**HIGH COURT OF SOUTH AFRICA**
**(GAUTENG DIVISION, PRETORIA)**

**CASE NO: 2091/2021**

**(1) REPORTABLE: NO.**
**(2) OF INTEREST TO OTHER JUDGES: NO.**
**(3) REVISED.**
**DATE 29 MARCH 2021**

**SIGNATURE**

In the matter between:

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|---|---|
| **THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE** | Applicant |
| and | |
| **PHELADI SUZAN RAPHELA** | First Respondent |
| **PSR SOLUTIONS (PTY) LTD** | Second Respondent |
| **THEMBEKA KOEKI MDLULWA** | Third Respondent |

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**J U D G M E N T**

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*This matter has been heard in open court in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.*

**DAVIS, J**

[1] This is the judgment if the anticipated return day of a temporary preservation order obtained by the Commissioner of the South African Revenue Service ("CSARS") whereby funds were frozen in the accounts of a taxpayer and the third respondent, Mrs Tembeka Koeki Mdlulwa. The anticipation of the order was heard in the urgent motion court.

[2] The background facts

2.1 The principal taxpayer involved in this dispute is PSR solutions (Pty) Ltd (PSR). It takes its name from its sole director, Mrs Pheladi Suzan Raphela, who was cited as the first respondent.

2.2 On 17 August 2020, the Fusion Centre referred a case concerning PSR to CSARS. The Fusion Centre is a collaborative, multi-agency body established by Presidential direction in response to alleged corruption in the COVID-19 personal protection equipment ("PPE") procurement.

2.3 On 21 April 2021, PSR was awarded a tender to supply 1,5 million facemasks at R30 per mask, apparently for use by the South African Police Service (the "SAPS"). As the tender value was R 45 million, it should have attracted output VAT in the amount of R 5 869 562, 21.

2.4 It appears that neither Mrs Raphela nor PSR had the funds to acquire the face masks in order to fulfill the tender. Through a Mr Kudzingana, Mrs Mdlulwa was approached for funding. This was four days prior to the expiry of the tender.

2.5 Mrs Mdlulwa thereafter, on 14 April 2021, paid the amount of R 19 939 000,00 to Chenhu, Jelecoro and J2L Trading, being the suppliers of the masks.

2.6 After the fulfillment of the tender by way of delivery of the masks paid for by Mrs Mdlulwa, PSR paid her R 33 154 000,00 on 21 April 2020 from the proceeds of the tender (a neat profit for Mrs Mdlulwa in excess of R13 million in 7 days, after the SAPS had paid 125% more than the actual cost of the PEE).

2.7 PSR had not fulfilled its tax obligations in respect of the transactions and, in particular, has neither disclosed the transaction in VAT returns nor has any VAT been paid thereon. A provisional calculation (not yet being an actual assessment) by CSARS indicated the amount due in respect of VAT, late payment and non-disclosure penalties to be R 14, 5 million at the time of the CSARS replying affidavit. The non-payment penalties and interest due on this amount continues to accrue.

2.8 By the end of July 2020, PSR only had R 110 377,72 left in its bank account.

[3] <u>The relevant legal position</u>

3.1 From the outset, one must distinguish between preservation provisions and recovery provisions available to CSARS in respect of unpaid amounts. The first are primarily catered for in Section 163 of the Tax Administration Act, 28 of 2011 (the "TAA") while the latter are contained in a host of other sections of the TAA. One of these, obliquely relevant to the present matter, is section 183, dealing with the liability of persons assisting in the dissipation of assets.

3.2 Section 163(1) of the TAA provides as follows:

> *"A senior SARS official may, in order to prevent any realizable assets from being disposed of or removed which may frustrate the*

*collection of the full amount of tax that is due or payable or the official on reasonable grounds is satisfied may be due or payable, authorize an ex parte application to the High Court for an order for the preservation of any assets of a taxpayer or other person prohibiting any person, ... from dealing in any manner with the assets to which the order relates*".

3.3 Section 163(3) of the TAA provides that:

"*A preservation order may be made if required to secure the collection of the tax referred to in subsection (1)...*".

3.4 Section 163(7) of the TAA provides for the granting of ancillary orders regarding how the assets must be dealt with, including the appointment of a *curator bonis* and the realization of the assets in satisfaction of the tax debt.

