred to in s 21 of FICA. On 11 February 2017, the applicants lodged a complaint with the ombudsman. The ombudsman's report came on 5 June 2017, wherein it was found that the request for the documents '*appears to be normal administration by the bank*'. The ombudsman further opined that Judge van Dijkhorst is required to provide the information immediately before he can be allowed to access the funds or to close the accounts. The Ombudsman referred Judge van Dijkhorst to the Financial Intelligence Centre.

[10] As Judge van Dijkhorst could not afford the Applicants' funds to be tied up for indefinite period, on 7 June 2017 he relented and provided the bank with a copy of Hettie van Dijkhorst Trust deed. A month thereafter, Nedbank released the funds.

Questions raised for determination

[11] In a Joint Minute submitted at the hearing by counsel of both parties, the following are the questions that need to be determined by this Court namely:

[11.1] Whether the restriction/freezing of the Applicants' accounts by Nedbank was lawful;

[11.2] Whether the restriction/freezing of the Applicants' accounts by Nedbank was lawful from the date of termination of its mandate on 20 January 2017;

[11.3] Whether Nedbank's interpretation of the provisions of Regulation 7(f)(3) relating to determination of the shareholding in the Applicants is correct;

[11.4] Whether the closure of the Applicants' accounts is a transaction as envisaged in FICA;

[11.5] Whether the Applicants are entitled to their claim against Nedbank in terms of prayers 1, 2 and 3 of the Notice of Motion;

[11.6] Whether the Applicants are entitled to a punitive cost order against Nedbank.

Analysis

[12] It is common cause between the parties that Nedbank was entitled to verify the identify of customers with which it has been conducting business prior to enactment of FICA in terms of

Section 21(2). The identity of the applicant companies was provided to Nedbank and there was no dispute in that regard. Section 21B (4) of FICA provides:

(4) If a natural person, in entering into a single transaction or establishing a business relationship as contemplated in Section 21, is acting in pursuance of the provisions of a trust agreement between the natural persons an accountable institution must, in addition to the steps required under Sections 21 and 21A and in accordance with his risk management and compliance program –

(a) Establish the identifying name and number of trusts, if applicable;

(b) Establish the address of the Master of the High Court where the trust is registered, if applicable;

(c) Establish the identity of the founder;

(d) Establish the identity of –

(i) Each trustee; and

(ii) Each natural person who purports to be authorised to enter into a single transaction or establish a business relationship with the accountable institution on behalf of the trust;

(e) Establish –

(i) The identity of each beneficiary referred to by name in the trust deed or other founding instrument in terms of which the trust is created; or

(ii) If beneficiaries are not referred to by name in the trust deed or other founding instrument in terms of which the trust is created, the particulars of how the beneficiaries of the trust are determined;

(f) Take reasonable steps to verify the particulars obtained in paragraph (a), (b) and (e)(ii); and

(g) Take reasonable steps to verify the identities of the natural persons referred to in paragraphs (c), (d) and (e)(i) so that accountable institution is satisfied that it knows the identities of the natural persons concerned.'

[13] In terms of Regulation 7 of the published Regulations, an accountable institution must obtain *from the natural person* acting or purporting to act on behalf of a close corporation or the

company with which it establishing a business relationship or concluding a single transaction:

"*(f) In the case of a company –*

(ii) The full names, date of birth, identity number, ... concerning the natural or legal person, partnership or trust holding 25% or more of the voting rights at the general meeting of the company concerned;"

[14] In essence, the provisions of FICA read with the Regulations, in particular Regulation 7(f)(ii), obligates the Nedbank to obtain particulars of trusts holding 25% or more of the voting rights at the general meeting of the company concerned, in this case both the Applicants.

[15] The shareholding in both companies was identical and described as follows:

Shareholders of Houtbosplaas (Edm) Bpk

Hettie Van Dijkhorst Trust – 1 ordinary no par share (25%).

Lientjie Van Dijkhorst Trust – 1 ordinary no par share (25%).

Adri Van Dijkhorst Trust – 1 ordinary no par share (25%).

Eldie Van Dijkhorst Trust – 1 ordinary no par share (25%).

Hettie Van Dijkhorst Trust – 1 preferential no par value share (20%).

Lientjie Van Dijkhorst Trust – 1 preferential no par value share value (each 20%).

Adri Van Dijkhorst Trust –1 preferential no par value share (20%).

Eldie Van Dijkhorst Trust – 1 preferential no par value share (20%).

Kees Van Dijkhorst – 1 preferential no par value share (20%).

Shareholders of TBS Alpha Beleggings (Edms) Bpk

Hettie Van Dijkhorst Trust – 1 ordinary no par share (25%).

Lientjie Van Dijkhorst Trust – 1 ordinary no par share (25%).

Adri Van Dijkhorst Trust – 1 ordinary no par share (25%).

Eldie Van Dijkhorst Trust – 1 ordinary no par share (25%).

Hettie Van Dijkhorst Trust – 1 preferential no par value share (20%).

Lientjie Van Dijkhorst Trust – 1 preferential no par value share value (20%).

Adri Van Dijkhorst Trust – 1 preferential no par value share (20%).

Eldie Van Dijkhorst Trust – 1 preferential no par value share (20%).

