



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable

Case no: 1268/2021

In the matter between:

SOUTH AFRICAN RESERVE BANK

FIRST APPELLANT

NATIONAL TREASURY

SECOND APPELLANT

and

JOHNINE WINSOME ELISIE MADDOCKS N O

FIRST RESPONDENT

AMERASAN PILLAY N O

SECOND RESPONDENT

Neutral citation: *South African Reserve Bank and Another v Johnine Winsome Elisie Maddocks N O and Another* (1268/2021) [2023] ZASCA 04 (23 January 2023)

Coram: ZONDI, MOCUMIE and GORVEN and NHLANGULELA AJJA and BASSON AJJA

Heard: 16 November 2022

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 15:00 pm on 23 January 2023.

Summary: Exchange Control Regulations of the Currency and Exchanges Act, 1933 – Legal consequences of a forfeiture order issued in terms of Regulation 22B after the

winding-up of a company – liquidation does not nullify a prior blocking order in respect of company's assets issued in terms of Regulation 22A and/or 22C – issuance of the blocking order and forfeiture order does not render the South African Reserve Bank a creditor of the insolvent company – forfeiture order competent.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban (Olsen J, sitting as court of first instance):

- 1 The appeal succeeds.
- 2 The order made by the high court is set aside and replaced with the following order:

'The application is dismissed with costs'.

JUDGMENT

Zondi JA (Mocumie and Gorven JJA and Nhlangulela and Basson AJJA concurring):

[1] This appeal is concerned with the legal consequences of three forfeiture orders issued by the first appellant, the South African Reserve Bank (the Reserve Bank) in terms of which it declared forfeited to the State monies standing to the credit of Sun Candle Products (Pty) Limited (Sun Candle) and Xinming Mountain Textile (Pty) Limited (Xinming) (the companies) in various South African banks. The Reserve Bank ordered that the monies be paid into the National Revenue Fund. The forfeiture orders were made after the liquidation of these two companies and pursuant to the provisions of Regulation 22B of the Exchange Control Regulations (the Regulations). These were made under s 9 of the Currency and Exchanges Act 9 of 1933 (the Act).

[2] Upon their appointment, the respondents, the liquidators of the companies (the liquidators), demanded that the forfeited monies be paid to them to be administered in terms of the insolvency laws. The Reserve Bank refused to accede to the demand contending that the forfeiture orders were validly made pursuant to blocking orders made prior to the liquidation of the companies. As a result, the liquidators brought an application in the KwaZulu-Natal Division of the High Court, Durban (the high court), for an order declaring the forfeiture orders null and void and directing the National Revenue Fund to pay the forfeited monies into the liquidators' bank account.

[3] The high court granted the orders as sought by the liquidators. Aggrieved by the outcome, the Reserve Bank and the second appellant, the National Treasury, sought and obtained from the high court leave to appeal against its judgment. The appeal is before this Court with leave granted by the high court.

[4] As I have already stated, the primary issue concerns the legal consequences of the forfeiture orders made by the Reserve Bank after the liquidation of the two companies. Before considering the issue, I deem it necessary to set out the applicable statutory framework and thereafter the facts within which the primary issue must be considered.

[5] The regulations in terms of which the functionaries of the Reserve Bank issued the blocking and forfeiture orders were promulgated by the President in terms of s 9 of the Act which, among other things, provides:

'(1) The [President] may make regulations in regard to any matter directly or indirectly relating to or affecting or having any bearing upon currency, banking or exchanges.

(2)(a) Such regulations may provide that the [President] may apply any sanctions therein set forth which he thinks fit to impose, whether civil or criminal.