3.5 Section183 of the TAA provides that: "*If a person knowingly assists in dissipating a taxpayer's assets in order to obstruct the collection of a tax debt of the taxpayer, the person is jointly and severally liable with the taxpayer for the tax debt to the extent that the person's assistance reduces the assets available to pay the taxpayer's tax debt*".

[4] <u>The preservation order</u>

4.1 CSARS investigations revealed that, since the receipt of the tender amount, which "SAPSfin" has paid by way of nine tranches of R 5 million each, all on 21 April 2021, PSR has made some 61 payments from its bank account, resulting in the remaining balance of some R 110 000.00 (only) referred to in paragraph 2.7 above.

4.2 Apart from the more than R 33 million paid to Mrs Mdlulwa, the other payments included:

4.2.1 R 1 041 000.00 into Mrs Raphela's bank account over the period from 22 April 2020 to 6 July 2020;

4.2.2 R 1 million to aforementioned Mr Kudzingana;

4.2.3 R 2,2 million for the purchase of a property in Mooikloof, Pretoria;

4.2.4 R 778 682, 05 for the purchase of a BMW X 5 registered to Mrs Raphela;

4.2.5 R 556 967, 40 to Absa Vehicle Finance in respect of a Mercedes Benz X2500 owned by Mrs Raphela;

4.2.6 R 2,5 million to Absa bank in respect of two MAN trucks, owned by Mrs Raphela.

4.3 Details of all the payments, bank accounts, holders thereof and vehicle particulars were contained in the founding affidavit deposed to on behalf of CSARS by a Senior Manager: Tactical Analysis and Investigations – Criminal and Illicit Activities Division, who is also a Senior SARS official as contemplated in section 6 of the TAA.

4.4 Based on all of the above and the facts mentioned in paragraph 2 above, the official was satisfied that reasonable grounds existed that tax may be due or payable and that a preservation order is needed to secure realizable assets from being disposed or removed which may frustrate the collection of tax.

4.5 Based on the above, this Court, per Basson, J, granted an order, with return day 15 March 2021, but with immediate effect, whereby a *curator bonis* was appointed with extensive powers, as contemplated in the TAA (the powers are not in dispute) in order to seize assets for the preservation thereof in terms of section 163 of the TAA.

4.6 The return day in respect of the order against Mrs Raphela and PSR has since been extended to 30 July 2021. Neither of these two parties have delivered any affidavits at the time of this judgment.

4.7 Pursuant to the preservation order, the curator proceeded to locate assets. He produced an interim report, confirmed by an affidavit. He found that Mrs Raphela's savings bank account at Absa only contained R 3 597,94 and that PSR's account then had a closing balance of R 1235 241,78. He found that Mrs Mdlulwa was residing in Spain with her family and that her residence in Bridle Park Country Estate in South Africa has not been maintained or occupied for a number of years. The curator has placed a "hold" on accounts of Mrs Mdlulwa at Investec with balances totaling some R 24 million. It is this lastmentioned amount which Mrs Mdlulwa now claims in her anticipation application, should be released.

[5] Mrs Mdlulwa's case

Apart from peripheral disputes between the parties relating to condonation needed by Mrs Mdlulwa for not filing her affidavit timeously, an application by CSARS for striking out certain portions of Mrs Mdlulwa's affidavit on the basis that it contains an unwarranted attack on SARS officials and the curator and a huge disputes about the making available of funds to allow Mrs Mdlulwa to travel from Spain (and back) to sign her

affidavit, the crux of her opposition against the continued existence of the preservation order, is the following:

5.1 The allegation that Mrs Mdlulwa was the "mastermind" of the tender transactions is unfounded. Coupled herewith, is the allegation that the requirements of section 183 of the TAA have not been met.

5.2 There was an insufficient disclosure in the founding affidavit to satisfy the test for ex parte applications. In particular, reliance was placed on the fact that the CSARS deponent had failed to disclose that Mrs Mdlulwa had the necessary permission in terms of the Foreign Exchange Control Regulations when she expatriated funds to Spain.

5.3 There is a disproportionality between the extent of funds "frozen" in terms of the preservation order, and the extent of the tax liability of PSR (and Mrs Raphela).

