

IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)

HELD AT MASERU

CCA/0073/2022

In the matter between:

MAMARE RAMPOOANA	1ST APPLICANT
MARE DESMOND RAMPOOANA	2ND APPLICANT
NOTABLE TECHNOLOGIES (PTY) LTD	3RD APPLICANT

AND

FIRST NATIONAL BANK OF LESOTHO LTD	RESPONDENT
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Neutral Citation: Mamare Rampooana & 2 Others v First National Bank of Lesotho Ltd. [2023] LSHC 132 Comm (03RD AUGUST 2023)

CORAM: **MOKHESI J**

HEARD: **09TH MARCH 2023**

DELIVERED: **03 AUGUST 2023**

SUMMARY

Law of Banking: *The bank froze its customer's bank account on account of what it suspected as money laundering- the bank relied on Financial Institutions (Anti-Money Laundering Guideline 2000, Money Laundering (Accountable Institutions) Guidelines, 2013, Money Laundering Regulations No. 19 of 2019 and Money Laundering and Proceeds of Crime Act, 2008 as amended, for its actions- Held, these laws do not in any manner authorise the bank to freeze its customer's bank account- Held, further that the bank's obligation in relation to combating money laundering is restricted to reporting suspicious activities to relevant authorities. The bank can only freeze its customer's bank account on the strength of a court order obtained by relevant law enforcement authorities.*

ANNOTATIONS

Books

Herbstein & Van Winsen *The Civil Practice of the High Courts of South Africa (2009) 5 ed. Vol. 1*

Legislation

Financial Institutions (Anti-Money Laundering Guideline 2000
Money Laundering (Accountable Institutions) Guidelines, 2013
Money Laundering Regulations No. 19 of 2019
Money Laundering and Proceeds of Crime Act, 2008 as amended

Legislation from other jurisdictions

Financial Intelligence Centre Act 38 of 2008

Cases

Mars Incorporated v Candy World (Pty) Ltd [1990] ZASCA 149: 1991 (1) SA 567
South African Petroleum Energy Guild (NPC) v RMB Private Bank (2014/27890)
[2014] ZAGPJHC 368 (5 December 2014)

JUDGMENT

[1] **Introduction**

This is an application in terms of which the applicants are seeking declaratory and interdictory orders against the respondent, in the following manner:

- “1. *Declaratory the freezing of 1st Applicant’s account 62926685458 by the Respondent on the 96th July 2022 as irregular and unlawful.*
2. *Declaring the reversal of a credit amount of M1,882,852.43 on the 07th July 2022 as irregular and unlawful.*
3. *Directing the Respondent to re-activate 1st Applicant’s account 62926685358 with a M1,882,856.43 credit as it was on the 05th July 2022, forthwith upon receipt of an order of court to that effect.*

Alternatively

4. *Restoring status quo ante, 1st Applicant’s account 62926685258 prior to its freezing on the 06th July 2022.*
5. *Interdicting and restraining the Respondent from interfering with 1st Applicant’s account 62926685358, except by due process of the law.*
6. *Ordering the Respondent to pay costs of this application on the attorney and own client scale”*

[2] Factual Background

This application is opposed. This application represents the after-effects of the unrelenting and colossal legal dispute between Platcorp Holdings Limited and Platinum Credit Limited. The dispute between the latter parties pertains to control and ownership of the latter entity. The nature of the dispute can be gleaned from the judgments of this court in **Platinum Credit Ltd v Platcorp Holdings Limited [2022] LSHC 199 Comm. (25 August 2022)** and **Platcorp Holdings Limited v Platinum Credit Limited and Others [2022] LSHC 298 Comm. (14 December 2022)**.

- [3] The 1st applicant holds a bank account with the respondent at its Teyateyaneng Branch. It is a personal account as opposed to a business account. On the 5th and 6th July 2022, the officers of the respondent noticed an unusually large and multiple transfer of money being made from Platinum Credit Limited's bank account to a number of individuals including the 1st applicant. Immediately they were flagged as suspicious transactions. The amount in respect of the 1st respondent was One Million, Nine Hundred Thousand Maloti (1,900,000). It is common cause this amount is inconsistent with the previous history of activities in the 1st applicant's account. The respondent triggered what it termed a "provisional freeze" on the account while it ascertained from the 1st applicant the source and legitimacy of the funds. On 06 July 2022, after the 2nd applicant had inquired why his mother's account (1st applicant) had been frozen, he was requested to provide proof of source of the funds and the relevant supporting documents. The 1st and 2nd applicants are both directors and shareholders of the 3rd applicant.