(b) any regulation contemplated in paragraph (a) may provide for-

(i) the blocking, attachment and obtaining of interdicts for a period referred to in paragraph (g) by the Treasury and the forfeiture and disposal by the Treasury of any money or goods referred to or defined in the regulations or determined in terms of the regulations or any money or goods into which such money or goods have been transformed by any person, and-

(aa) which are suspected by the Treasury on reasonable grounds to be involved in an offence or suspected offence against any regulation referred to in this section, or in respect of which such offence has been committed or so suspected to have been committed;

(bb) which are in the possession of the offender, suspected offender or any other person or have been obtained by any such person or are due to any such person and which would not have been in such possession or so obtained or due if such offence or suspected offence had not been committed; or

(cc) by which the offender, suspected offender or any other person has been benefited or enriched as a result of such offence or suspected offence:

Provided that, in the case of any person other than the offender or suspected offender, no such money or goods shall be blocked, attached, interdicted, forfeited and disposed if such money or goods were acquired by such person *bona fide* for reasonable consideration a result of a transaction in the ordinary course of business and not in contravention of the regulations; and

(ii) in general, any matter which the [President] deems necessary for the fulfilment of the objectives and purposes referred to in subparagraph (i), including the blocking, attachment, interdicting, forfeiture and disposal referred to in subparagraph (i) by the Treasury of any other money or goods belonging to the offender, suspected offender or any other person in order to recover an amount equal to the value of the money or

goods, recoverable in terms of the regulations referred to in subparagraph (i), but which can for any reason not be so recovered.

(c) . . .

(d) Any regulation contemplated in paragraph (a) shall provide—

(i) that any person who feels aggrieved by any decision made or action taken by any person in the exercise of his powers under a regulation referred to in paragraph (b) which has the effect of blocking, attaching, or interdicting any money or goods, may lodge an application in a competent court for the revision of such decision or action or any other relief...

(ii) . . .

(iii) That any other person who feels aggrieved by any decision to forfeit and dispose of such money, within a period prescribed by the regulations, which shall not be less than 90 days after the date of the notice in the Gazette and referred to in subparagraph (ii), institute legal proceedings in a competent court for the setting aside of such decision, and the court shall not set aside such decision unless it is satisfied—

(aa) that person who made such decision did not act in accordance with the relevant provisions of the regulation; or

(bb) that such person did not have grounds to make such decision; or

(cc) that the grounds for the making of such decision no longer exist.

(e) . . .

(f) . . .

(g) The period referred to in paragraph (b)(i) shall be a period not exceeding 36 months or such longer period—

(i) as ends 12 months after the final judgement (including on appeal, if any) in every prosecution for any contravention of the regulations or any other law in relation to the money or goods concerned or in which such money or goods are relevant to any aspect of such prosecution; or

- (ii) as may be determined by the competent court in relation to the money or goods concerned on good cause shown by the Treasury.’

[6] The two respondents are the joint liquidators of the companies. The applications for winding-up were lodged on 13 February 2017. The companies were provisionally wound up by the high court on 17 February 2017 and finally on 10 March 2017. The *concursum creditorum* in respect of each company is taken to have been established on 13 February 2017 when the applications were lodged with the high court. In each of these cases the orders were made under s 348 of the Companies Act 61 of 1973 (Companies Act) on the application of a creditor, Pathema CC.

[7] On 10 September 2015 and before the liquidation of the companies, Mr Malherbe, an official in the Financial Intelligence Department of the Reserve Bank, acting in terms of Regulation 22A and/or Regulation 22C of the Regulations, issued ‘blocking orders’ in respect of the amounts standing to the credit of each of the companies in various South African banks. The accounts were blocked on the reasonable suspicion that the companies had, in contravention of the Regulations, exported from the Republic large sums of monies without permission of the second appellant, the National Treasury, and made advance payments for imported goods without submitting proof of importation of goods into the Republic to the authorized dealer. The effect of such orders is 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.’

[8] As required by the Act, during May 2016 and December 2016 the Reserve Bank sent letters to the companies and to the attorney representing them, advising them of

the issue of the blocking orders and informing them that the funds in the blocked banking accounts could be forfeited to the State. The Reserve Bank invited them to make representations as to why all or any of the monies should not be forfeited. Responses were sent to the Reserve Bank, but they failed to provide valid reasons as to why the amounts standing to the credit of the blocked banking accounts should not be declared forfeited to the State. The liquidators confirmed that they were unable to gainsay or dispute that no satisfactory explanation was given by the directors of the companies or their attorney, but contended that forfeiture could not validly take place after the winding-up of the companies.

