Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No.: **A 481/05**

In the matter between:

GARY WALTER VAN DER MERWE	First Appellant
ZONNEKUS MANSION (PTY) LIMITED	Second Appellant

and

INSPECTOR NEL	First Respondent
THE MINISTER OF SAFETY AND SECURITY	Second Respondent
THE DIRECTOR OF PUBLIC PROSECUTIONS	Third Respondent
COMMISSIONER OF SOUTH AFRICAN REVENUE SERVICES	Fourth Respondent

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JUDGMENT : 24TH FEBRUARY 2006

WAGLAY, J.

1. The first Appellant was arrested at Cape Town International Airport whilst he was about to depart for Las Palmas via London, to join his family and friends for an extended holiday in Europe. The member of the South African Police Services also confiscated the foreign currency in his possession at the time of his arrest.

2. On 13 July 2004, after passing the security checkpoint but before passing the Passport Control, first Appellant was requested by Custom Officials to complete a “customs declaration form”. After completing the form, his hand luggage was searched with his consent. First Appellant’s hand luggage contained 130 000 euros and 21 249 US dollars, the combined value of which amounted to approximately R1 million.

3. The Customs Officials called the South African Police Services (SAPS) and advised them that first Appellant was about to leave the country with the foreign currency referred to above and handed the matter over to them. The first Appellant explained to the members of the SAPS who were then seized with the matter that the foreign currency in his possession represented foreign currency belonging to an entire group which including him, consisted of 8 adults and 4 children. He also explained that the other members of the group had departed for Las Palmas two days earlier.

4. Although the members of the SAPS believed that it was unlawful to leave the country with the amount of foreign currency possessed by the first Appellant, having heard Appellant’s explanation they were uncertain, as to what regulation was being contravened. Because of this uncertainty they allowed the first Appellant to board his flight to London, while other members of the SAPS were attempting to establish what Act or Regulation, if any, was being contravened. Before the plane could depart, the SAPS believing that the first Appellant was contravening Regulation

3(1)(a) of the Exchange Control Regulations, 1961 promulgated under s 9 of the Currency and Exchange Act of 1933 (Regulations or Reg.) had first appellant off-loaded from the flight.

5. First Appellant was then arrested and informed that his arrest was pursuant to the provisions of Reg.3(1)(a). First Appellant was also informed, “that the foreign currency will be confiscated”.

6. The matter was thereafter referred to the Commercial branch of the SAPS. The member of the Commercial branch of the SAPS took the first Appellant to the Bellville police station where he was held overnight. The foreign currency was seized, placed in a bag and recorded in the “SAP 13” register at the Bellville police station. On the next day, 14 July 2004, the first Appellant was released on bail. According to his counsel the criminal case against him is still pending.

7. On the same day as first Appellant’s release the South African Revenue Services (SARS) issued a notice in terms of s 99 of the Income Tax Act 58 of 1962 appointing the member of the SAPS who had seized the foreign currency from the first Appellant and recorded it in the SAP 13 register at the Bellville police station, as an agent of the first Appellant. The aforesaid notice referred to the first Appellant as “Gary Walter Van der Merwe/Wellness International Network (Pty) Ltd”. In terms of this appointment the said member of the SAPS was required to pay over the

foreign currency seized from the first Appellant to the SARS. On 19 July 2004 the foreign currency was paid over to the SARS.

8. On or about 15 or 16 July 2004 the first Appellant together with Zonnekus Mansions (Pty) Ltd (Zonnekus), the second Appellant, instituted the present proceedings. Zonnekus is owned solely by the Eagles Family Trust (Trust). First Appellant is the sole director of Zonnekus and one of the trustees of the Trust. The beneficiaries of the Trust are the first Appellant's issue.

9. The two Appellants sought the return of the foreign currency seized by the SAPS to first Appellant and an order granting first Appellant permission to travel out of the Republic of South Africa (Republic) with the said currency. The application was premised on the basis that the amount of foreign currency seized by the SAPS from the first Appellant was below the amount he was legally entitled to take out of the country, and that first Appellant's arrest and detention was wrongful, unlawful and malicious.

10. The Respondents denied that the first Appellant's arrest or the seizure of the foreign currency was wrongful and/or unlawful. Respondents averred that it was unlawful in terms of the Regulations for the first Appellant to have in his possession or attempt to take out of the Republic the amount of foreign currency found on the Appellant. Furthermore Respondents stated that the first Appellant was contravening the Regulations as he had already exhausted his legally permitted travel allowance for the 2004

calendar year, adding that the first Appellant's own version that he was carrying the foreign currency for other persons rendered him liable to criminal prosecution in terms of Reg.3 (1)(a).

