



REPORTABLE

CASE NO: SA 79/2024

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

**BANK OF NAMIBIA
PENELAO KAPENDA N.O.**

**First Appellant
Second Appellant**

and

**NEMI INVESTMENTS 104 CC
NEMI INVESTMENTS 105 CC
RANI TRADERS CC
RUNDU CASH AND CARRY CC
DHARANI TRADERS CC
OSHANA CASH AND CARRY CC
BANK WINDHOEK LTD
MINISTER OF FINANCE
INSPECTOR-GENERAL: NAMIBIAN POLICE**

**First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent
Seventh Respondent
Eighth Respondent
Ninth Respondent**

Coram: SHIVUTE CJ, DAMASEB DCJ and FRANK AJA

Heard: 26 November 2024

Delivered: 31 January 2025

Summary: The first to sixth respondents in this appeal are entities conducting business in Namibia. With some of them conducting business in northern Namibia, they attracted customers from Angola. These businesses received authorisation from Bank of Namibia (BoN) to accept United States Dollars (USD) from their Angolan customers 'strictly in payment of goods sold or services rendered' to such customers. Such foreign currency had to be dealt with in terms of regulations applicable to the receipt of such monies. The second appellant (Ms Kapenda) in her capacity as Acting Director: Exchange Control and Legal Services at BoN received information that the first to sixth respondents were acting contrary to the foreign exchange (forex) regulations in the dealings with the USD receipts. Ms Kapenda launched an investigation, had the premises of the businesses and some of its managers' residences searched and concluded that there was indeed something awry with the manner in which the first to sixth respondents dealt with the USD they received. According to her, she on reasonable grounds, suspected these businesses to be involved in the contravention of the forex regulations and she instructed their bank (ie Bank Windhoek) to block the accounts of these entities subject to the finalisation of her investigation.

Aggrieved, the six businesses approached the High Court for relief and sought to review and set aside Ms Kapenda's decisions.

The High Court considered the issue of delegation of powers from the President in terms of the Currency and Exchanges Act 9 of 1933 to Treasury and from Treasury to BoN and from BoN to its employee (ie Ms Kapenda). The court found that based on the maxim *delagatus non potest delegare* BoN was precluded from delegating the powers that it received from Treasury further to Ms Kapenda. As Ms Kapenda was not vested with the discretionary power to block the accounts, the court *a quo* granted the relief claimed, ie declaring the orders blocking the accounts as being unlawful. This is the decision the appellants are appealing against.

On appeal, the Court had to consider whether the delegations had the effect of clothing Ms Kapenda with the necessary authority to order the blocking of the respondents' business bank accounts.

Held that, the power to sub-delegate can arise by express or by necessary implication from the delegated powers. Whether a power can be further delegated or sub-delegated will depend on certain factors such as the nature of the power being sub-delegated, the extent of the transfer of the power, the importance of the sub-delegatee and practical necessity.

Held that, the court *a quo* was correct to find that there is a rebuttable presumption against sub-delegation. This means that the power delegated does not automatically include the power to (further) delegate. Whether the delegated powers can be further delegated depends on the context in which the initial delegation took place and whether it is such as to rebut the presumption against further delegation.

Held that, what the Minister of Finance delegated to BoN was powers and functions to be performed by the Board or the Governor and neither of these entities can sub-delegate these powers and functions beyond those two categories and hence. There are no provisions in either the Bank of Namibia Act 8 of 1990 or the Bank of Namibia Act 1 of 2020 which allow BoN to vary the mandate conveyed to them in the delegation from the Minister of Finance unilaterally.

Consequently, the appeal is dismissed.

APPEAL JUDGMENT

FRANK AJA (SHIVUTE CJ and DAMASEB DCJ concurring):

Introduction

[1] First to sixth respondents are all entities who conduct business in Namibia. Because some of the said respondents conduct business in the north of Namibia (ie Oshikango and Rundu) which businesses attracted customers from Angola, these businesses received authorisation from the Bank of Namibia (BoN) to accept United States Dollars (USD) from such Angolan customers 'strictly in payment of goods sold or services rendered' to such customers. Such foreign currency had to be dealt with in terms of regulations applicable to the receipt of such monies.

