IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 16177/21

In the matter between

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES	APPLICANT

AND

ESIBONGA INVESTMENT (PTY) LTD	FIRST RESPONDENT
SIVALUTCHMEE MOOLIAR N.O	SECONDEND RESPONDENT
EBRAHIM MEHNAAZ N.O.	THIRD RESPONDENT
ITAI CHATAURWA	FOURTH RESPONDENT
LIONEL MARAY TABANI MUHLANGA	FIFTH RESPONDENT
TERRENCE MUDIWA MUSARURWA N.O.	SIXTH RESPONDENT
PARTSON MUNYARADZI N.O.	SEVENTH RESPONDENT
GARY OWEN WATSON	EIGHT RESPONDENT
LESLEY WATSON	NINTH RESPONDENT
TAKUDZA TALENT MUSVANGA	TENTH RESPONDENT
SIMON TAVAGUTA HOMENGA	ELEVENTH RESPONDENT
TANYARDZWA JOY NYAMARAI	TWELFTH RESPONDENT
FABIOLA GONYE	THIRTEENTH RESPONDENT
AMOS PHIRI	FOURTHEENTH RESPONDENT
LIZAAN ENGELBRECHT	FIFTHEETH RESPONDENT
LYTON REID	SIXTEENTH RESPONDENT
GALARD MASANGO	SEVENTIETH RESPONDENT
DENSON MUVANDI	EIGHTEETH RESPONDENT

JUDGMENT delivered on 2 December 2021

THULARE AJ

[1] This is an anticipation by respondent 8 and 9 (the Watsons) of the return date of a provisional preservation order granted in favour of the applicant (SARS) on 1 October 2021. The order related to the preservation of Erf 1635, Fourways Extension 15, City of Johannesburg, Gauteng (ST83747/2019) (the property) which was registers into the names of by the Watsons. The order was granted, amongst others authorizing the Registrar of Deeds to register a caveat notice on the property to ensure that the property was not transferred without notice to SARS and the *curator bonis*, appointing a *curator bonis* and authorizing him to take control of the property. The application is opposed by SARS.

[2] Esibonga Investments (Esibonga) was started as a business in 2018 and Mr Nicolas Johannes Van Vuuren (Van Vuuren) was the sole director. He was an accountant by trade. Esibonga, as a tax payer did not submit its tax returns for the period 2018-2020. When SARS contacted Van Vuuren about Esibonga's tax affairs, Van Vuuren indicated that Esibonga was under 'voluntary liquidation by creditors' and that this liquidation was on 22 November 2019 before Esibonga's first tax returns were due. As a result, according to Van Vuuren, Esibonga would not file any tax returns. SARS applied to the High Court and was granted a winding-up order.

[3] SARS conducted an in-depth information gathering process in respect of Esibonga. According to Van Vuuren, Esibonga did not keep any trial balances, general ledgers and did not draft any financial statements. Its best record of transactions were its bank statements. It was registered to render services of a bookkeeping nature. SARS obtained statements from Standard Bank for the bank accounts held by Esibonga. It was a business account and a money market account. SARS audited Esibonga for the period 2019-2020. It had a tax debt of

R987 972 392-40. SARS obtained a compulsory winding-up order. Esibonga's statements revealed that it purchased inter alia immovable properties in excess of R11 million, all of which were owned by Zimbabwean nationals and not registered in the name of Esibonga.

[4] SARS provided a bank statement of Esibonga with its account held by Standard Bank dated 17 September 2019 which showed that an amount of R2,1 million was paid by Esibonga to the transferring attorneys bank account on 21 August 2019. A payments final audit report from Standard Bank was provided as proof of payment that this amount was paid to Smith Tabata Buchanan Boyes (STBB), the transferring attorneys of the property to the names of the Watsons. This trail showed that money transferred from Esibonga account was paid to STBB for the purchase of the property.

[5] The property was not registered in the name of Esibonga, but in the names of the Watsons. It was on this basis that the purchase of the property required a thorough investigation by the liquidators of SARS. SARS sought and obtained the order to prevent the property from being disposed of, which may frustrate the collection of the full amount of tax that was due and payable. SARS harboured the fear of risk that Esibonga may dissipate the assets, which dissipation would hinder the collection of the tax amount due.

[6] The Watsons are husband and wife who reside at 44 Cambridge Road, Avondale, Harare, Zimbabwe. The basic premise of their anticipation related to the requirement that such order was required to prevent the dissipation of asset, which dissipation may frustrate the collection of tax by SARS. It is their case that there was no evidence of dissipation to warrant the granting or sustenance of the order. In their view, SARS failed to show that in the absence of a preservation order, there was a material risk that the asset available for the satisfaction of tax will no longer be available. SARS failed to show the existence of a material risk that they, the Watson family, would dissipate the property in order to frustrate the collection of tax by SARS.

