REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 49048/21

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 3 May 2022 E van der Schyff

In the matter between:

VISHEN SOOKOO	FIRST APPLICANT
SPIRIT OF AFRICA (PTY) LTD	SECOND APPLICANT
ON TRACK MOBILE (PTY) LTD	THIRD APPLICANT
and	
COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	FIRST RESPONDENT
JACQUES VAN WYK N.O.	SECOND RESPONDENT

JUDGMENT

Van der Schyff J

[1] The applicants approached the urgent court for the anticipation of a preservation order handed down on 27 October 2021 insofar as it relates to the first two applicants and for the declaration of the preservation of the assets of the third applicant as unlawful, and applied for the assets to be released.

[2] It is common cause that a provisional preservation order was granted in this court on 27 October 2021 with a return date of 28 February 2022. The preservation order followed an *ex parte* application by the South African Revenue Service (SARS). On 28 February 2022, the parties extended the return date to 23 May 2022 by agreement.

The applicant's case

[3] The first applicant (VS) is the 22nd respondent in the preservation application and the second applicant (SOA) is the 21st respondent in the preservation application. The third applicant is not cited as a respondent in the preservation application or the preservation order. When the preservation order was granted, VS was a director of the third applicant (OT). He resigned on 22 February 2022, and the change was effected by CIPC on 25 February 2022.

[4] VS was served with the preservation order on 4 November 2021. He states that he was only cited in his representative capacity, unlike other respondents who were cited in their personal capacities. I pause to note that on the provisional order handed down, VS is not cited *nomine officio. In* the founding affidavit to the *ex parte* application, it is stated that VS is cited in his capacity as director of SOA.

[5] VS informs in the founding affidavit to this urgent application that he used to be the sole director of SOA but sold his shareholding in SOA to his mother-in-law shortly before the preservation order was obtained. However, his resignation as director of SOA was only effected on 28 October 2021 after the preservation order was already granted, but before he claims he became aware of the order.

[6] After being presented with the preservation order, VS contacted his attorney, who, in turn, contacted the curator. The curator allegedly undertook not to freeze any of

VS's bank accounts. Still, on 9 November 2021, VS's personal bank accounts and the account of OT and other entities not cited in the preservation order were frozen. In a meeting held on 10 November 2021 that VS attended, the curator informed VS's attorney that the accounts were frozen erroneously. By 16 November 2021, the bank accounts were still frozen, and creditors, which had to be paid by 12 November 2021, were only paid by 16 November 2021. Towards the end of November 2021, the curator indicated that he required security before releasing the bank accounts. A further meeting was held with the curator on 1 December 2022 and the applicants provided security in the value of approximately R6 million to the curator. The curator indicated that he was satisfied with the security, and the hold on the bank accounts was released on 7 December 2021. Subsequent meetings were held with an auditor of SARS.

[7] On 27 January 2022, the curator wrote to VS's attorney indicating that he is still awaiting information previously requested on 2 December 2021. VS claims, however, that the documentation requested by the curator is unconnected with the assets of SOA or himself or the preservation of these assets. The information requested relates specifically to the PPE deal that was the subject of SARS' attention. VS submits that the curator was acting outside the scope of the preservation order and abusing his preservation powers to perform SARS audit functions for it.

[8] Around 21 February 2021, VS had a telephone conversation with the curator. The curator demanded weekly reports relating to the creditors and debtors of 'the four companies.' VS explained that this demand was not in accordance with the agreement reached between himself and the curator since he already provided security for the tax liability that SOA could potentially incur based on the PPE transaction referred to in the founding affidavit to the preservation order.

[9] Despite threats being made by the curator, the applicants agreed to the extension of the preservation order. Around 23 February 2022, a discussion ensued between VS's attorney and SARS's attorney. VS explains that the proviso for agreeing to the extension of the preservation order was that his personal estate and those of the

companies not cited in the preservation order would be released from curatorship. SARS's attorney allegedly indicated that he was prepared to release VS and SOA from curatorship provided that sufficient security was put up but had to obtain instructions from his client. VS was requested not to launch urgent court proceedings until the attorney for SARS had the opportunity to obtain instructions. I pause to note that the extension of the return date was evidently agreed to before the applicants were informed as to whether SARS accepted the proviso communicated to their attorney.