[2] At all relevant times to this matter, the second appellant (Ms Kapenda) was the Acting Director: Exchange Control and Legal Services at BoN. In her capacity as such she received information that the first to sixth respondents were acting contrary to the foreign exchange (forex) regulations in their dealings with their USD receipts. She launched an investigation, had the premises of the businesses and some of its managers' residences searched and concluded that there was indeed something awry with the manner in which the first to sixth respondents dealt with the USD they received. According to her, she on reasonable grounds, suspected these businesses to be involved in the contravention of the forex regulations and she thus instructed their bank (ie Bank Windhoek) to block the accounts of the six entities subject to the finalisation of her investigation.

[3] The six businesses approached the High Court for relief and sought to review and set aside the decisions of Ms Kapenda. The High Court found that Ms Kapenda was not vested with the discretionary power to block the accounts and granted the relief claimed, ie declaring the orders blocking the accounts as being unlawful.

[4] The High Court considered the delegation of powers in terms of the Currency and Exchanges Act 9 of 1933 by the President to the Treasury and from the Treasury to BoN and from BoN to its employee, Ms Kapenda, in her capacity as Acting Director: Exchange Control and Legal Services. The High Court found that based on the maxim *delagatus non potest delagare*, BoN was precluded from delegating the powers that it received from Treasury further to Ms Kapenda.

[5] BoN and Ms Kapenda noted an appeal against the decision of the High Court maintaining that the High Court erred in its reasoning when regard is had to the statutory context within which the various delegations took place and that in its proper context the further delegation by BoN to Ms Kapenda was authorised.

[6] It is thus necessary for the purpose of this appeal to consider whether the delegations, which are common cause, had the effect of clothing Ms Kapenda with the necessary authority to order the blocking of the respondents' business bank accounts.

The route leading to Ms Kapenda becoming the decision maker

[7] In terms of the Currency and Exchanges Act, the President has the powers to make exchange control regulations. His powers are as wide as they can possibly be.

Section 9 stipulates that 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’. He may ‘apply any sanctions’ criminal or civil. The regulations may provide for the ‘blocking, attachments and obtaining of interdicts . . . by the Treasury and the forfeiture and disposal by the Treasury of any money or goods . . .’ suspected by the Treasury on reasonable grounds to be involved in an offence or suspected offence against any regulation. In terms of s 9(2)(c) of the Currency and Exchanges Act any regulation by the President ‘may authorise any person who is vested with any power’ or who must perform any duty in terms of the regulation to delegate such power or to assign such power to any other person.

[8] It should be noted that for the purpose of the regulations the reference to ‘Treasury’ is defined to mean the Minister of Finance or any officer in the Department of Finance, who by virtue of the division of work in that department, deals with the matter on the authority of the Minister.

[9] The Exchange Control Regulations¹ – regulation 22(A)(1)(a)(i) – authorises Treasury to ‘attach money . . . which the Treasury on reasonable grounds suspects’ to be held or dealt with contrary to the regulations. In terms of regulation 22B, the Treasury may declare forfeited money to the State in respect of contraventions of the forex regulations.

¹ Exchange Control Regulations, 1961 RSA Government Notice R.1111 of 1961 (RSA GG 123, published in OG 2355) came into force on 1 December 1961.

[10] Regulation 22E(1) deals with the delegation of powers by the Minister of Finance and reads as follows:

‘The Minister of Finance may delegate to any person any power or function conferred upon the Treasury by any provision of these regulations or assign to any such person a duty imposed thereunder to the Treasury.’

[11] Per letter dated 20 March 1991 the then Minister of Finance delegated his powers to BoN. The salient part of this letter containing the delegation of powers reads as follows:

‘DELEGATION OF POWERS TO THE BANK OF NAMIBIA TO CARRY OUT THE
FUNCTION OF EXCHANGE CONTROL

Pursuant to Regulation 22E of the Exchange Control Regulations, Orders and Rules and the provisions of Article 48(1) of the Bank of Namibia Act (No. 8, 1990), I hereby delegate all powers and functions, with the exception of Regulations 3(5) and (8), 16, 20 and 22, to the Bank of Namibia for the purpose of carrying out the function of exchange control.

Furthermore, I wish to inform the Bank of Namibia to apply the following laws and rules to execute the function of exchange control:

- a) The Currency and Exchanges Act, No 9 of 1933 (as amended);
- b) The Exchange Control Regulations, Orders and Rules of 1951 (as amended);
- c) The Exchange Control Rulings;
- d) The Exchange Control Circulars of the South African Reserve Bank prior to the 23 April 1990;
- e) The Securities Control Circulars of the South African Reserve Bank prior to the 23 April 1990;

- f) The Exchange Control Circulars of the Namibian Exchange Control Division, starting with circular no. 1990/001 of the 23 April 1990.'