[9] The cause for issuing blocking orders was that the Reserve Bank had reasonable grounds to suspect that the companies committed, or were each party to, certain acts or omissions which constituted contraventions of the Exchange Control Regulations. The Regulations the two companies were reasonably suspected to have contravened, are Regulations 10(1)(c), 12(1) and 22.

[10] Regulation 10 deals with restrictions on export of capital. Regulation 10(1)(c) provides:

'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.'

[11] Regulation 12 deals with goods purchased outside the Republic. Regulation 12(1) provides:

'Whenever a person in the Republic has purchased goods from any country outside the Republic and has paid for or made a payment on account of such goods, but the said goods have not been consigned to the Republic within four months from the date on which such payment was made, such person shall within fourteen days from the date of expiry of the said of four months report in writing to the Treasury or to an authorized dealer that the goods have not been consigned to the Republic and the Treasury may thereupon order such person to assign to the Treasury or to a person authorized by the Treasury his right to the said goods.' Regulation 22 provides that a contravention of the Regulations is an offence punishable with either a fine or a term of imprisonment, or both.'

[12] The Treasury may, under prescribed conditions, attach money and goods involved in any such contravention (Reg 22A). The money or goods attached may be forfeited to the State (Reg 22B) and the Treasury may recover certain 'shortfalls' upon the realisation of the money or goods forfeited (Reg 22C).¹

[13] Subsequent to the issue of the blocking orders and after the liquidation of the companies, Mr K Naidoo, the Deputy Governor of the Reserve Bank, exercising the power delegated to him by the Minister of Finance, issued three forfeiture orders in terms of Regulation 22B in respect of the monies standing to the credit of the banking accounts of each of the companies as identified in each of the forfeiture orders. The first forfeiture order was issued on 19 June 2017 in respect of funds standing to the credit of Xinming in the banking accounts held with the banks, the particulars of which were set out in the order. It was published in the Government Gazette on 14 July 2017,

¹ *South African Reserve Bank v Torwood Properties (Pty) Ltd* [1996] ZASCA 104; [1996] 4 All SA 494 (A) at 497.

on which date the monies specified in the forfeiture order became forfeited to the State and were deposited into the National Revenue Fund.

[14] A second forfeiture order was issued on 16 August 2018 in respect of the amount of R329 794, together with any interest standing to the credit of Xinming in account number 7444 5892 918 held with First Rand Bank Limited. This forfeiture order was published in the Government Gazette on 31 August 2018, on which date the money specified therein was forfeited to the State and was deposited into the National Revenue Fund. The third forfeiture order issued in respect of the monies standing to the credit of Sun Candle in the banks specified in the order, was published in the Government Gazette on 31 August 2018.

[15] Upon their appointment, the liquidators of the companies demanded that the monies that were declared forfeited to the State be paid to them. They asserted that by virtue of the winding-up and the establishment of the *concurus creditorum* on 13 February 2017, the monies held in the bank accounts to the credit of the companies fell into the insolvent estates and are subject to the provisions of s 391 and s 342 of the Companies Act. The Reserve Bank refused to accede to the demand, contending that the forfeiture orders were validly made as the accounts were subject to valid blocking orders issued in terms of either Regulation 22A or 22C.

[16] As a result of the Reserve Bank's refusal to accede to their demand, the liquidators, on 4 October 2019 approached the high court seeking the following relief:

'1. That the following forfeiture orders are declared null and void and are hereby set aside namely:

(a) notice 515 of 2018 which is annexure "JM6" annexed to the founding affidavit;

(b) notice 527 of 2017 which is annexure "JM9" annexed to the founding affidavit;

(c) notice 514 of 2018 which is annexure “JM11” annexed to the founding affidavit.