[10] On 15 March 2022, the curator again demanded receiving the information requested on 2 December 2021 concerning the PPE transaction. VS's attorney wrote to the curator, informing him that VS was uncomfortable disclosing the requested information to the curator's office as the curator's mandate is to preserve the assets of the cited parties and not to investigate the merits of the matter. On 23 March 2022, the curator threatened to freeze the accounts again, and on 24 March 2022, one of VS's personal accounts and the accounts of four companies were again frozen.

[11] VS states that the matter is urgent because the effect of the preservation order became unbearable. He cannot set up new deals because of the negative impact of the preservation order. Creditors are being paid late and, in some instances, not at all. Potential business partners avoid conducting business proceedings with VS and the associated companies. Many people dependant on the applicants' companies have lost their livelihoods, and VS and his wife have received death threats from people whose livelihoods have been terminated.

[12] The applicants claim that the curator acted unlawfully because he froze accounts that he was not lawfully permitted to freeze in the first instance and refroze it again simply because he has been refused information that he is not entitled to. The applicants are also prejudiced by SARS failing to communicate the outcome of the audit that they are conducting. The applicants contend that the preservation order should not have been granted against them in the first place because SOA had no assets, a fact SARS can be assumed to have been aware of when it initially applied for the preservation order.

SARS's case

[13] SARS admits from the onset that OT, the third applicant, is not cited as a party to the preservation order granted on 25 October 2021. SARS contends that the preservation order was required to secure the collection of tax debts that may be due and payable by the respondents cited in the order. This tax debt emanates from questionable awards made by the South African Police Service (SAPS) as part of the procurement of Personal Protective Clothing (PPE) made during the National Disaster caused by the Covid-19 pandemic. The nature of the suspicious relationship between the various respondents who benefitted from the SAPS PPE awards, the flow of funds amongst the respondents cited without any plausible business or financial transactions, and the risks of tax evasion are explained in detail in the application for the preservation order.

[14] SARS highlights that the applicants challenge the provisional preservation application and ask for its discharge, citing the allegation of unlawful conduct on the part of the *curator bonis.* They rely on their alleged disputes with the curator concerning the lawfulness or not of his conduct as a basis for seeking the discharge of the provisional order. SARS submits that the curator's conduct is irrelevant in determining whether a provisional preservation order should be discharged or not. SARS proposes that allegations of hardships or harm suffered by a litigant, which are denied in the present matter, can be alleviated through an order varying the provisional preservation order but do not justify the discharge of the preservation order.

[15] SARS contends that the applicants failed to comply with s 11(4) of the Tax Administration Act 28 of 2011 (TAA). The applicants failed to give written notice to SARS of their intention to institute the present application. Since litigation was ongoing and alive between the SOA, VS, and SARS, I believe non-compliance with s 11(4), if any, can be condoned.

[16] SARS disputes that the application is urgent and avers that it is inappropriate to saddle the urgent court with disputes relating to a complex investigation in

circumstances where the audit investigation into an elaborate scheme of tax invasion is not yet complete. The applicants seek a final order without establishing a clear right. Although the confirmatory affidavits of the directors of SOA and OT are attached, no company resolutions authorising the participation of SOA and OT are attached. Neither is it alluded to in the confirmatory affidavits that such resolutions were taken.

[17] SARS informs the court that the preservation application revolves around transactions emanating from a PPE tender with the hallmark of simulated transactions. Although the audit investigation is not completed, there is a prima facie view that tax adjustments will be made in favour of the fiscus, and to release the applicants' assets prematurely from the preservation order would mean that SARS runs a substantial risk of not collecting such tax amount if it is not secured through a preservation order.

[18] SARS holds that the curator is best suited to address the issues relating to the interaction between the curator and VS.

The curator's case

[19] The curator claims that he is entitled in terms of the powers granted in the preservation order to request the information he sought. The curator explains that he indicated that he was prepared provisionally to agree to R6 million security be provided after which the bank accounts would be unfrozen, but indicated that the process still had to be followed. VS's personal accounts were released on 30 November 2021, and the business accounts on 7 December 2021. The curator was informed that VS manages the companies concerned as a group. The curator states that the information he sought is directly related to the court order. Because the applicants failed to provide him with the information, he was entitled to freeze the accounts again in terms of the preservation order.

The applicant's reply

[20] The applicants point out in reply that SARS does not deny in their answering affidavit that SOA had no assets at the time that the preservation order was sought or that it failed to point this out to the presiding officer.