[12] As is evident from the body of the letter, the Minister also refers to s 48(1) of the Bank of Namibia Act 8 of 1990 (Act 8 of 1990) which Act at the time established a new statutory entity pursuant to Art 128 of the Namibian Constitution. The Constitution refers to the establishment of a Central Bank 'to serve as the State's principal instrument to control the money supply, the currency, and banking institutions . . .' and which would be operated by a governing board. Section 48(1) of Act 8 of 1990 to which the Minister of Finance referred to reads as follows:

'The Bank shall act as agent for the Government in the administration of any law relating to exchange control, in accordance with such instructions or directives as the Minister may from time to time issue for this purpose.'

[13] In terms of s 8 of Act 8 of 1990, a Board is established in which the powers, duties and functions of the BoN shall be vested and which, 'subject to the provisions of this Act', would be responsible for the policies and general administration of the BoN. The Board consisted of a Governor, Deputy Governor and four additional members. In terms of s 9 of Act 8 of 1990, the Governor served as the chief executive officer who exercised all powers and performed all duties and functions of BoN not explicitly reserved for the Board. In terms of s 15 of Act 8 of 1990, the Board had to meet at least once a quarter.

[14] The current Bank of Namibia Act 1 of 2020 (Act 1 of 2020) retains the basic structure of the original Bank of Namibia Act 8 of 1990 in that BoN still acts as ‘agent for the Government in exercising and performing powers and functions relating to any exchange control that the Minister may assign or delegate to the Bank pursuant to the Currency and Exchanges Act’ (s 54(1)). Further, the Board is still the ultimate decision maker and not involved in the day-to-day operations of BoN. The day-to-day operations are within the ambit of the Governor who is the chief executive officer and he or she may delegate tasks with the approval of the Board to other employees of BoN.

[15] Act 1 of 2020 stipulates the object and functions of BoN in more detail than Act 8 of 1990 and expressly mentions in s 4(1)(d), (g) and (o) the following functions:

‘ . . .

(d) to oversee money and foreign exchange markets;

. . .

(g) to hold and manage foreign reserves of Namibia;

. . .

(o) to exercise and perform such powers and functions as may be assigned to or conferred on the Bank by any other law.’

[16] In short, and in terms of the basic structure of Act 8 of 1990 and Act 1 of 2020, BoN is headed by the Board as its ultimate decision maker. However, recognising that the Board will not run the day-to-day affairs of BoN, but exercise its supervisory role as to the affairs of BoN essentially through quarterly meetings, the Governor of BoN is envisaged to be in overall charge and supervision of the day-to-day affairs of BoN. Because of the practicalities involved in managing BoN, provision is made for the

Governor to delegate his or her powers and authorities to his subordinates. This however can only happen with the approval of the Board.

[17] On 22 November 2019, the Board of BoN adopted a schedule of delegated authorities. In terms of this delegation of authorities, the authority of BoN as the agent for the government in the administration of exchange control was delegated as follows:

‘Delegated to Director: Exchange Control; see delegation under the Currency and Exchanges Act, 1933.’

[18] The aforesaid delegation by the Board on 22 November 2019 is the delegation relied upon by BoN and Ms Kapenda for the latter’s powers to block the accounts of the first to sixth respondents.

Extent of the authority granted to BoN

[19] It was not contested that the President could make regulations and that the regulations in terms of the Currency and Exchanges Act could authorise Treasury to block accounts where accounts ‘are suspected by the Treasury on reasonable grounds to involve an offence or suspected offence’ of the forex regulations.

[20] It was also not contested that the Minister of Finance (who, as will be recalled, is defined as the Head of Treasury) could delegate the function of forex control to BoN on the wide terms set out above. The question that arose was, who on behalf of BoN could exercise this forex function?

[21] As BoN is a juristic person it must exercise its powers and functions through a natural person or persons. The obvious entity at BoN in this regard is the Board which is in overall supervision of all of BoN's operations. Without considering the context of the delegation and simply considering it on its own, it expressly only authorises the Board to exercise the delegated forex functions on behalf of the Minister (Treasury).

