THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 810/2011
Reportable

In the matter between:

TULIP DIAMONDS FZE **APPELLANT**

and

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT **FIRST RESPONDENT**

MENZI SIMELANE NO **SECOND RESPONDENT**

STEVEN HOLZEN NO **THIRD RESPONDENT**

DIRECTOR-GENERAL: DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT **FOURTH RESPONDENT**

BRINKS (SOUTHERN AFRICA) (PROPRIETARY) LIMITED **FIFTH RESPONDENT**

Neutral citation: *Tulip Diamonds Fze v Minister of Justice and Constitutional Development* (810/2011) [2012] ZASCA 111 (7 September 2012)

Coram: Mthiyane DP, Brand, Cachalia, Leach and Wallis JJA

Heard: **15 August 2012**
Delivered: **7 September 2012**

Summary: **Standing – International Co-operation in Criminal Matters Act 75 of 1996 – request by Belgian examining magistrate for assistance of South African authorities to obtain documents – foreign based company claiming confidential information in documents in possession of local company – appellant seeking to challenge decision by South African authorities to provide assistance and issue of subpoena to South African company to produce documents – failure to establish that information in documents confidential – failure to show that it has substantial interest in the subject matter of the**

litigation.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (CJ Claassen J and Jordaan AJ sitting as court of first instance):

The following order is made:

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

MTHIYANE DP (BRAND, CACHALIA, LEACH AND WALLIS JJA CONCURRING)

[1] This is an appeal against an order of the South Gauteng High Court (CJ Claassen J with Jordaan AJ concurring) dismissing an application by the appellant, Tulip Diamonds Fze, a foreign company which carries on business in Dubai, to set aside certain decisions of the first, second and third respondents made in terms of the provisions of the International Co-operation in Criminal Matters Act 75 of 1996 (the Act). The second respondent, then the Director General: Department of Justice and Constitutional Development, had considered a request for assistance from the Belgian authorities to search and seize from the fifth respondent, a company in South Africa, Brinks Southern Africa, certain documents which the Belgian authorities required in connection with a criminal investigation they were conducting against Omega Diamonds (Omega), a Belgian company and a citizen of that country, Sylvain Goldberg. In the

course of a search and seizure operation at the offices of Omega, the Belgian authorities had found nine invoices issued by Brinks, showing that Brinks had transported diamond shipments between Angola and the appellant in Dubai. The South African authorities were requested to inspect, seize and make copies of all relevant documents relating to similar shipments both to the appellant, as well as a number of other entities, including invoices, Kimberley Certificates, packing lists, shipment documents, insurance policies and the like found in Brinks' possession. They were also requested to interview the responsible person at Brinks with regard to the invoices and their relationship with Omega.

[2] The Director-General and thereafter the first respondent, the Minister of Justice and Constitutional Development (the Minister), acceded to the above request. The third respondent (the Magistrate) to whom the matter was referred, issued a subpoena requiring Brinks to produce the required documents and information. Brinks was willing to comply with the subpoena.

[3] On appeal the appellant contends, as it did in the court below, that the surrender of the required documents by Brinks or their disclosure would violate its right to confidentiality in respect of the information contained in those documents. The question then arose as to whether the appellant had the necessary legal standing (locus standi) in the subject matter of the relief claimed, in what was on the face of it a matter between the respondents and Brinks, at the instance of the Belgian authorities. The appellant claimed that it had a substantial interest in the subject matter of the litigation based on its alleged right to confidentiality in the documents in the hands of Brinks. It argued that although it was a peregrinus, where its right to confidentiality was threatened in South

Africa by South African state organs, albeit at the instance of a foreign state, it had standing before a South African court to assert and protect that right.

[4] The high court rejected the above contention on the basis that the appellant was a foreign company which had no presence in this country. It held that the appellant had no standing in the courts of this country 'to invoke the protection and benefits of any enshrined constitutional right, such as fair administrative action'. The court also rejected the appellant's submissions on the merits, in which it included its claim to confidentiality. I shall return to the merits later in this judgment. It suffices at this stage to record that the application was dismissed with costs and the appellant was granted leave by the high court to appeal to this court. Brinks who was cited as a respondent did not appear in the appeal and abides the decision of the court.

[5] The appeal raises two issues. The first is whether the appellant has standing to attack the validity of the decisions of the respondents to accede to a request from the Belgian authorities on the basis of its right to confidentiality in the documentation requested being threatened. The second is whether the decisions of the Minister and the Director-General to accede to the letter of request and the subsequent decision of the Magistrate to issue a subpoena, should be reviewed and set aside. The review was sought on six separate grounds. They were (a) the validity of the Magistrate's appointment; (b) the invocation by the Magistrate of s 205 of the Criminal Procedure Act 51 of 1977 instead of ss 7 and 8 of the Act; (c) non-compliance with the jurisdictional requirement that the Director-General had to satisfy himself as to the commission of the offence by Omega; (d) the failure by the Director-General to take into

account relevant considerations; (e) non-observance of procedural fairness, in that the appellant was not afforded an opportunity to be heard before decisions were taken and the subpoena issued by the Magistrate; and (f) the over-breadth of the letter of request, in that it required the South African officials to do more than is permitted by ss 7 and 8 of the Act.