2. That the First Respondent, alternatively, the Second Respondent is directed to pay the amounts set forth in the aforementioned forfeiture orders together with interest thereon in the Applicants’ banking account, particulars of which follows-

Name of account- First Financial Business Rescue and Insolvency Practitioners

Bank- Nedbank

Branch code- 164826

Account number-1062293010

3. That the Respondents are directed to file any claim or claims they may have against Sun Candle Products (Pty) Ltd and Xinming Mountain Textile (Pty) Ltd with the Applicants within 20 days of the date of the granting of this order whereupon the Applicants shall convene a special creditors’ meeting for the purpose of the respondents proving such claims as they may have.’

[17] The basis upon which the liquidators sought the order is summarised as follows in their founding affidavit:

‘ I submit:

- (a) that by virtue of the winding-up and the establishment of the *concurso creditorum* on 13 February 2017 the monies held in the bank accounts to the credit of Sun Candle and Xinming fall into the insolvent estates and are subject to the provisions of section 91, 391 and section 342 of the (old) Companies Act.
- (b) that the Applicants in their capacity as liquidators are under statutory duty to take possession of these assets;
- (c) that the first respondent does not have any superior right to these funds in preference to the rights of proved creditors and, in particular, the South African Revenue Service, which has proved claims as set forth in annexures “JM18”;

(d) that the first respondent mistakenly believes that it is not bound by the aforementioned provisions of the Companies Act and that it can act in disregard of the statutory duties of the applicants...’

[18] At the hearing before the high court, the liquidators in the alternative sought an order declaring that the monies referred to in the forfeiture orders vest in them. They contended that the liquidation of the two companies had the legal effect of vesting monies standing to the credit of the banking accounts in them and that, therefore, the issue of forfeiture orders in terms of Regulation 22B ceased to be legally competent. The liquidators asserted further that the publication of the forfeiture order after 13 February 2017 was a nullity because they had already been empowered to take control of the assets of the two companies. They further contended that after the commencement of *concursum creditorum*, and certainly after the granting of the final order for liquidation, the Reserve Bank could not take steps to execute forfeiture orders in terms of the Regulations because by doing so it would interfere with their ability to carry out their statutorily entrenched functions in terms of the provisions of the Companies Act and the Insolvency Act 24 of 1936.

[19] The Reserve Bank contended that, notwithstanding the commencement of the winding-up of the two companies, the blocking orders remained in force, and that the liquidators could not, by reason of the liquidation, acquire any greater rights to claim payment of the funds standing to the credit of the banking accounts, than the companies themselves had immediately prior to the commencement of the winding-up. The fact that upon liquidation, proceeded the argument, the liquidators were obliged to take possession of the assets of the companies, did not in law have the

consequence, as contended by the liquidators, that a forfeiture of those rights was no longer competent or permissible.

[20] In addition to resisting the liquidators' application on the merits, the National Treasury also raised two preliminary objections. It argued, first, that the high court lacked jurisdiction to hear the matter. It contended that its principal place of business is in Pretoria, Gauteng and that therefore it should have been sued in the Gauteng Division of the High Court, Pretoria and not in the KwaZulu-Natal Division of the High Court, Durban (jurisdiction point). Secondly, the National Treasury contended that the application was defective in that there is no prayer in the notice of motion for the review and setting aside of the Reserve Bank's decision to issue the forfeiture orders. It accordingly argued that in the absence of a review either under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) or in terms of the principle of legality the just and equitable remedy of substitution could not be made. This submission was based on the contention that the Reserve Bank's decision to issue forfeiture orders constitutes 'administrative action' which is reviewable under PAJA.