[22] It must be borne in mind that regulation 22E(1) authorises the Minister of Finance to delegate 'to any person any power or function conferred upon the Treasury . . . or assign to any such person a duty imposed thereunder to the Treasury'. This is not a position where the law has designated a special subordinate authority but where it allowed the Minister to designate 'any person'. Nevertheless, where the Minister delegated to BoN, it was a referral to the Board as the Board is the ultimate authority in BoN's governance structure. The question that thus arises is whether the Board can sub-delegate this function further and to whom?

[23] As pointed out by the court *a quo* there is a rebuttable presumption against sub-delegation. This normally means that the power delegated does not include the power to (further) delegate. This power to further delegate can however arise expressly or by necessary implication from the delegated powers. Whether it can be further delegated or sub-delegated will depend on certain factors such as the nature of the power being

sub-delegated, the extent of the transfer of the power, the importance of the sub-delegatee and practical necessity.²

[24] Baxter in *Administrative Law*³ refers to the factors to be considered when determining whether sub-delegation should be allowed as the following: the degree of devolution of the power, the importance of the original delegatee, the complexity and breadth of discretion, the impact of the power and practical necessities. Where there is a complete hand over of power and responsibility the courts are more loath to accept such sub-delegation. The more subjectively phrased the power is, the less likely a court is to accept such sub-delegation. Conversely, where the sub-delegatee is a more skilled person to deal with the issues, then the sub-delegation may be acceptable. Power which involves little or no discretion is more likely to pass muster when it comes to sub-delegation than power involving a significant discretionary component. The more far reaching the deeds and effects of the power are, the lesser the chances of the court accepting such sub-delegation. When it is practically impossible for the nominated delegatee to attend to the delegated power personally, the benefits of efficiency in exercising such power through a sub-delegatee may render such sub-delegation acceptable.

² See *Attorney-General O.F.S. v Cyril Anderson Investments (Pty) Ltd* 1965 (4) SA 628 (A) at 639C-D; *Chairman of the Board on Tariffs and Trade & others v Teltron (Pty) Ltd* 1997 (2) SA 25 (A) at 39E-F and C Hoexter *Administrative Law in South Africa* 2 ed (2012) at 268.

³ L Baxter *Administrative Law* (1984) at 435.

[25] When regard is had to the present matter, it is clear that the delegation is wide and covers a big portion of the administration of forex regulations that is inclusive of a discretionary power when it comes to the blocking of accounts. It is also clear from the extent of the mandate that BoN would have to take over as 'the agent' of the Treasury and for this purpose a department at BoN known as the Department of Exchange Control and Legal Services needed to be established to give effect to the mandate from the Minister of Finance. The effect of the discretionary power granted to BoN relating to the blocking of accounts may have far reaching deleterious effects on persons whose accounts are subject to blocking orders. It thus seems from a practical day-to-day position that it was impractical for the Board of BoN to administer the powers and functions of the forex regulations and that it would be more expedient if this was done under the supervision and control of the Governor (ie the chief executive officer of the Bank). In view however of the discretion to block accounts and the potential deleterious effect of such blocking on the account holders, no delegation other than to the Governor can be implied in the delegation from the Minister to the Bank. In short, the delegation to BoN by the Minister of Finance in respect of the forex regulations, can only justify the exercise of such powers and functions by the Board or the Governor (the chief executive officer of BoN) and by no one else. Nothing would, of course, prevent the Governor from receiving reports from the Director: Exchange Control and Legal Services and even reports on inspections carried out by the department for his or her consideration, but the discretion to block an account must remain with the Board or the Governor. The delegation of the Minister of Finance to BoN can be dealt with practically and efficiently and without leaving the far reaching discretion to block an account to the

discretion of a person who reports on investigations into alleged non-compliances with the forex regulations. Because of the potential deleterious effect of a discretionary blocking order the court must interpret such delegation so as to maintain the 'highest standard of propriety' in respect of such orders which normally implies the highest ranking official which the circumstances dictate⁴.

[26] I point out in passing that there appears to be no resolution authorising the Governor to exercise the powers and functions of the forex regulations as per the delegation of the Minister of Finance. If the Board is of the view that the Board itself is not ideally placed to deal with this delegation itself and its 'agency' in this regard would be more practically and efficiently dealt with as part of the day-to-day activities of the bank, the Board would be at liberty to sub-delegate this function to the Governor. As pointed out above, this is the extent of the sub-delegation implicit in the delegation from the Minister of Finance and a further sub-delegation would not pass the test imposed by the *delegatus delegare non potest* maxim.