[6] Before turning to the issue of standing, it is necessary to set out the relevant statutory provisions of the Act. Section 7 provides as follows:

'(1) A request by a court or tribunal exercising jurisdiction in a foreign State or by an appropriate government body in a foreign State, for assistance in obtaining evidence in the Republic for use in such foreign State shall be submitted to the Director-General.

2) Upon receipt of such request the Director-General shall satisfy himself or herself-

a) that proceedings have been instituted in a court or tribunal exercising jurisdiction in the requesting State; or

b) that there are reasonable grounds for believing that an offence has been committed in the requesting State or that it is necessary to determine whether an offence has been so committed and that an investigation in respect thereof is being conducted in the requesting State.

3) For purposes of subsection (2) the Director-General may rely on a certificate purported to be issued by a competent authority in the State concerned, stating the facts contemplated in paragraph *(a)* or *(b)* of the said subsection.

4) The Director-General shall, if satisfied as contemplated in subsection (2), submit the request for assistance in obtaining evidence to the Minister for his or her approval.

5) Upon being notified of the Minister's approval the Director-General shall forward the request contemplated in subsection (1) to the magistrate within whose area of jurisdiction the witness resides.'

[7] The examination of witnesses by a magistrate is provided for in s 8.

It reads as follows:

'(1) The magistrate to whom a request has been forwarded in terms of section 7(5) shall cause the person whose evidence is required, to be subpoenaed to appear before him or her to give evidence or to produce any book, document or object and upon the appearance of such person the magistrate shall administer an oath to or accept an affirmation from him or her, and take the evidence of such person upon interrogatories or otherwise as requested, as if the said person was a witness in a magistrate's court in proceedings similar to those in connection with which his or her evidence is required: Provided that a person who from lack of knowledge arising from youth, defective education or other cause, is found to be unable to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in the proceedings without taking the oath or making the affirmation: Provided further that such person shall, in lieu of the oath or affirmation, be admonished by the magistrate to speak the truth, the whole truth and nothing but the truth.

2) A person referred to in subsection (1) shall be subpoenaed in the same manner as a person who is subpoenaed to appear as a witness in proceedings in a magistrate's court.

3) Upon completion of the examination of the witness the magistrate taking the evidence shall transmit to the Director-General the record of the evidence certified by him or her to be correct, together with a certificate showing the amount of expenses and costs incurred in connection with the examination of the witness.

4) If the services of an interpreter were used at the examination of the witness, the interpreter shall certify that he or she has translated truthfully and to the best of his or her ability, and such certificate shall accompany the documents transmitted by the magistrate to the Director-General.'

[8] The request for assistance from the Belgian authorities was contained in a letter from the 'Office of Examining Magistrate B De Hous, Antwerp' dated 23 December 2008 addressed to the Minister and

the Director-General. In the letter, assistance was requested from South African authorities to gather information which might assist in the conduct of a criminal enquiry against Omega and Goldberg. The enquiry related to the allegations of forgery and use of false documents, tax fraud and violations of the Belgian Codes dealing with income tax and money-laundering. The provisions of the Belgian code under which the above offences were punishable were also quoted in the letter.

[9] The letter recorded how Omega and Goldberg were implicated in the alleged criminal activities. It stated that Omega imported diamonds from Angola and Congo through an associated company in Dubai into Belgium. Omega ordered the shipment of diamonds purchased in Angola and Congo in accordance with the legally required Kimberley Certificates, for delivery to the appellant (or other entities not relevant for this case) located in Dubai. The diamonds were packed in small parcels. Upon arrival in Dubai the small parcels were retained but repacked into larger parcels, containing diamonds from both Angola and Congo, without physically mixing the stones. Thereafter the new shipment of diamonds was provided with a new Kimberley Certificate indicating that the shipment emanated from the United Arab Emirates and marked 'diamonds of mixed origin'. The new shipment was issued with a new invoice made out by the appellant and addressed to Omega wherein the value of the diamonds was increased by between 20 and 31 per cent. In so doing it was said that the value of the diamonds was artificially increased, generating profits which were kept secret from the Belgian tax authorities.

[10] The letter alluded to the fact that when a search and seizure operation was conducted at the premises of Omega in Belgium, exhibits

and documents including nine invoices on which the names of Brinks and the appellant appeared, were found.

[11] The letter requested the South African authorities to assist in the identification of Brinks in South Africa and to inspect the documents in Brinks' possession in order to compare and investigate the nine invoices, to search and establish whether there were similar consignments from Angola and Congo to Dubai, and to search and investigate all invoices and diamond consignments to associated companies in Dubai. Although mention was made of the appellant, the letter of request made it clear that the Belgian authorities did not regard either Brinks or the appellant as in any way implicated in the criminal activities alleged against Omega and Goldberg.