[21] In my view, the National Treasury's jurisdiction point should fail for the simple reason that it is clear from the prayers in the notice of motion that the effect of the liquidators' application was to have declared null and void the forfeiture decisions issued by the Reserve Bank after the liquidation of the two companies on the basis that it was no longer legally competent for it to make them, following the winding-up of the two companies. Properly construed, the effect of the application, although not labeled as such, was a review based on either PAJA or the principle of legality, and that being the case, in terms of s 1 of PAJA, the liquidators could bring the application

before a court within whose jurisdiction the administrative action occurred or the party, whose rights were affected, is domiciled or ordinarily resident. The bank accounts in respect of which the forfeiture orders were issued, were held with the banks located in Durban and accordingly the high court had the requisite jurisdiction to entertain the application. The lack of jurisdiction point was correctly rejected by the high court.

[22] As I see it, the thrust of the liquidators' case in the high court was that after the commencement of the winding-up, it was no longer legally permissible for the Reserve Bank to exercise a power under Regulation 22B to order the forfeiture of the assets of the companies in liquidation and that the purported forfeiture orders were *ultra vires*. The factual basis for this contention was that the Reserve Bank, after issuing the blocking orders in respect of the monies standing to the credit of the companies, became their creditor. It was required to participate in the *concurus creditorum*, and could therefore not validly deal with the assets of the companies in liquidation by the issue of forfeiture orders, which prejudiced other creditors.

[23] The liquidators' contentions found favour with the high court. It granted orders declaring the three forfeiture orders null and void and directing the National Treasury to pay the amounts referred to in the forfeiture orders together with interest, to the liquidators. It ordered the Reserve Bank and the National Treasury, jointly and severally, to pay the liquidators' costs, including costs of two counsel.

[24] Central to the high court's conclusion were the following findings:

(a) The effect of the forfeiture orders was that the Reserve Bank became a creditor of each of the companies, its claim being to the contractual right each company had against each of the affected banks.

(b) The Reserve Bank was already a creditor at the time of the commencement of the winding-up as blocking orders were already in place. 'Whether the claims against the banks for the money in question would be lost to the companies depended on a condition, namely a decision by the Reserve Bank that the claim should be forfeited. The Reserve Bank qualified as a creditor with a conditional claim on the date of the winding-up'.

(c) If insolvency law applies, the liquidators were entitled to take possession of and assert the companies' rights to claim the amounts standing to the credit of the various bank accounts in which the companies had made deposits, and to deal with the proceeds in discharge of their duties under s 391 of the Companies Act.

(d) The intervention of the winding-up of the companies rendered unlawful the issue of forfeiture orders which made it mandatory for the banks to ignore the companies' claims, and pay the amounts in question into the National Revenue Fund.

[25] It was contended by the Reserve Bank and the National Treasury that the high court erred in finding that the forfeiture orders rendered the Reserve Bank a creditor of the respective companies with a conditional claim on the date of the winding-up of the two companies. They argued that the funds targeted by the forfeiture orders belonged neither to the insolvent companies, nor the liquidators. In relation to these funds, proceeded the argument, the Reserve Bank was not a mere creditor and the forfeiture orders it sought to enforce, were in no way nullified by the liquidation of the

insolvent companies. The Reserve Bank, so it was argued, was entitled to enforce the orders and seize the impugned funds.

[26] Arguing in support of the high court's judgment, counsel for the liquidators submitted that the reasoning and the findings of the high court could not be faulted. He argued that there was no warrant or justification for the proposition that the regulations trump insolvency law, which he submitted was well established and that being the case, proceeded his argument, the high court was correct when it held that there did not appear to be a dispute about the rights of the Reserve Bank to participate in the insolvent estates. Counsel's submission is based on authority of *Walker v Syfret* 1911 AD 141 in which it was held at 160:

'The effect of a winding-up order is to establish a *concursum creditorum*, and nothing can thereafter be allowed to be done by any of the creditors to alter the rights of the other creditors.'

[27] The Constitutional Court in *Chisuse and Others v Director-General*² at para 47, reiterated that in 'interpreting statutory provisions, recourse is first had to the plain, ordinary, grammatical meaning of the words in question.' In addition principles of interpretation require that (a) the statutory provisions should always be interpreted purposively; (b) the relevant statutory provision must be properly contextualised; and (c) all statements must be construed consistently with the Constitution.