[7] Their case was that nothing specific to the actions of the Watsons was canvassed to support a reasonable apprehension of the risk of the dissipation of the property by them or on their behalf. The property was used as their primary residence and family home in South Africa and was purchased for that reason. They stayed in the property from time to time when they come to Johannesburg and it was also used by their children, including one who was a student at the University of Stellenbosch. They are citizens of Zimbabwe and the husband was also a citizen of South Africa. They did not seek to and have no intention of disposing or transferring the property.

[8] According to them, they do not know and have never met any of the other respondents. They alleged that they paid funds required to acquire the property to a Zimbabwean foreign exchange agent in Harare. They do not identify the agent nor provide any support to their bald allegations of payment. They alleged that they were advised that the funds would be paid to the South African conveyancers for payment towards the purchase price through routine and ordinary commercial channels. They alleged that they had no dealings or involvement of any kind with Esibonga and learnt for the first time of the name upon receipt of the application for the preservation order. The conveyancers did not inform them of anything untoward and they assumed that the funds were transferred through legitimate channels. The channeling of the funds through Esibonag was not on their instructions and they deny indebtedness to Esibonga.

[9] The Watsons did not set out any iota of evidence that the operation of the preservation order caused or will cause them undue hardship and such hardship outweighed the risk that the property may be destroyed, lost, damaged, concealed or transferred. This is not an anticipation in which the variation of the order is sought as envisaged in section 163(9) of the Tax Administration Act, 2011 (Act No. 28 of 2011) (the TAA). The facts set out by the Watsons do not support an anticipation for the rescission on the grounds of undue hardship.

[10] Section 163(4)(c) provide as follows:

“163 Preservation order

(4) The court to which an application for a preservation order is made may-

(c) upon application by the taxpayer or other person, anticipate the return day for the purpose of discharging the preservation order if 24 hours' notice of the application had been given to SARS;"

[11] This section is under Part B of the TAA, which provides for the payment of tax by a taxpayer. Applicable to this judgment, taxpayer means a person who is or may be chargeable to tax or with a tax offence [section 151(a) of the TAA]. A person chargeable to tax is a person upon whom the liability for tax due under a tax Act is imposed and who is personally liable for the tax [section 152 of the TAA]. On the facts of this case, the taxpayer is Esibonga. It is against this background that Part B, which deals with the payment of tax, in which section 163 of TAA is located, should be approached and interpreted.

[12] SARS demonstrated, through following the money trail, that Esibonga paid R2.1 million for the purchase of the property, and that the property was not registered in the name of Esibonga, but that of the Watsons. I understand the order envisaged, sought and granted in terms of section 163(1) to be a form of an anti-dissipation interdict. Section 163(1) provides:

"163 Preservation order

(1) 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, subject to the conditions and exceptions as may be specified in the preservation order, from dealing in any manner with the assets to which the order relates."

[13] The purpose of the order of the kind in section 163(1) has been explained as follows in *National Director of Public Prosecutions v Rautenbach* 2005 (4) SA 603 (SCA) at para 13:

"It is to ensure that the property concerned is not disposed of or concealed in anticipation of such proceedings."

In my view, section 163(1) extended the protection of property against being disposed or concealed to include persons in the position of the Watsons.

[14] In this matter, the debtor was Esibonga, and the property was already registered in the names of the Watsons. The facts suggested that Esibonga was dissipating its funds when it purchased the property and registered it in the name of the Watsons. In *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (AD) at 372D-H the anti-dissipation interdict was explained as follows:

"As to the nature of the interdict, this was dealt with by Stegmann J in 1994 (3) SA at 706B to 707B and in 1995 (2) SA at 591A to 600F. The latter passage was largely devoted to showing that it is not necessary for an applicant to show that the respondent has no *bona fide* defence to the action. This conclusion was not attacked before us and I agree with it.

What then must an applicant show in this regard? In the passages mentioned above Stegmann J quoted the relevant cases in our law and I do not propose dealing with all of them. For the most part they were decided on their own facts without providing any theoretical justification for the interdict. However, in *Mcitiki and Another v Maweni* 1913 CPD 684 at p 687 Hopley J stated the effect of earlier cases as follows:

"... they all proceed upon the wish of the Court that the plaintiff should not have an injustice done to him by reason of leaving his debtor possessed of funds sufficient to satisfy the claim, when circumstances show that such debtor is wasting or getting rid of such funds to defeat his creditors, or is likely to do so."