[12] Upon receipt of the request the Director-General considered it and recommended that it be acceded to by the Minister as envisaged in s 7(4) of the Act. The request was in due course approved by the Minister. Upon being notified of the approval the Director-General forwarded the request to the Magistrate in terms of s 7(5) for the implementation of the request by way of the issue of a subpoena as set out in s 8 of the Act. The subpoena was duly issued and served on Brinks.

[13] Turning to the question of standing, a person wishing to institute or defend legal proceedings must have a direct and substantial interest in the right which is the subject matter of the litigation (*Jacobs & 'n ander v Waks & andere* 1992 (1) SA 521 (A) at 534A-E). Legal standing concerns the 'sufficiency and directness of a litigant's interest in proceedings which warrants his or her title to prosecute the claim asserted' (*Sandton Civic Precinct (Pty) Ltd v City of JHB & another* 2009 (1) SA 317 (SCA) para 19 per Cameron JA). That in sum is the nature of

the interest the appellant was required to show in order to demonstrate its entitlement to come to court seeking the relief it sought in this case.

[14] The high court held that the appellant was non-suited to challenge the decisions of the Minister, the Director-General and the Magistrate. Regrettably the court based its conclusion on a faulty premise. It held that the appellant was non-suited because it was a foreign company which had no presence in this country and relied for its conclusion on the decisions in *Lawyers for Human Rights & another v Minister of Home Affairs & another* 2004 (4) SA 125 (CC) and *Kaunda & others v President of the Republic of South Africa & others* 2005 (4) SA 235 (CC) para 36. The court's reliance on these cases was misplaced. Counsel for the appellant argued, correctly in my view, that these cases do not deal with standing, but rather with the definition of the class of beneficiaries of the rights in the Bill of Rights. I do not think that the rulings in these cases constitute a bar to a foreign litigant who has a protectable interest in this country, seeking to protect that interest before a South African court. The appellant in this case sought to protect allegedly confidential information from compelled disclosure in the jurisdiction where the third party, namely Brinks, who holds it happens to be and where the compulsion is sought. According to the appellant the subpoena to compel Brinks will lead to the release of information about itself in breach of obligations of confidentiality Brinks owes towards it. The appellant sought to prevent this outcome by seeking relief against the South African state organs who will exercise this coercive power.

[15] The appellant's major difficulty lies in whether it proved the confidentiality to which it laid claim in relation to the documents in Brinks' possession. Although, as I have indicated, the high court dealt with this issue in its consideration of the merits, it ought properly to have

been considered as an issue pertaining to standing. The assertion of confidentiality by the appellant in this case is unsubstantiated and amounts to no more than a bald claim to confidentiality. The appellant failed to indicate which documents contained confidential information, the nature of such information and the legal basis on which it asserted such right to confidentiality. One needs only have regard to the documents referred to in the founding affidavit to see that they are by their nature not confidential. They include shippers' letters of instruction, shippers' invoices to consignees, various SARS and customs documents, as well as airline waybills.

[16] It has not been shown that Brinks had a contractual obligation to preserve confidentiality in these documents and their contents. On the contrary, Brinks was quite prepared to surrender the documents to the South African authorities. Although Brinks deposed to an affidavit in other related proceedings stating that it 'accepts that the information and documentation it receives from its customers are of a confidential nature and, subject to valid legal process requiring the contrary, it treats it as such' this does not provide proof that the documents in issue in this case are of a confidential nature. Brinks' *ipse dixit* does not assist. I am not aware of any general duty of confidentiality in law between a principal and a courier or a consignor and a consignee and no evidence in that regard has been adduced in the present matter.

[17] Despite the weaknesses in the appellant's case on the question of confidentiality, counsel pressed on and submitted that the appellant's standing had been admitted by the respondents. That, submitted counsel, rendered it unnecessary to provide any further proof in regard to confidentiality.

[18] The above point however flounders when tested against the respondents' deposition in the answering affidavit. The respondents denied that the documents are 'relevant to the [appellant's] proprietary rights and that disclosure to the Belgian authorities would infringe the [appellant's rights]'. Confidentiality, which was the proprietary right the appellant sought to protect, was placed in issue by way of an express and repeated denial that the documents or their contents were confidential. All that was accepted was that if confidentiality had been shown there would be standing in respect of those confidential documents.

[19] In light of the view taken in relation to the question of standing it is unnecessary to deal with the merits. In the result the appeal is dismissed with costs, including the costs of two counsel.

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K K MTHIYANE
DEPUTY PRESIDENT

APPEARANCES

For Appellant:	GJ Marcus SC (with him A Stein) Instructed by: Edward Nathan Sonnenberg Inc, Johannesburg McIntyre & van der Post, Bloemfontein
For 1st to 4th Respondents:	AP Laka SC (with him M Sello) Instructed by: The State Attorney, Pretoria The State Attorney, Bloemfontein