[28] This Court in *South African Reserve Bank v Leathern N O and Others*³ (*Leathern*) held that the purpose of the regulations is three-fold. First, it is to prevent loss of foreign

² *Chisuse and Others v Director-General, Department of Home Affairs and Another* [2020] ZACC 20; 2020 (10) BCLR 1173 (CC).

³ *South African Reserve Bank v Leathern N O and Others* [2021] ZASCA 102; 2021 (5) SA 543 (SCA).

currency resources through the transfer abroad of financial capital assets held in South Africa. Secondly, to ensure effective control of the movement of financial and real assets into and out of South Africa; and thirdly, to avoid interference with the efficient operations of the commercial, industrial and financial system of the country. The court added that as part of the context within which the purpose of the regulations must be considered is the mischief at which the regulations are aimed namely, 'the prevention of illicit flow and influx of foreign capital from the country...'.⁴

[29] This Court made the following findings which are relevant to this appeal:

'[T]he purpose of a blocking or attachment order in terms of the regulations is to secure assets which may be liable to forfeiture in terms of the regulations. This adds to the general context of the regulations in that a blocking order is provisional only and the final position can only be determined if the Reserve Bank seeks a forfeiture order. Context includes, amongst others, the mischief which the regulations are aimed at, that is, the prevention of illicit flow and influx of foreign capital from the country risk of damage to the economy of the country as a result.

[37] A blocking or attachment is therefore a prerequisite for a valid forfeiture of the funds to the State. If a blocking order is terminated by the grant of a subsequent sequestration order, the forfeiture of the assets used in the contravention of the regulations might never be realised. The effect would be that assets which legitimately ought to be forfeited to the State in terms of the regulations, would vest in the insolvent estate and be subject to distribution by the trustees. The remedy of forfeiture, a sanction of public law imposed to protect the currency and the economy, would be lost by operation of the law of insolvency. That is an absurdity so glaring that the legislature could not have contemplated it.

[38] Just as a solvent person must suffer the lawful attachment of funds in his or her bank account, with the possible imposition of forfeiture in due course, the trustees of the insolvent

⁴ Ibid para 36.

estate of that person can be in no better position. Seen in this context, the reach of the regulations is such that a sequestration order must yield to a blocking order. This interpretation is consistent with s 224 of Constitution, in terms of which the primary object of the Reserve Bank is to protect the value of the currency “in the interest of balanced and sustainable economic growth in the Republic.” The regulations constitute mechanisms, among others, to assist the Reserve Bank to execute its Constitutional mandate.⁵

Counsel for the Reserve Bank and the National Treasury relied on these findings and submitted that they were applicable in this case. I agree with their submission.

[30] The high court erred in declaring the forfeiture orders null and void and ordering the National Revenue Fund to pay to the liquidators the monies reflected in the forfeiture orders on the basis of the reasoning that the intervention of the winding-up of the companies rendered them unlawful to the extent that they made it mandatory for the banks to ignore the companies' claims .

[31] The conclusion of the high court that the intervention of the winding-up of the two companies rendered unlawful the issue of the forfeiture orders undermines the purpose which the Regulations seek to achieve. The enabling legislation – the Act – empowers the President to make regulations providing for the blocking and forfeiture orders to be made in respect of any money or goods which are suspected by the Treasury on reasonable grounds to be involved in the commission of an offence. The fact that the forfeiture orders issued in terms of Regulation 22B provided for the targeted funds to be forfeited to the State and for such monies to be paid into the National Revenue Fund, rather than to the liquidators, did not render such orders

⁵ Ibid paras 36-38

unlawful. It must be remembered that the companies in issue were already subject to the blocking orders long before their liquidation. The operation of the blocking orders did not result in the creation of a debtor-creditor relationship between the companies and the Reserve Bank. The Act and the Regulations must be interpreted purposively.