Kees Van Dijkhorst – 1 preferential no par value share (20%).

[16] Nedbank referred this Court to copies of letters from the auditors of the company Vos Steyn Labuschagne Ing. /Inc. dated 14

November 2016, as confirmation, in their view, that the shareholding of each Trust is 25% and as such, the applicants fell within the provisions of Regulation 7 (f) (ii), which requires the shareholding of the trusts to be 25% of the voting rights in a general meeting of the company. Nedbank's determination of the voting rights of each shareholding Trust, exercised in a general meeting, does not accord with the provisions of Article 2 of the Memorandum of Incorporation of each of the two companies.

[17] The Memorandum of Incorporation ("MOI") of the two applicant companies is identical in its description of voting rights in a general meeting. Article 2.1 of the MOI deals with shares and the rights of shareholders that accrue therefrom. In particular, the voting rights accorded to the preference shares are restricted as they concern *"a resolution that may have the result that a determination is made concerning the property of the company for their own benefit or for the benefit of the estate."* However, the restriction "*shall not have the effect of excluding the right of the preference shareholders to vote on any resolution relating to the compensation of directors or other matters within the normal scope of the powers of the company."*

[18] The Applicants' counsel submits that in determining the voting rights exercised by each trust shareholder in a general meeting, one has to include the preferential shares held by such trust and in essence, each trust will in fact have 22% of the voting rights. Consequently, Nedbank erred in invoking the provisions of Regulation 7(f)(ii), to demand the trust deeds of the shareholders to the Applicants. I agree with this submission and in my view on this point alone, Nedbank's interpretation of Regulation 7(f)(ii) in relation to the applicants was incorrect. Nedbank was therefore not lawfully entitled to demand the trust deeds of the trust's shareholders of the applicants.

[19] On this point alone, Nedbank ignored or misinterpreted the provisions of the MOI of the two companies and thus acted unlawfully in imposing the restrictions of access to the accounts. Nedbank is therefore liable for payment of the loss of mora interest.

[20] There is another matter. Nedbank seems to hold the view that its customers with which it has a business relationship are obligated by FICA to provide verification documents to it on demand. I could not find anywhere in the provisions of FICA, that apart from demanding new customers to submit identification

documents, Nedbank, or any financial institution for that matter, can demand from their existing account holders, and enforce that demand for submission of identity documents for verification, by restricting access to their accounts. On the contrary, Section 21B (4) enjoins the bank to establish the address of *the Master of the High Court* where a trust is registered, if applicable. It seems to me that by not specifically providing that the financial institutions should obtain identification only from the customers, FICA has left room for these financial institutions to access other sources from which such documents and/or information could be obtained, such as the office of the Companies and Intellectual Property Commission ("CIPC"), the office of the Master of the High Court in respect of trusts and the personal identity documents of individuals and partners to a partnership from the Department of Home Affairs.

[21] A business relationship between a financial institution and a customer does not entitle the former to restrict or freeze access to the account of the latter, even in instances where there is a suspicion that the transaction involves unlawful activity. Section 29 of FICA provides for suspicious and unusual transactions. That would include transactions relating to offences such as money laundering or money used to further terrorist activities or

those that appear to be involved in unlawful activity. The courts[1] have frowned upon the freezing of accounts even in more serious cases were unlawful activities or a suspicion thereof was conducted in those accounts. It is common cause between the parties that the identity verification in this case had absolutely nothing to do with unlawful activity or a suspicion thereof conducted in the applicants' accounts.

[22] In view of the conclusions reached in the preceding paragraphs, I am of the view that Nedbank acted incorrectly and is thus liable for the amounts claimed. For that reason, it is unnecessary for this Court to determine the other issues.

[23] In regard to costs, I do not agree that the punitive cost order would be justified in this case. While Nedbank's conduct was prejudicial, I am unable to determine on the evidence that there was malice intended. Nedbank's conduct was premised on a wrong interpretation of Regulation 7(f)(ii) of the FICA Regulations. The costs on a party/party would thus follow the result.

[1] Annex Distribution (Pty) Ltd and Others v Bank of Baroda 2818 (1) SA 562 (GP); The unreported judgment of South African Petroleum Energy Guild (NPC) v RMB Private Bank 2015 JDR 0010 (GJ) and the unreported judgment in Ospoort Boerdery CC v Freyson Attorneys 2019 JDR 0341 (GJ).

[24] In the premises I make the following order:

[24.1] The Applicants' claim against Nedbank succeeds;

[24.2] An order is granted in terms of prayers 1 and 2 of the Notice of Motion in the following terms;

(1)Judgment is granted in favour of the First Applicant against the Respondent for payment of the amount of R 66 814,68;

(2)Interest on the amount of R66 814,68 at the rate of 10,25% per annum from 8 July 2017 to date of payment;

(3)Judgment is granted in favour of the Second Applicant against the Respondent for payment of the amount of R114 288,63;

(4)Interest on the amount of R114 288,63 at the rate of 10.25% from 8 July 2017 to date of payment.

[24.3] Nedbank is ordered to pay the costs of the proceedings on a party/party scale including costs of Applicants' counsel.

JUDGE S P MOTHLE
Judge of the High Court
Gauteng Division
Pretoria

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