[21] The applicants' further contention that neither of the respondents denies that he was cited in his representative capacity is neither here nor there in light of him being cited in the founding affidavit to the main application in the following manner:

> 'The Twenty-Second Respondent is Vishen Sookoo ("Mr. Sookoo"), a major male with identity number [xx] and currently residing at [xx], Mr. Sookoo is cited in this application in his capacity as director of Spirit of Africa.'

Discussion

[22] At the onset of the hearing, I indicated that the issue of urgency would be determined within the factual matrix of the application. The application was issued on 7 April 2022. The respondents were afforded until 13 April 2022 to file notices of their intention to oppose and until 14 April 2022 to file their answering affidavits. SARS filed its answering affidavit outside the prescribed time period but explained that it was impossible to file the answering affidavit within the period prescribed by the applicants.

[23] I accept that the applicant reverted to instituting this urgent application after the curator again froze certain bank accounts on 24 March 2022. It is common cause that the curator reverted to freezing bank accounts of legal entities not listed as respondents on the preservation order.

[24] Section 163 authorises SARS to approach the court on an *ex parte* basis to apply for an order to preserve any assets of a taxpayer or another person, subject to the conditions and exceptions as may be specified in the preservation order. The court to which an application for a preservation order is made may make a provisional preservation order having immediate effect and simultaneously grant a rule *nisi*

calling on the taxpayer or other person to appear and to show cause why the preservation order should not be made final.

[25] A preservation order is an invasive remedy. The rule *nisi* calling on persons whose assets are seized to preserve it affords affected parties with an opportunity to address the court either on the return date or on the date to which the return date is anticipated. This process honours the principle of *audi et alteram partem*.

[26] The factual matrix of this application requires differentiation to be made between the three applicants before the court. VS and SOA were duly cited as respondents in the preservation order granted during October 2021. The return date was extended by agreement. A dispute of fact exists as to whether the *curator bonis* unconditionally lifted the hold on these two entities' bank accounts and whether the lifting of the hold was conditional on VS and SOA providing information to the curator. The same applies to the dispute as to whether the applicants were informed that they had to provide weekly reports despite providing security. This requires the application of the well-known Plascon Evans principle, and I am to accept the curator's evidence in this regard.

[27] The preservation order granted in October 2021 empowers the curator *bonis* to request any information about the companies' business and tax affairs as may reasonably be required. Respondents are obliged to disclose all particulars of all transfers of assets to other persons during such periods as the curator *bonis* may stipulate to enable the curator *bonis* to determine whether such transfers can and should be set aside, and how the assets concerned can be secured pending the setting aside thereof.' Respondents are likewise obliged in terms of the preservation order to disclose to the curator *bonis* particulars of all the business transactions wherein they were involved to enable the curator to submit tax returns, VAT, and PAYEE returns to the extent necessary to bring the tax affairs of the concerned respondents and all the businesses conducted by them up to date. If DOA and VS believed that the curator's powers were extensive, they could apply for the amendment or even termination thereof.

[28] I have been referred to the judgment of *Peacock Television (Pty) Ltd v Transkei Development Corporation*[1] where Madlanga J, as he then was, held:[2]

> 'In my view, what this boils down to is that the anticipation was brought on the merits and the question is: can a litigant simply anticipate a return date at any time?
>
> It is so that Rule 6(8) does not stipulate any time limit within which an affected person may anticipate a return day. The Rule reads:
>
> > 'Any person against whom an order is granted *ex parte* may anticipate the return day upon delivery of not less than 24 hours' notice.'
>
> Though the Rule be so worded, it cannot be that persons adversely affected by a rule *nisi* obtained *ex parte* are free, as of right, to anticipate the extended return day thereof despite an extension or extensions of the rule *nisi* in their presence. It seems to me that Rule 6(8) was meant to come to the aid of a litigant who finds himself/herself *taken by surprise* by an order granted *ex parte*. Once such a litigant becomes aware of the order, he/she should then take steps to avoid and/or ameliorate the effect thereof by anticipating the return day of the rule *nisi*. Rule 6(8) could never have been meant to cover a situation like the one now before me. If respondents, in circumstances like the present, were to be allowed to anticipate a return day as they please, the orderly practice of this Court and the purpose thereof would be defeated. Such anticipation would amount to allowing respondents to avoid having to properly set their matters down for hearing on the opposed roll. This would not only result in chaos, but it would also prejudice those litigants who have set down their opposed matters properly and have waited their turn on the opposed roll.'