11. Six months after the application was launched the matter came before Allie, J. At that hearing Appellants no longer sought the return of the foreign currency to the first Appellant and permission for him to travel abroad with that currency, but the return of the 13 000 euros to the first Appellant on the bases of the *rei-vindicatio*. Appellants did not seek the return of the US$ 21 249 as that money, according to them, was the property of one Allison and the first Appellant was merely carrying the money on Allison's behalf. Second Appellant also did not seek any relief.

12. Allie, J. dismissed the application with costs and the matter now comes before this Court on appeal.

13. The Appellants argument is that the 130 000 euros was and remains the property of the first Appellant and as such he is entitled to its return. Bearing in mind that the return of the foreign currency to first Appellant would give rise to a contravention of the Regulations, first Appellant properly seeks for the foreign currency to be deposited into his banking account where it could be converted into local currency and made available to him.

14. Respondents oppose the relief sought on the basis that once the foreign currency was seized it became forfeited to the National Revenue Fund; the first Appellant cannot therefore claim ownership thereof. If first Appellant is not the owner of the 130 000 euros he cannot seek its return on the basis of the *rei-vindicatio*. The *rei-vindicatio* is only open to an owner for the recovery of his/her property. According to the Respondents when the first Appellant was arrested and informed that he was arrested pursuant to the provisions of Reg.3(1)(a) and that all the foreign currency he had in his possession at the time was being seized, he was being informed that the foreign currency was being seized in terms of the Regulations. The provision under which the foreign currency was seized therefore had to be Reg.3(3) which provides:

> *"(3) Every person who is about to leave the Republic and every person in any port or other place recognized as a place of departure from the Republic, who is requested to do so by the appropriate officer shall –*
>
> *(a) declare whether or not he has with him any bank notes, gold, securities or foreign currency; and*
> *(b) produce any bank notes, gold, securities or foreign currency 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 bank notes, gold, securities or foreign currency, and may seize any bank*

notes, gold, securities or foreign currency produced or found upon such examination or search unless either –

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

(ii) such person produces to the appropriate officer a certificate granted by the Treasury which shows that the exportation by such person of any bank notes, gold, securities or foreign currency which he has with him does not involve a contravention of that sub-regulation.

…"

15. According to Respondents the effect of a seizure of foreign currency under Reg.3(3) is that it immediately becomes forfeited to the National Revenue Fund and can only be refunded or returned to the person from whom it was seized by the Treasury. This is provided for in Reg.3(5) which reads:

"(5) All bank notes, gold, securities and foreign currency seized under sub-regulation (3) or (4) shall be forfeited for the benefit of the National Revenue Fund: Provided that the Treasury may, in its discretion, direct that any bank notes, gold, securities or foreign currency 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." (my emphasis).

16. Dealing firstly then with the issue of forfeiture. The Respondents reliance on Reg.(3)5 to hold that the foreign currency on seizure was immediately forfeited to the National Revenue Fund is based upon the decision of *Action Engineering and Fencing (Pty) Ltd v Moyses NO and Others* 2004 (5) SA 399 (T). In that matter, Muleya, an employee of *Action Engineering,* was given over ZAR700 000 in Zimbabwe to bring to South Africa and to deposit that money into a South African banking account. He was arrested at the bank before he could make the deposit and the money in his possession was seized. While Muleya was arrested pursuant to Regulation 3(1)(b) *bis* the money was seized in terms of the provisions of the Criminal Procedure Act 51 of 1977 (CPA). After Muleya pleaded guilty before the magistrate and was duly convicted, the State applied for the money seized from Muleya to be forfeited to it in terms of s35(1)(a) of the CPA. The Court granted such application. *Action Engineering* the owner of the monies then brought an application to review and set aside the decision of the magistrate to grant the order in terms of s35(1)(a).

17. In considering the review application, the Court looked at Reg3(6); 3(7) and 3(8). These 3 paragraphs are similar in all respects to Regulations 3(3); 3(4) and 3(5) save that while sub-regulation 3(3), 3(4) and 3(5) deal with persons who are about to leave the Republic with “bank notes, gold, securities and/or foreign currency, sub-regulations 3(6), 3(7) and 3(8) deal with persons entering the Republic with South African currency.