- [4] The applicants produced a document which was marked Annexure “C”. This document is the Invoice directed at Platinum Credit Limited by the 3rd applicant, for having rendered business advisory, consultancy and Strategy Planning services to Platinum Credit Limited. The value of the invoice was Two Million Maloti (M2,000,000.00). As the invoice did not refer to the 1st applicant the respondent was still not satisfied. The 2nd applicant went back to the offices of Platinum Credit Limited and brought a letter in terms of which the Managing Director of the latter company notified the respondent that Notable Tech had provided Platinum Credit Limited with business consultancy and advisory services, and that the invoice was for such service, excluding tax.
- [5] The Managing Director of Platinum Credit Limited notified the respondent that they had tried to pay the money into the 3rd applicant’s business account, and when the money could not go through, they requested an alternative bank account into which payment could be made. The 2nd applicant provided the personal account of his mother (1st applicant) into which the money was deposited. When this exchange could not yield the results in terms of satisfying the respondent about the source of the funds, the latter decided to freeze the 1st applicant’s account as already said. When the respondent could not be persuaded to unfreeze the account, the applicants lodged this application seeking the reliefs outlined in introductory paragraph of this judgment.
- [6] **Respective Parties Cases**

The respondent had raised a point in *limine* that the 2nd and 3rd applicant do not have *locus standi* regarding the *locus standi* as the bank account in question belongs to the 1st applicant. To this point the applicant argued that the supporting affidavits have been filed in terms of which these applicants associate themselves with the averments in the founding affidavit deposed to by the 2nd respondent, and that they all have interest in the subject matter of this litigation.

- [7] On the merits, the applicants argue that no court order authorized the respondent to freeze the 1st applicant's account and that its reliance on the provisions of the money laundering and Proceeds of Crime Act, 2008 read with Money Laundering Regulations No. 19 of 2019, is equally without merit.
- [8] The respondent, on the one hand, argued that it imposed what it referred to as a “temporary freeze” on the 1st applicant’s bank account due large transfers of money which were made into this account which were determined to be inconsistent with the account’s transaction history. These transactions were suspicious, triggering it to log a ‘suspicious transaction’ with the Financial Intelligence Unit (FIU) in terms of the anti-money laundering legislation. The respondent argues that “immediately thereafter” it was served with a court order directing it to reverse the payment totalling an amount of M2,805,493.23, and that the same court order also interdicted it from making any further payments from Platinum Credit Limited account without Platcorp Holdings Limited’s prior written consent, and that this order remains extant.

[9] The second leg of the respondent's contention went like this: The transactions involved here raised suspicions because they did not fit with the knowledge base for which the business relationship between the respondent and 1st applicant was established, and therefore, for this reason, in terms of Guideline 2 read with Guideline 11 of the Financial Institutions (Anti-Money Laundering Guideline 2000, Guideline 7 read with Guideline 18(1) of the Money Laundering (Accountable Institutions) Guidelines, 2013, it was enjoined to report any transactions which raised suspicions. It went further to argue that in terms of Money Laundering and Proceeds of Crime (Amendment), Act, 2016, Section 11 (1A) (b) thereof, it is obligated to conduct an on-going customer due diligence on the relationship it has with its customers which includes scrutinizing transactions undertaken to ensure that they are consistent with the accountable institution's knowledge of the Customer, the business and risk profile. In doing so in some instances it demands information from clients concerning the source of their funds where it suspects that the transaction involved is related to commission of money laundering offence and to report same to the FIU in terms of section 18 of the Money Laundering and Proceeds of Crime Act, 2008 as amended.

[10] **Issues for determination**

- (i) *Locus Standi* of 2nd and 3rd applicants
- (ii) The merits

[11] **The Law and Discussion**

- (i) **2nd and 3rd Applicants' lack of standing**

It is trite that the applicant in the founding affidavit must set out his/her *locus standi* (see **Mars Incorporated v Candy World (Pty) Ltd [1990] ZASCA 149: 1991 (1) SA 567** at 575 H-I). Failure to allege and prove *locus standi* of the applicant would spell doom for the application at this initial stage. However, where the party's *locus standi* appears clearly from the facts of the case, there is no need to allege it. *Locus standi* refers to the capacity of a person to institute proceedings and the interest such a person has in the outcome of the case, what is commonly referred to as a direct and substantial interest in the relief sought (**Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa (2009) 5 ed. Vol. 1** at 143).