[6] Evaluation

6.1 Mrs Mdlulwa not only denies that she was a mastermind of any sorts regarding the transactions in question, but avers that she has no relationship with Msr Raphela and only got involved as a result of Mr Kudzingana's intervention. However, seven months after her loan to PSR, she furnished Mrs Raphela with an "invoice". This "invoice" was addressed to "Suzan" and purported to provide a basis for the loan. PSR attempted to use this invoice to support a claim for input VAT, but this attempt was rejected by SARS due to the obvious deficiencies in the invoice. Even if Mrs Mdlulwa was not a "mastermind", she appears to have a closer relationship with Mrs Raphela than she is prepared to concede, but for present purposes, nothing much turns on this. The order sought and obtained against Mrs Mdlulwa was not on the basis of her tax liability, but that of PSR (and Mrs Raphela).

Although CSARS had relied on her involvement in the dissipation of funds, it was as recipient and not (yet, at least, on these papers) on grounds such as those contemplated in section 183 of the TAA, i.e as co-perpetrator. CSARS has also not claimed that she be held jointly and severally liable. Her reliance on the applicability of section 183 is therefore misplaced. Counsel for CSARS also made this clear during argument: CSARS is currently relying on asset preservation provisions and not on tax recovery provisions of the TAA.

6.2 In this regard, Mrs Mdlulwa contends that, although she had received the funds in question from PSR, it is "untenable" that CSARS may "freeze" the funds. In heads of argument filed on her behalf, it is suggested that CSARS "... *should only freeze the account of the taxpayer or the account of any person who knowingly assisted the taxpayer in dissipating assets* ...".

6.3 The restricted interpretation which Mrs Mdlulwa seeks to place on section 163, is not supported by the wording thereof. The section clearly contemplates the granting of the order against a taxpayer or "other person", lastmentined clearly being someone other than the taxpayer. Applying the principles of interpretation as set out by Wallis JA in Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) and the annotations thereof, this is the only sensible manner on which the words "other person", can be interpreted in the context of the section as a whole and its intended aim, namely, to prevent (further) dissipation of assets by the taxpayer which, if not "followed" and "preserved", might lead to the tax being unrecoverable. This is particularly in circumstances, such as in the present case, where, after such dissipation, the taxpayer appears to be unable to meet its estimated tax liability.

6.4 The "reading in" into section 163 of the requirement of collusion or an intention of dissipation on the part of the "other person" is, as aforesaid, not supported by the wording of the section. CSARS, in utilising the preservation provisions, is empowered to pursue and preserve assets in order to secure the recoverability of a taxpayer's tax liability, not to punish or attach assets of a person who may (also) be a co-perpetrator (as contemplated in section 183). For this purpose, it has been found that CSARS need not prove any intention of such "other person" in the same manner as may be required for an anti-dissipation interdict (a *Mareava* injunction in English law) as set out in Knox D'Arcy Ltd and Others v Jamieson and Others 1996 (4) SA 348 (A). All that CSARS has to show, is that there is a material risk that assets which would otherwise be available (or which would otherwise have been available) for the satisfaction of the taxpayer's tax liability would, in the absence of a preservation order, no longer be available. See Commissioner of South African Revenue Service v Tradex (Pty) Ltd and Others 2015 (3) SA.

6.5 In the present case, the bulk of the funds from which PSR would have been able to satisfy its tax obligations have already been dissipated to Mrs Mdlulwa and some of those funds have already been expatriated out of the country. It matters not that such expatriation had been done with compliance with Foreign Exchange Control Regulations, the consequence is that those funds are already no longer recoverable. The facts also show that Mrs Mdlulwa is no longer living in the country on a full-time basis, her daughters are also overseas, playing tennis on the international circuit and that she uses funds, expatriated funds at that, to support that lifestyle. She herself, hints at an increase of the need for funds outside the country as the one daughter is now being enrolled for residential study at a university in the United State of America. Preserving the funds which have

emanated from the taxpayer and which are now in the hands of Mrs Mdlulwa as an "other person" and which funds are, for the time being, in South Africa, in my assessment, constitute sufficient grounds to indicate the "practical utility" of a preservation order. See, again: the Tradex – judgment at paragraph [37].

6.6 Mrs Mdlulwa's contentions that the provisions of section 163 should not apply to her as an alleged "innocent" person and should not apply without satisfaction of the requirements of section 183 of the TAA, can neither in fact nor in law, be upheld.