18. After quoting sub-regulations 3(6), 3(7) and 3(8) the Court in *Action Engineering* goes on to say at page 407 C – D:

> *"On a general reading of these provisions, I am of the view that the actions of Savious, [Muleya] in respect of which he pleaded guilty and was convicted, fall squarely inside the ambit of these sub-regulations. Moreover, it appears to be provided in peremptory language that the money must be forfeited for the benefit of the National Revenue Fund, whereupon, the Treasury (third respondent as per the definition quoted), in its discretion, may direct that the money seized, or any portion thereof, may be refunded either to Savious [Muleya] or to whoever was entitled to have custody or possession – in this case, the applicant by all accounts."* (emphasis added).

19. Later in the judgment the Court stated that because the actions of Muleya in bringing South African currency into the Republic without the necessary permission "fell squarely inside the ambit of the mechanism provided for in regulation 3, the provisions of s35 of the CPA do not apply". This view of the Court was based on its interpretation of s35(1)(a) of the CPA which it held did not apply in circumstances that obtained in that matter. s35 of the CPA provides for the court that convicts an accused to declare the instrument used to commit the offence or by means of which an offence was committed to be declared forfeited to the State. The Court in *Action Engineering* held that the money that was seized by reason of contravention of Reg.3 could not constitute an "instrument" used to commit an offence or an "instrument" by means of which an offence was

committed and could therefore not be forfeited to the State in terms of s35(1)(a).

20. Even if the Court is correct that the money seized from Muleya was not capable of being forfeited in terms of s35(1)(a) of the CPA I do not believe that that, in itself, would trigger the applicability of the provisions in Reg.3 which provide for forfeiture of seized goods. In any event, I am not satisfied that Reg.3(8) provides for automatic forfeiture. Reg.3(8) mirrors Reg.3(5). Both these sub-regulations provide that money seized in terms of sub-regulation (6) or (7) or (3) or (4) "shall be forfeited to the National Revenue Fund", however this forfeiture is subject to ("Provided that") the Treasury, in its discretion, directing that any of the "foreign currency" or "any notes" "**so seized**" in terms Reg.3(5) or in terms of Reg.3(8) are refunded or returned. This *proviso* that the Treasury may return or refund "foreign currency" or "notes" "**so seized**" suggest that the Treasury must exercise a discretion before forfeiture has taken place. Had forfeiture been automatic as suggested by the Respondents and by *Action Engineering* then instead of the words "**so seized**",I believe the legislature would have used the word "**so forfeited**".

21. The fact that the Treasury is given a discretion to deal with seized "foreign currency" indicates that the legislature intended that once foreign currency is seized pursuant to Regulation 3(3) or 3(4),the Treasury be informed (Reg.5). Once the Treasury is informed it must then exercise a discretion as to whether or not any or all of the items **seized** be refunded or returned

and *a priori*, where there is no refund or return or only partial refund or return, the items then held are deemed to be forfeited. Whether representation may be entertained before the Treasury exercises its discretion is not indicated, but I see no reason why a party who may be affected should not at this stage make representations as to why the Treasury should exercise its discretion in favour of returning or refunding the items seized.

22. Insofar as Respondents may contend that the use of the word “refund” envisages automatic forfeiture rather than to simply hold, this argument is, in my view, contrived. Refund can only apply to money. It means to pay back and when money is seized and mixed with other money in a manner where it can no longer be distinguished from the other money, it cannot be capable of being returned and can accordingly only be refunded. The use of the term refund does not therefore imply that forfeiture in terms of Reg.3(5) is automatic.

23. Furthermore, I do not believe that it could ever have been intended that an act of seizure could constitute a permanent deprivation without any intervention from a body other than party seizing the items.

24. The Respondents’ averment that the first Appellant cannot claim ownership of the 130 000 euros because this was forfeited to the National Revenue Fund cannot therefore be upheld.

25. I now turn to consider the applicable regulation in terms of which the foreign currency was seized by the SAPS. As I understand Respondents' argument, where a person is arrested in terms of Reg.3(1) any seizure persuant to such arrest has to be a seizure in terms of Reg.3(3). This view, I suspect, is also based on the judgment of *Action Engineering* for reasons indicated earlier. I do not agree with this view. Where a person is arrested in terms of Reg.3(1)(a) and items pursuant to such arrest are seized, such items do not have to be seized in terms of Reg.3(3) they can be seized in terms of s20(a) of the CPA. Section 20 of the CPA entitles the State to seize anything which is concerned or "believed to be concerned in the commission or suspected commission of an offence…". Foreign currency seized must be seen to be "concerned with" or "believed to be concerned" with the suspected contravention of Reg.3(1)(a) if it is found upon a person who is charged with contravening that Regulation, which deals with taking foreign currency out of the Republic without authorization.