[12] In the present matter the 2nd applicant deposed to the founding affidavit as the director of the 3rd respondent whose funds were deposited into the bank account of the 2nd respondent (its other director) following the rendering of services by the 3rd respondent to Platinum Credited Limited. Inasmuch as the account which is frozen belongs to the 1st applicant, my considered view is that the 3rd applicant has a direct and substantial interest in the outcome of this matter as it alleges the funds were meant for it. As I see it, the only person who should not have been joined as a party in this matter is the 2nd applicant as he does not have a direct and substantial interest in the outcome of the matter, he is merely a director of the 3rd applicant. The point of lack of *locus standi* in relation to the 2nd applicant has been correctly taken.

[13] (ii) **The merits**

As already stated, the respondent relies on a number of legislative instruments to support its defence that it was entitled to put in place what it calls “a temporary freeze” of the 1st applicant’s bank account. It is apposite

therefore to quote the legal provisions in terms of which the financial institution must act when it sees suspicious transactions. ‘Suspicious transactions’ have been defined in Guideline 2 of the Financial Institutions (Anti-Money Laundering) Guidelines, 2000 as “a transaction which is inconsistent with a customer’s known legitimate business or personal activities or with the normal business for that type of account.” This Guideline should be read with Guideline 11 of the same Guidelines which imposes obligation on the financial institution on suspecting that any transaction by a customer may form part of a criminal activity or otherwise constitutes a suspicious transaction, to report such suspicious transaction to the law enforcement authorities and the Central Bank.

- [14] In terms of Guideline 7 of Money Laundering (Accountable Institutions) Guidelines 2013:

“An accountable institution shall –

- (a) Obtain a sound knowledge of the purpose for which the customer or client is seeking a business relationship with the accountable institution; and*
- (b) Report any dealing which appears not to fit the knowledge base for which the business relationship was established.”*

- [15] To be read with this Guideline is Guideline 19 of the same Money Laundering Guidelines (Accountable Institutions) Guidelines 2013 which imposes an obligation on the financial institution to report suspicions of money laundering to Financial Intelligence Unit. These reporting

requirements are also provided in Section 18 of the Money Laundering and Proceeds of Crime Act, 2008 as amended.

[16] Upon reading of these provisions I find nowhere where the bank is empowered to freeze a client's bank account on suspecting money laundering. What all these provisions say is that the bank must report either to the Central Bank, law enforcement authorities or to the Financial Intelligence Unit. It would be a different story if the respondent is saying it is empowered by the contract between itself and the 1st applicant to freeze her account on noticing suspicious transactions, but I did not hear the respondent's counsel to be arguing along that line. I found a very persuasive and apposite remarks, when dealing with similar argument in the context of the South African legislation (Financial Intelligence Centre Act 38 of 2008) which was enacted to fight money laundering and other crimes, which imposes similar obligations on financial institutions. The remarks were made in the matter of **South African Petroleum Energy Guild (NPC) v RMB Private Bank (2014/27890) [2014] ZAGPJHC 368** (5 December 2014) at paras. 27 to 29. I cannot do better than quote them as they were made in the judgement:

"[27] It seems to me that the obligations of a bank to initiate action about money laundering are wholly regulated by statute. There is no space, and indeed no need that is discernible in this regard to imply additional duties on the bank into its contract with its clients. This outcome can be contrasted with circumstances illustrated in Van Nieuwkerk v McCrae 2007 (5) SA 21 (W) at 28D where Goldblatt J construed a sale of residential property to include ex lege an (sic) terms that the buildings were erected in compliance with building

regulations applicable to that area, and consciously developed common law to reflect that such a term was a naturalium. The respondent's role in combating money laundering is already spelt out in the legislation: in essence to be vigilant about possible unlawful activity and report it when it is noticed and if lawfully instructed to put a hold on funds, to do so. There is no scope to develop a role for what would be a cousin of the Lex Commissoria to add to the battalions arrayed against rich crooks. The existence of the warranty in my view, does not disturb this overall outcome: rather it tends to support the notion that the protections against legitimate criticism of the respondent have been comprehensively addressed.