[32] Having regard to the context and purpose of the Regulations, it seems to me that as the blocking orders were still extant at the time of the winding-up of the companies, it was competent for the Reserve Bank to issue the relevant forfeiture orders. As has been mentioned, in *Leathern* this Court decided that blocking orders are not affected by the subsequent insolvency of the person in question. Such a finding would be rendered nugatory if forfeiture orders could not follow. The effect of the blocking orders was that whilst they existed, the companies, pending investigation as to whether the funds should be declared forfeited to the State, were prevented from drawing funds from the bank accounts to which the blocking orders related. The subsequent liquidation of the companies could not affect the validity and the existence of the blocking orders, which means that whilst they existed the Reserve Bank could make an order declaring the funds subject to the blocking orders forfeited to the State. That much is apparent from the provisions of s 9(2)(b)(ii) of the Act which authorises the President to make any regulations which may provide for any matter he or she deems necessary for the fulfilment of the objectives and purposes referred to in subparagraph (i) including forfeiture and disposal by the Treasury of any money or goods belonging to the offender, suspected offender or any other person.

[33] To apply the Regulations in the manner contended for by the liquidators' counsel in the factual context of this matter would be incongruent with and inimical to the Act

and the entire regulatory framework relating to currency, banking or exchanges. It would defeat the entire purpose of a blocking order if a forfeiture order, made pursuant to the blocking order, fell away upon the winding-up of the companies. If a forfeiture order is terminated by the grant of a subsequent winding-up order, the forfeiture of the assets used in the contravention of the regulations might never be realized, and the effect would be that the assets which legitimately ought to be forfeited to the State in terms of the regulations, would vest in the insolvent estate and be subject to distribution by the liquidators. Companies such as the two companies in issue, in order to defeat the purpose the forfeiture orders, could simply commence winding-up proceedings to prevent the forfeiture of funds held in an account that had been made subject to a blocking order. The winding-up of the two companies cannot retrospectively terminate the legal effect of the blocking orders.

[34] The liquidators' reliance on *Commissioner, South African Revenue Service v Van der Merwe and Others (Van der Merwe)*⁶ is misplaced. The facts of this case are distinguishable from those in *Van der Merwe*. The question in *Van der Merwe* was whether the Customs and Excise Act 91 of 1964 and the Value Added Tax Act 89 of 1991 precluded the Commissioner of the South African Revenue Service (SARS) from releasing imported equipment to liquidators without the liquidators first having to pay duty and Value Added Tax on the equipment. Unlike the purpose of forfeiture orders, the purpose of the Customs and Excise Act is to ensure the duties are collected on goods which are imported into South Africa. Unlike the Reserve Bank, the powers exercised by the Commissioner when claiming duties due to SARS in respect of

⁶ *Commissioner, South African Revenue Service v Van der Merwe N O and Others* [2017] ZASCA 138; 2017 (3) SA 34 (SCA).

property under the Customs and Excise Act are indeed powers exercised as a 'creditor' and the insolvent company is a debtor in relation of unpaid customs and duties. SARS may be considered a '*lienholder*' in respect of the property which is held in terms of the Act where duties are unpaid.

[35] To sum up, the liquidation of the two companies did not nullify the blocking order which was in existence at the time. As a blocking order was not nullified, it was competent for the Reserve Bank after the liquidation of the companies to issue the forfeiture orders which made it mandatory for the banks which held the accounts in which monies were kept, to pay such monies into the National Revenue Fund. The forfeiture orders issued after the liquidation of the companies were not affected by the liquidation and the monies which were declared forfeited to the State did not fall into the estates of the insolvent companies. The liquidators were therefore not entitled to demand that the funds be paid out to them for distribution.

[36] In the result I make the following order:

- 1 The appeal succeeds.
- 2 The order made by the high court is set aside and replaced with the following order:

'The application is dismissed with costs'.

D H ZONDI
JUDGE OF APPEAL

APPEARANCES

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