[27] Counsel for BoN submitted that it was not correct to interpret the delegation by the Minister of Finance primarily with reference to the Currency and Exchanges Act 9 of 1933 and the regulations pursuant thereto, but that reference must also be had to the two Bank of Namibia Acts, which according to counsel, make it clear that the delegation by the Board to Ms Kapenda was authorised.

⁴ *Prosecutor-General v Lameck & others* 2010 (1) NR 156 (HC) para35.

[28] In terms of s 9(6) of Act 8 of 1990, the Governor may with the approval of the Board delegate any of his or her powers to other officers of BoN and in terms of s 16(1) of Act 8 of 1990, the Board may delegate its power to appoint employees for BoN. These powers to delegate, must be read with s 48(1) of Act 8 of 1990 which states that BoN 'shall act as agent for the Government in the administration of any law relating to exchange control, in accordance with such instructions or directives as the Minister may from time to time issue . . .'. These sections do not assist BoN or Ms Kapenda. Section 9(6) of Act 8 of 1990 clearly refers to the functions stipulated in s 9(5) of Act 8 of 1990 which stipulates the functions of the Governor as the chief executive officer and it is clear that these functions can be delegated with the approval of the Board. Section 16(1) of Act 8 of 1990, which deals with the appointment of employees or officials for BoN, is not a general power to delegate any functions or duties. Section 48(1) of Act 8 of 1990 clearly empowers BoN as a creature of statute to act as agent for the Government but this is subject to the mandate given to it in this respect by the Minister of Finance. This mandate is limited to the delegation (mandate) in law with respect of blocking orders to the Board or to the Governor and hence neither BoN nor the Governor can extend the scope of this mandate.

[29] Act 1 of 2020 also does not take the matter any further. Section 79(1) of Act 1 of 2020 authorises the Minister of Finance to, in writing and under such conditions as the 'Minister may determine, delegate a power or assign a function conferred or imposed . . . by or under this Act' to another person. '(t)his Act refers' to Act 1 of 2020 and such delegation has nothing to do with a function that has to be performed per the

regulations issued pursuant to the Currency and Exchanges Act 9 of 1933. Section 79(2) authorises the Board to delegate functions and powers imposed on the board 'under this Act' which, of course, equally has nothing to do with the powers and functions imposed on the Board by way of mandate for it as an agent under the Currency and Exchanges Act 9 of 1933. A similar situation prevails in s 79(3) which allows the governor to delegate functions and powers under this Act (ie Act 1 of 2020), which likewise has nothing to do with powers and functions conferred on the Governor pursuant to the regulations to the Currency and Exchanges Act 9 of 1933. The agency of BoN for Government in respect of exchange control stipulated in s 54(1) of Act 1 of 2020 is basically a rehash of s 48(1) of Act 8 of 1990 which stipulates that BoN must perform such powers and functions that the 'Minister may assign or delegate to the Bank under the Currency and Exchanges Act 9 of 1933'. As pointed out above, what the Minister delegated to BoN was powers and functions to be performed by the Board or the Governor and neither of these entities can sub-delegate it beyond these two categories and hence, there are no provisions in either Act 8 of 1990 or Act 1 of 2020 which allows BoN to vary the mandate conveyed to them in the delegation from the Minister of Finance unilaterally.

[30] It follows from what is stated above that the appeal on the merits cannot succeed and will have to be dismissed.

[31] The court *a quo*, when setting aside the blocking notices, ordered BoN to pay the costs of the applicants *a quo*, by including the cost of two legal practitioners. It is

pointed out by the appellants that the costs order was granted contrary to rule 124(6) of the Rules of the High Court which stipulates that not more than one legal practitioner's costs can be claimed when more than one legal practitioner from the same firm is used. The costs order should thus be altered to comply with rule 124(6).

Conclusion

[32] In the result, the following order is made:

- (a) The court order of the High Court is confirmed, save that the costs order is set aside and substituted with the following costs order:

‘3. Bank of Namibia must pay applicants’ costs, which costs are limited to the costs of one legal practitioner.’

- (b) The appeal is dismissed with costs.

FRANK AJA

SHIVUTE CJ

DAMASEB DCJ

APPEARANCES

APPELLANTS:

N Bassingthwaite (with her T
Muhongo)

Instructed by ENS Africa|Namibia

FIRST TO SIXTH RESPONDENTS:

S Namandje (with him M Jankie)

Of Sisa Namandje & Co. Inc.