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[1] 1998 (2) SA 259 (Tk).

[2] 262D-H.

[29] In the current application, the return date was extended by agreement. After considering the facts of the matter, I am of the view that no exceptional circumstances have been indicated that would justify anticipating the return date on an urgent basis. I have already indicated that I am bound to accept the curator's evidence that he provisionally agreed to the upliftment of the hold on SOA and VS's bank account and replaced the hold because he was not provided with the information he sought and to which he is, in his view, entitled in terms of the order. Both SARS and the curator indicated that they were pressed for time due to the truncated periods within which they were required to file answering affidavits. The underlying issues are complex, and the first and second applicants' discomfort and the alleged harm suffered by them need to be considered within the broader interests protected by the preservation order. If the second applicant is suffering undue hardship, s 163(7)(d) of the TAA provides for a variation of the preservation order. It empowers the court to make ancillary orders regarding how the assets must be dealt with. The validity of the preservation order can be challenged on the return date.

[30] The position regarding the third applicant, OT, is somewhat different. The third applicant is not cited as a respondent in the preservation order. VS used to be a director of OT but resigned on 22 February 2022. The change was affected by CIPC on 25 February 2022. VS's wife is the sole shareholder of OT. I am of the view that the fact that OT might have met the definition of 'related person' before VS's resignation as director as provided for in terms of s 75 of the Companies Act 71 of 2008, is neither here nor there since OT is not listed as a respondent in the preservation order. Until a preservation order is obtained against OT, no legal ground underpins the preservation of OT's assets, and the preservation thereof is unlawful. A court cannot condone the continuance of an unlawful act. The third applicant is entitled to relief being granted on an urgent basis.

[31] VS mentioned that the curator also froze the bank accounts of other companies of which he is the director, which are not cited as respondents in the preservation order. Those companies are separate legal entities, and they are also not cited as applicants in this application. VS cannot cry foul when the bank accounts of those companies are dealt with as if it is his personal bank accounts and simultaneously

seek the release of those bank accounts on the basis that they are accounts of other legal entities in an application wherein those entities are not cited as applicants. Because the companies are not applicants before this court, their plight cannot be considered, and relief cannot be granted in a vacuum.

[32] The second respondent, SARS, took issue with the fact that it was cited as a respondent in this application, where the applicants mainly take issue with the curator's conduct. SARS is a party with a vested interest in the assets that are being preserved. The third applicant was obliged to join SARS as a respondent. SARS was made aware of the seizure of assets by the curator belonging to an entity against whom they did not obtain a preservation order. They cannot merely shrug their shoulders and say that it does not concern them and that they are entitled to the costs occasioned by opposing the application, where one of the applicants succeeded with the relief sought. Although a costs order will not be granted against SARS as far as the relief sought by the third applicant is concerned, a costs order will also not be granted in SARS's favour as far as the third applicant's application is concerned.

[33] The general principle that costs follow the event, applies. The first and second applicants are not entitled to costs since they were unsuccessful in the relief they sought. The third applicant is successful, but she only sought relief against the curator.

Order

In the result, the following order is granted:

1. The third applicant's non-compliance with the Uniform Rules of Court is condoned, and the application, as far as the third applicant is concerned, is heard on an urgent basis in terms of Rule 6(12)(a);

2. The preservation of assets of On Track Mobile (Pty) Ltd is declared unlawful, and the second respondent is ordered to release such assets forthwith;

3. The first and second applicants' non-compliance with the Uniform Rules of Court is not condoned, and the return day of the preservation order handed down by this court on 27 October 2021 and extended on 22 February 2022 is not anticipated but remains 23 May 2022;

4. The second respondent is to pay the costs of the third applicant, including the costs of two counsel;

5. The first and second respondents' costs, including costs of two counsel, where so employed, as far as it relates to the first and second applicants' application, are costs in the preservation application.

E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the applicant:	Adv. R Maastenbroek
With:	Adv. Van der Westhuizen
Instructed by:	Ulrich Roux and Associates
For the first respondent:	Adv. L Sigogo SC
With:	Adv. L Kalipa
Instructed by:	Majang Inc.
For the second respondent:	Adv. B H Steyn
Instructed by:	Rosendorff Reitz Barry
Date of the hearing:	28 April 2022
Date of judgment:	3 May 2022