[28] Moreover, the term sought to be imputed and its radical intrusion on the rights of a client far exceeds what FICA authorities centre to do. What is sometimes overlooked is that even criminals have rights; the more basic of which is to be convicted before being punished. With the sole exception of the process of Asset forfeiture provided for in Chapter 6 of the POCA, our law adheres to this order of things.

[29] By contrast, the respondent claims a term that entitles it to freeze R5 million of a business for five months, and further claims it may continue to do so until the applicant convinces a court that the bank's belief in its wickedness is unreasonable. In my view to imply such a term is untenable. In Schoeman v Constantia Insurance Co. Ltd 2003 (6) SA 313 (SCA) at [21] Marais JA was moved to remark that 'our law is basically anti-penal.' In my view that is a salutary thought and the adverse consequence to the client's case flow, market reputation, and solvency if a bank could invoke such a power over the client is so intrusive, that in my view, the only way to found such power would be an express terms of an agreement. If a bank should desire to operate bank accounts on such a basis in order to pursue its public spirited

commitment to the promotion of an ethos of integrity, it should do so on express terms, not ambush a client ex post facto.”(emphasis added)

- [17] In the above-quoted case, the applicant entity which is a client of the respondent bank applied to court to force the bank to release the funds in its account held with the bank. The bank resisted the application on the score that there was a tacit term of the agreement between it and its client that if the bank reasonably suspects that there is money laundering happening in relation to the client’s bank account, it may freeze the funds in the account until the client satisfies it that the funds are not proceeds of illegal activities. The court agreed with the applicant that the freezing of its account was unlawful.
- [18] In the present matter the respondent advances more or less similar arguments that it was entitled to impose what it calls ‘temporary freeze’ of the 1st applicant’s account until the latter satisfied it of the source of the funds. Despite explanations and documentary proof, the respondent remained unconvinced and adamant that its ‘temporary freeze’ should remain in place until the applicants were forced to approach this court by filing the current applicant on 29 July 2022.
- [19] Faced with the lack statutory support for its actions, the respondent further sought refuge in the order of this court (Annexure “FNB1”) in terms of which this court authorized it to reverse funds and to interdict further transfers out of Platinum Credit Limited’s account without prior consent of Platcorp Holdings Limited. It should be stated at the outset that the said court order does not support the respondent. Importantly, this court order

was issued on the 15 July 2022, and relevant for present purposes, in prayer 1(a) (vii), it provides that:

“That the 10th respondent, FNB, is ordered to immediately reverse the payments/debits out of 1st respondent’s FNB account number 62789893130 made on 14 July 2022 in the amounts M2805,493.23 AND ordered to desist from making any further payments at all out of any and all of the 1st respondent’s FNB accounts without the applicant’s prior written consent.”

- [20] The terms of the prayer are clear; it relates to the reversal of payments made from Platinum Credit Limited’s account on 14 July 2022. It is common cause that on this date the 1st applicant’s account was already under the respondent’s self-imposed temporary freeze. This court order had nothing to do with the payments made by Platinum Credit Limited to the 1st applicant as it was made prior to the date set in the court order. There was, therefore, no lawful basis on which the respondent had frozen the funds in the bank account of the 1st applicant.
- [21] I would have no problem granting the declarators sought in Prayers 1 and 2 of the Notice of Motion. I do, however, have serious difficulty granting Prayer 3 because the funds have been reversed and credited to Platinum Credit Limited’s bank account. The funds to which the 1st applicant is referring to will only be made available to it through a fresh mandate from Platinum Credit Limited. The 3rd applicant should approach Platinum Credit Limited and arrange with it to have its payment processed. I do not see any difficulty in this course of action being successful as the 3rd applicant is owed by Platinum Credit Limited for the services rendered.

[22] In the result the following order is made:

- a) It is declared that the freezing of the 1st applicant's bank account 62926685458 by the respondent on the 06th July 2022 was irregular and unlawful.
- b) It is declared that the reversal of the credit amount of M1,882,856.43 on the 07th July 2022 was irregular and unlawful.
- c) The respondent should pay the costs of suit on the ordinary scale.

MOKHESI J

For the Applicants: **Adv. T. Mpaka from Du Preez, Liebetrau & Co. Attorneys**

For the Respondent: **Adv. S. Shale instructed by DR. I. M. P Shale Attorneys**

