

Freezing of clients' account prohibited in certain circumstances

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by Tracy-Lee Janse van Rensburg, Director and Juliet Siwela, Candidate Attorney

The Financial Intelligence Centre Act, 38 of 2001 ("**FIC Act**"), places an obligation on accountable institutions to identify clients, to keep record of transactions, to report various transactions and to take measures to promote compliance with the provisions of the FIC Act. In the recent matter between Houtbosplaas (Pty) Ltd, TBS Alpha Beleggings (Pty) Ltd (the "**Applicants**") and Nedbank Limited ("**the Respondent**")^[1], it was held that a financial institution, such as a bank, may not freeze, or restrict a client's access to an account for the simple reason that the client did not satisfactorily identify itself and/or its stakeholders on the demand of the bank. Mothle J, found that in the absence of any provision within the confines of the FIC Act specifically providing that financial institutions should obtain identification information only from customers, it is indeed possible for financial institutions to obtain the relevant documentation or information required for purposes of undertaking and/or completing the identification and/or verification of clients from alternative sources, such as the Companies and Intellectual Property Commission ("**CIPC**"), the Master of the High Court in respect of trusts (section 21B(4) of the FIC Act) or the Department of Home Affairs.

In the matter of *Houtbosplaas (Pty) Ltd v Nedbank Ltd*, the Applicant companies had a complex shareholding structure. In essence, the shares were held by four registered trusts. For purposes of updating the Know Your Client ("**KYC**") status, the Respondent requested the Applicants to provide them with copies of the trust deeds of the four respective trusts. The Applicants were however of the view that for purposes of the verification of the identities of the shareholders of the Applicant companies, the trust deeds were confidential and that they were not obliged to disclose same to the Respondent. Consequently, the Respondent restricted access to both Applicants' bank accounts.

The court was required to consider whether the restriction and/or the freezing of the Applicants' accounts by the Respondent was lawful, whether the Respondent's interpretation of the provisions of Regulation 7(f)(ii) of the Money Laundering and Terrorist Financing Control Regulations (the "**Regulations**") relating to determination of the shareholding in the Applicants was correct and whether the closure of the Applicants' accounts was a transaction as envisaged in the FIC Act.

Mothle J was of the view that a business relationship between an accountable institution and a client does not entitle such institution to restrict access to or freeze an account of a client, even where there is a suspicion that a transaction involves unlawful activity as contemplated in section 29 of the FIC Act. Similarly, the FIC Act does not allow financial institutions to demand, from existing clients, that they submit identity documents on pain of the restriction of access to, or the freezing of, their accounts. In this regard, the court considered the fact that the Applicants had been conducting business with the Respondent for a number of years. In fact, their business relationship with the Respondent dated back to prior the enactment of the FIC Act. The Applicant companies were accordingly well known to the Respondent and there was no evidence whatsoever which would have caused suspicion that either of the Applicants were involved in any money laundering or unlawful activities, which is the mischief that the FIC Act primarily intends to address.

In determining whether the Respondent's interpretation of regulation 7 of the Regulations was correct, the court considered the wording thereof and held that the Respondent's interpretation was incorrect. Regulation 7 provides that financial institutions must obtain particulars concerning persons representing legal persons like companies. In the instance of trusts,

the regulation obliges financial institutions to obtain the said particulars of trusts holding 25% or more of the voting rights at the general meeting of the company concerned. However, the Applicants contended that the individual trusts do not have a 25% shareholding in the companies, which was the threshold at and above which the Respondent was entitled to probe the shareholders. The court found in favour of the Applicants, confirming that the individual trusts in fact had a 22% shareholding in each company and, as such, regulation 7(f)(ii) of the Regulations does not apply to the Applicants. Accordingly, the Respondent was not lawfully entitled to demand access to the trust deeds of the respective trusts.

In light of the above, it is evident that accountable institutions should carefully inspect the founding documents of their respective corporate clients and may not simply proceed to freeze or restrict their clients' access to an account for the mere reason that the client did not satisfactorily identify itself or its stakeholders to such accountable institution, on demand. There is nothing within the confines of the FIC Act which prohibits a financial institution from using alternative sources to identify and verify a client, including through accessing the records of CIPC, the Department of Home Affairs and/or the offices of the Master of the High Court for purposes of obtaining relevant documentation and/or information. Furthermore, insofar as an accountable institution has an ongoing relationship with an existing client, such accountable institution should very well be able to utilise available alternative sources for purposes of undertaking the identification and verification requirements in relation to such clients and cannot summarily freeze an account due to a client failing to provide it with documents required for purposes of an accountable institution undertaking its requisite KYC checks.

[1] 2020 (4) SA 560 (GP).



Tracy-Lee Janse van Rensburg

Director

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