

62 years on – Exchange control regulations alive and well: a look at a recent supreme court of appeal case

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Much like certain former Soviet Republics, the People's Republic of China, India, certain South American jurisdictions, a number of other countries in Africa with 'transitional economies' and countries such as the Bahamas, Cuba, Iran, North Korea and Sudan, South Africa has an exchange control regime in terms of which cross-border money flows are regulated by government.

Other countries that formerly had exchange controls in the modern era include Argentina, Egypt, Finland, Israel, Taiwan and the United Kingdom. In the case of South Africa, the exchange control regime is in place by virtue of the Exchange Control Regulations, 1961, published some 62 years ago under Government Notice R1111 in Government Gazette Extraordinary 123 of 1 December 1961 (as subsequently amended).

The regulations were promulgated under the [Currency and Exchanges Act No 9 of 1933](#) and are administered (in the main) by the South African Reserve Bank, on behalf of National Treasury. The South African Reserve Bank has in turn delegated certain of these functions to 'Authorised Dealers' (being commercial banks in South Africa) and these delegations permit Authorised Dealers to exercise authority within the confines of a set of rulings and circulars, summarised in Currency and Exchanges Manuals, which manuals are updated by the South African Reserve Bank from time to time as and when new rulings and circulars are issued.

There is a plethora of exchange control rules which South African residents must comply with and which impact **cross-border transactions and money flow**. Not many South African residents are aware of the exchange control rules, and even fewer are aware that every person who contravenes or fails to comply with these rules, is guilty of an offence and liable upon conviction to a **fine not exceeding R250,000 or to imprisonment** for a period not exceeding 5 years, or to both. In addition, the Exchange Control Regulations make provision for the attachment of money and goods, and blocking of bank accounts (Regulation 22A), forfeiture to the State and disposal of money or goods attached or in respect of which orders have been issued or made (Regulation 22B), and the recovery of certain amounts by National Treasury (in effect, the South African Reserve Bank) (Regulation 22C).

For many decades there have been rumours that the South African exchange control regime may be abolished to allow for a free flow of moneys across our borders, or that some of the harsh provisions would not be used or implemented by the exchange control authorities. In some circles it has even been suggested that the validity or enforceability of the Exchange Control Regulations might be susceptible to attack in view of the fact that they are so far-reaching.

In the recent judgment handed down by the Supreme Court of Appeal (the 'SCA'), in the matter of *South African Reserve Bank and Another v Johnine Winsome Elisie Maddocks N. O. and another* (1268/2021) [2023] ZASCA 04 (23 January 2023) (the 'Maddocks case'), Zondi JA (with Mocomie and Gorven JJA, and Nhlangulela and Basson AJJA concurring) upheld an appeal by the South African Reserve Bank and the National Treasury against the decision of the Kwa-Zulu Natal Division of the High Court, Durban.

In the court a quo the liquidators of Sun Candle Products (Pty) Limited and Xinming Mountain Textile (Pty) Limited (the 'Companies') brought an application for an order declaring null and void certain forfeiture orders made pursuant to the provisions of Regulation 22B of the Exchange Control Regulations, and directing the National Revenue Fund to pay the forfeited moneys into the liquidators' bank account. The court a quo granted the orders as sought by the liquidators. The South African Reserve Bank and the National Treasury appealed to the SCA against the judgment of the court a quo.

The appeal before the SCA therefore brought into focus the **legal consequences** of the forfeiture orders made by the South African Reserve Bank pursuant to the provisions of Regulation 22B in respect of moneys standing to the credit of the Companies in various South African bank accounts. Although the forfeiture orders as such were issued by the South African Reserve Bank after the liquidation of the Companies, the facts were that and before the liquidation of the Companies ensued, the South African Reserve Bank, acting in terms of Regulation 22A and/or Regulation 22C, issued 'blocking orders' in respect of the moneys concerned.

In terms of the '**blocking orders**' the bank accounts concerned were blocked on the reasonable suspicion that the Companies had, in contravention of the Exchange Control Regulations, exported from the Republic large sums of moneys without permission of the exchange control authorities, and made advance payments for imported goods without submitting proof of importation of goods into the Republic to the Authorised Dealer concerned.

The effect of the orders made in terms of Regulation 22A and/or Regulation 22C was that 'no person may withdraw or cause the withdrawal of funds together with the interest thereon and/or accrual thereto in accounts held at the banks. The SCA held that the subsequent issuing of the forfeiture orders in terms of Regulation 22B, which occurred after the liquidation of the Companies, was not affected by the liquidation and that the moneys which were declared forfeited to the State, thus do not fall within the insolvent estates of the Companies, as argued on behalf of the liquidators. For these reasons, the appeal against the finding of the court a quo was upheld with costs by the SCA.

The judgment of the SCA in the Maddocks case discussed above in effect confirms that:

- the Exchange Control Regulations are alive and well in South Africa;
- rumours that the exchange control regime may be abolished, have to date not materialised;
- the rather harsh provisions are indeed being used and implemented (another example of this is the orders made by the High Court of South Africa, Western Cape Division, Cape Town, on application of the South African Reserve Bank, in terms of regulations 22A, 22B and 22C in case number 16823/2022 in the high profile case pertaining to the affairs of Markus Johannes Jooste and others);
- that the Exchange Control Regulations are being regarded by our courts as valid and enforceable.

In view of the above, SA resident individuals and entities will be well advised to take professional advice from someone well versed in exchange control matters before engaging in cross-border transactions. The same applies to overseas parties planning to transact with South African counterparties, or to invest in South Africa.

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