See also *Bricktec (Pty) Ltd v Pantland* 1977 (2) SA 489 (T) at p 493E-G.

The question which arises from this approach is whether an applicant need show a particular state of mind on the part of the respondent, i e, that he is getting rid of the funds, or is likely to do so, with the intention of defeating the claims of creditors. Having regard to the purpose of this type of interdict the answer must be, I consider, yes, except possibly in exceptional cases. As I have said, the effect of the interdict is to prevent the respondent from freely dealing with his own property to which the applicant lays no claim. Justice may require this restriction in cases where the respondent is shown to be acting mala fide with the intent of preventing execution in respect of the applicant's claim."

[15] In *Mngadi v Beacon Sweets & Chocolates Provident Fund & Others* 2004 (5) SA 388 (D & CLD) it was said:

"The law has never shrunk from interdicting a debtor from dissipating funds to thwart the rights of creditors. Such cases are decided because the plaintiff should not have an injustice done to him by reason of leaving his debtor possessed of funds sufficient to satisfy the claim, when circumstances show that such debtor is wasting or getting rid of such funds to defeat

the creditors, or is likely to do so. In general an applicant needs to show a particular state of mind on the part of the respondent, ie that he is getting rid of the funds, or is likely to do so, with the intention of defeating the claims of creditors, except possibly in exceptional cases. In those cases the effect of the interdict is to protect the respondent from freely dealing with his own property to which the applicant lays no claim. … Justice may require this restriction in cases where the respondent is shown to be acting *mala fide* with intent of preventing execution in respect of the applicant's claim. …
It seems to me that it is no great leap for the courts to extend the last-mentioned principles to cover safeguarding a payout in the hands of a fund, such as the first respondent herein."

[16] Section 163(1) makes provision for an order to be made for the preservation of assets of the taxpayer or other person. This includes a person in the position of the Watsons, to whom the trail of money paid from the account of a taxpayer, led SARS to their door. It was incumbent upon the Watsons to consider whether it could be said that they took reasonable steps to investigate whether, in the circumstances, the payment of the purchase price for their home by Esibonga was required and the payment was reasonably made. This was necessary because the Watsons should be measured with the yardstick of a reasonable person.

[17] Where a preservation order is made against a person in the position of the Watsons, the order in my view has the significance that such person is called upon to take reasonable steps to ascertain whether the payment was legally due, payable and paid from the taxpayer. An alleged representation by a mysterious agent operating behind the scenes and placed in the darkness outside the streak of the judicial spotlight of this application was not enough. Once there is doubt about the conduct of their agent, the persons who should be asked about the payment of money from the taxpayer were the Watsons. Even after the preservation order was made and came to the knowledge of the Watsons, in my view, they did not do an adequate enquiry required. In my view, to secure a discharge of the preservation order, they should have made the necessary enquiries into the trail of payment from the moment they made it, wherever it was, until it reached STBB. This was moreso because the preservation order provided that they disclose all particulars of all transfers of the property to enable a determination whether the transfer can and should be set aside.

[18] It was for the Watsons to establish, in the anticipation, that the Court must be satisfied that a reasonable person in the position of the Watsons could not know that Esibonga paid or if they knew, that the payment was not in furtherance of dissipation of the taxpayer's assets. Where SARS had shown that it was probable that Esibonga entered the transaction whilst it appreciated that it would prejudice SARS, the inescapable conclusion was that the transaction was unreasonable for Esibonga to have entered into, and that what Esibonga intended through the payment was to prejudice SARS. In my view, the arm of the law as envisaged in section 163(1), was intended to extend in order to reach property in the hands of other persons like the Watsons, where the trail of the money, followed from a taxpayer by SARS, led SARS to.

[19] To avoid a successful and complete dissipation by the taxpayer, Esibonga, which dissipation would frustrate the collection of taxes, it was necessary to preserve the property. It must be borne in mind that the property, now in the hands of the Watsons, the other person and not the taxpayer, are strategically out of the scope of assets preserved by virtue of the liquidation of Esibonga. In the absence of a preservation order, the Watsons are at liberty to transfer or dispose of the property without the knowledge of SARS and in that freedom, they have no obligation to wait for the finalization of the liquidation process. For these reasons I make the following order:

1. The application is dismissed.
2. The provisional order granted against the 8th and 9th respondents is confirmed.
3. 8th and 9th respondent are to pay the costs jointly and severally, the one to pay the other to be absolved.

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DM THULARE

ACTING JUDGE OF THE HIGH COURT