26. The provisions of s20(a) of the CPA are thus wide enough to include seizure of foreign currency from persons in the position that the first Appellant was at the time of his arrest. In so far as it may be necessary to determine whether or not the foreign currency seized from the first Appellant was seized in terms of Reg.3(3) or s20(a) of the CPA, I believe, having regard to the fact that the monies were paid over to SARS after a notice in terms of s99 of the Income Tax act was issued points more to the foreign currency being seized in term of s20 of the CPA rather then

regulation 3(3). I do not accept Appellant's argument that because the foreign currency was entered into the SAP13 register this also points to a seizure in terms of s20 of the CPA. Recordal of seized items in the SAP13 register is not proof of the seizure being pursuant to s20 of the CPA. This register simply provides proof of the seizure and holding of goods and does not constitute a recordal of whether or not the items were seized in terms of s20 of the CPA. In any event, if foreign currency is seized under s20 of the CPA, there is no reason why such seizure cannot later be converted to one under reg.3(3). If such seizure is converted, persons in the position of the first Appellant, need to be advised thereof.

27. The argument as to whether the foreign currency seized from the first Appellant was seized in terms of Reg.3(3) or s20 of the CPA is however only relevant in so far as Respondents persisted with their claim that the foreign currency was forfeited in terms of Regulation 3(5). Since I find that there was no forfeiture, it is of no significance if the foreign currency was seized in terms of s20 of the CPA as contended by the Appellants. Whether it was seized in terms of Reg.3(3) or s20 of the CPA, the one thing that is certain is that the seizure was neither wrongful nor unlawful.

28. Notwithstanding the lawful seizure, Appellants persist with their claim for the return of the foreign currency. In this respect, it is claimed that first Appellant as owner of the foreign currency is entitled to the *rei vindicatio*.

29. In this matter the first Appellant was arrested pursuant to the provisions of Reg.3(1)(a), which prohibits the taking out of the Republic foreign currency without authorization. The foreign currency was then seized and Appellants now seek the return of the foreign currency even though first Appellant has been criminally charged and the criminal trial is at present still pending against him.

30. In any event, before the first Appellant can succeed with the *rei vindicatio* he needs to satisfy the Court that he is in fact the owner of the foreign currency seized. In this respect, in his founding affidavit the first Appellant (as the first Applicant and on behalf of the second Applicant) makes the following allegation:

30.1 *"Applicants seek to recover their foreign currency . . . "* paragraph 7.

30.2 *"The said foreign currency which belongs to me and the second Applicant…"* paragraph 7.

30.3 *". . . I was the only adult male to accompany the group and who was responsible for the provision of all the financial support of the whole group, as well as the crew of the ship, decided that it would be safe for me to take the foreign currency with me as it would be risky to place such a large amount in their possession. It was therefore decided that I would take all the foreign currency except for 300 Euros on behalf of all the members of our group when I depart on 13th July 2004. The other member of the group as a*

result left without any currency except for 300 Euros…" paragraph 24.

30.4 *". . . I explained that, due to my delay and the balance of my party having departed the Sunday two days earlier, I was carrying the entire group's currency."* paragraph 33.

31. This founding affidavit does not support first Appellant's contention that he is in fact the owner of the 130 000 euros seized. The first Appellant, under oath, states that the foreign currency belongs to Zonnekus and himself (paragraph 31.2 above). He then states that he was merely carrying the foreign currency for others in the group (paragraph 31.4 above) and adds that he was doing so for reasons of safety (paragraph31.3 above).

32. Counsel for the Appellants was at pains to explain that although the Appellants claim that the South African monies utilized to purchase the foreign currency did not only belong to the first Appellant, the fact that those monies were deposited into the first Appellant's banking account made him the owner of the South African monies. This may be true but once the first Appellant obtained the foreign currency and did not regard this as his own but recognized that it was owned by others as reflected in his affidavit, it cannot be said that he is the owner of it, notwithstanding that he may have purchased the foreign currency from his own funds.

33. For all the above reasons I am satisfied that there is no reason to interfere with the decision handed down by the Court –*a quo*.

In the result the appeal is dismissed with costs.

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WAGLAY, J.

I agree.

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TRAVERSO, DJP.

I agree.

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LOUW, J.