6.7 In a recent judgment by Sutherland ADJP in this division in case no 35696/2020 in CSARS v Hamilton Holdings (Pty) Ltd & Others, 1 March 2021 a similar stance to that of Mrs Mdlulwa was taken with regard to the CSARS' founding affidavit. It was also alleged in that application that the founding affidavit failed to disclose all relevant facts and therefore breached the *uberrima fides*-requirements relating to *ex parte* applications. The principal "non-disclosures" relied on by Mrs Mdlulwa were the lack of proof relating to the "mastermind" allegation, already dealt with in paragraph 6.1 above, and the fact that, the funds that had been expatriated to Spain, had been expatriated legally. Based on these non-disclosures, counsel for Mrs Mdlulwa argued that CSARS' application should be non-suited *in toto*. In similar fashion as in the matter before Sutherland ADJP, I am of the view that these facts were not so material that, had they been communicated to the judge who granted the initial order, she would not have granted the order.

6.8 The last issue is that of alleged disproportionality between the estimated future tax liability of PSR and the amounts frozen in Mrs Mdlulwa's

accounts. Reduced to its most basic, Mrs Mdlulwa's argument is that, on CSARS' estimate R 14,5 million would constitute the "maximum" possible tax liability (calculated as the R 5,8 million unpaid VAT plus 150% penalties), but some R 24 million have been blocked in terms of the preservation order.

6.9 As already indicated, the R14,5 million, continues to attract non-payment penalties and interest. In addition, PSR's income tax liabilities still have to be calculated. These might also attract non-disclosure and other penalties. Interest is also already due in respect of non-payment of provisional tax. Sutherland ADJP also dealt with a similar objection in the matter which served before him. He found (at [26]) that, even if it may be that the estimated liability may be higher than what may eventually be determined or assessed, that does not establish "overbroadness" for purposes of a preservation order. In the present instance, the position is even "worse" for the taxpayer and Mrs Mdlulwa's argument: taking everything into account, even the facts averred by Mrs Mdlulwa in her answering affidavit, the relevant CSARS official contemplated in section 163, was of the view that the "*amount preserved may not even be sufficient to cover or satisfy the tax liability when it becomes due and /or is levied*". It must further be borne in mind that the preservation order is not final in nature. See the Tradex – judgment at [40]. In this regard further, Sutherland ADJP made the following remarks in Hamilton Holdings (above) at [20]: "*The officials can, on the basis of fragmentary information available, at best, make an estimate and self-evident practicality dictates that the estimate should be generous rather than conservative because its purpose is to ensure that all due tax shall be collected ... a dispute of fact about the estimate in interim proceedings is futile. If hardship because of the seizure of assets has resulted, the section makes provision for relief*".

6.10 The section the learned judge had in mind regarding the relief of hardship, is section 163(7)(d), providing for a variation of the order, upon the satisfaction of certain further disclosure requirements relating to living expenses of the person against whom an order had been made and, in this case, her defendants. Apart from vague allegations, none of the required particulars have been disclosed. CSARS has also indicated that it would be willing to consider sufficient alternative forms of security instead of the preservation order. To date, none have been suggested.

6.11 In the premises I am satisfied that the jurisdictional requirements for the preservation order have been met. In the circumstances of this case, I further find no cogent reason to depart for the customary rule that costs should follow the event.

[7] Having reached the above conclusions, I find it unnecessary to deal with CSARS' application for striking out, the separate adjudication of Mrs Mdlulwa's application for condonation (all papers files of record had been considered), the spat between Mrs Mdlulwa (and her Attorneys) and the curator regarding the release of funds for travelling, the extent and timing thereof and the heated exchanges contained in related e-mails, particularly on an urgent basis.

[8] <u>The order:</u>

1. The provisional order against the third respondent is confirmed.

2. The third respondent is ordered to pay the costs of the application against her.

3. The extension of the rule nisi as against the other two respondents to 30 July 2021, remains in place.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 19 March 2021

Judgment delivered: 29 March 2021

APPEARANCES:

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|---|---|
| For the Applicant: | Adv. K D Magano |
| Attorney for Applicant: | Ledwaba Maswai Attorney, Pretoria |
| For the 3rd Respondent: | Adv. M D Stubbs together with Adv M Musandiwa |
| Attorney for 3rd Respondent: | Selepe Attorney, Johannesburg c/o Hills Incorporated Attorney, Pretoria |