



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

CASE NO: B445/2023

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

11/10/23

In the matter between:

**THE COMMISSIONER FOR THE SOUTH
AFRICAN REVENUE SERVICE**

Applicant

and

MAJESTIC SILVER TRADING 275 (PTY) LTD

First Respondent

ZAHEER CASSIM N. O.

Second Respondent

NGWANE ROUX SHABANGU N. O.

Third Respondent

PROE SHABANGU N. O.

Fourth Respondent

STEMBILE ALPHONSINA SHABANGU N. O.

Fifth Respondent

NONZAMO PERSERVERENCE SHABANGU N. O.

Sixth Respondent

NGWANE ROUX SHABANGU

Seventh Respondent

NONZAMO PERSERVERENCE SHABANGU

Eighth Respondent

COMPANY AND INTELLECTUAL PROPERTY

COMMISSION

Ninth Respondent

ABSA BANK LTD

Tenth Respondent

Summary: *On the anticipated return day of a provisional preservation order in terms of section 163 of the Tax Administration Act, it was partially confirmed and partially discharged. The basis for confirmation was that the tax liability was undisputed and that it had been proven that, should a court appointed curator not take control of relevant taxpayers' assets and ancillary relief not be granted, the recovery of the long outstanding tax debt might be compromised. In the instance of the eighth respondent, where these aspects were absent, the provisional order was discharged.*

ORDERS

1. The provisional preservation order granted on 14 February 2023 against the third, fourth, fifth and sixth respondents (in their capacity as trustees of the Roux Shabangu Family Trust) and against the seventh respondent is confirmed.
2. The provisional preservation order granted on 14 February 2023 against the eighth respondent is discharged.
3. The *curator bonis* is authorised, in order to give effect to this order in respect of taxes due by the Roux Shabangu Family Trust and Mr Ngwane

Roux Shabangu (the taxpayers) in terms of a tax assessment of such a taxpayer, to dispose of any or all such taxpayer's assets, by means of auctions or out of hand sales, in order to secure the collection of taxes and in satisfaction of such taxpayer's tax debts and to hold those proceeds in trust pending an application by the applicant to have those proceeds declared executable for the tax debts of any of the taxpayers.

4. The auctions and/or out of hand sales referred to above should take place on the following basis:

4.1 Any auction sale must be advertised, at the very least, as well as ins required in the event of a sale in execution, and in the case of moveable assets, an advertisement must be published at least five (5) business days in advance of the auction;

4.2 Any out of hand sale may take place without prior notice, but such sale will only take effect after expiry of four (4) business days after notice of the sale has been given to any of the taxpayers who may have an interest in the said assets;

4.3 None of the encumbered assets over which a financial institution has real rights, in the form of mortgage bonds, shall be realized and sold and transferred by the *curator bonis* without the consent and authorization of the relevant financial institution.

5. The third, fourth, fifth and sixth respondents in their aforesaid capacities and the seventh respondent, jointly and severally, are ordered to pay the costs of the Commissioner of the South African Revenue Service in respect of the application against them, including the costs of the anticipated opposed return day.

6. The Commissioner of the South African Revenue Service is ordered to pay the costs of the eighth respondent, including her costs incurred in respect of the opposed anticipated return day.
7. It is noted that the provisional preservation order granted against the first and second respondents has been dealt with separately from the orders against the remaining respondents by way of separate orders and extended return dates.

J U D G M E N T

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

DAVIS, J

Introduction

[1] On 14 February 2023 this court, per Le Roux AJ, on application by the Commissioner of the South African Revenue Services (SARS) granted a provisional preservation order (the preservation order) in terms of section 163 of the Tax Administration Act 28 of 2011 (the TAA) against a company, a trust and certain individuals who are all taxpayers with outstanding tax debts in terms of the TAA (except for the eighth respondent). The outstanding debt exceeds R60 million, the bulk of which is over 5 years old. All the taxpayers involved sought to have the preservation order discharged on an anticipated return day thereof.

The taxpayers involved

[2] Due to the fact that a number of role-players feature in both the preservation order and the related litigation, it is apposite to identify them at the outset as this will assist in the evaluation of the matter. The parties shall be referred to as in the initial application.

[3] The first respondent is the principal taxpayer involved and owes the largest tax debt. It is a company called Majestic Silver Trading 275 (Pty) Ltd (Majestic Silver). Shortly after SARS had obtained a civil judgment against Majestic Silver, in terms of section 173 and 174 of the TAA in March 2022 for some of the company's tax debt (at the time around R29 million), Mr Ngwane Roux Shabangu (Mr Shabangu) as authorised director of Majestic Silver, took steps to have Majestic Silver placed in voluntary business rescue.

[4] The first business rescue practitioner (BRP) nominated by Mr Shabangu at the time, was his attorney, Mr Etienne Jacques Naude (Naude). At a subsequent meeting of creditors, Mr Chetty, on behalf of SARS objected to Mr Naude's appointment, citing a conflict of interest. Mr Naude subsequently resigned on 15 August 2022. He was replaced by a Mr Zaheer Cassim, with whom the curator appointed by the court in terms of the preservation order had interacted prior to the anticipation of that order. Mr Cassim then featured as the second respondent. Subsequent to judgment having been reserved regarding the anticipation of the preservation order and its confirmation or discharge, Mr Cassim has been replaced by Messrs Thomas George Nell and Gideon Johannes Slabbert as the current BRPs.

[5] The third, fourth, fifth and sixth respondents are the trustees of another taxpayer, the Roux Shabangu Family Trust, IT 484/05 (the Trust).

[6] The remainder of trustees are made up by Mr Shabangu as seventh respondent and Mrs Shabangu as eighth respondent. Insofar as SARS also claims the setting aside of the business rescue proceedings of Majestic Silver as being “a sham”, the Companies and Intellectual Property Commission has been cited as the ninth respondent.

[7] An issue which has arisen during the course of the anticipation of the preservation order and the exchange of heads of argument, was the issue regarding Majestic Silver’s opposition to the order and who may represent it. The application for anticipation of the preservation order was launched by the first to eighth respondents. The principal affidavit delivered in support thereof was deposed to by Mr Shabangu. In it, he styled himself as the managing director of Majestic Silver and the authorised trustee of the Trust. In support of this, he produced resolutions taken at the outset by the board of directors and later the trustees, respectively. In SARS’s answering affidavit it was however pointed out that, from date of commencement of business rescue proceedings, a company’s directors were divested of their powers of control and management of the company, which would include representation thereof in a matter such as the present. In reply, Mr Shabangu conceded that “... *insofar as Majestic is concerned, Majestic is currently under business rescue and its business rescue practitioner has full management control over it subject to the curator’s approval on certain aspects*”. He, however went on to “... *deal fully with Majestic’s opposition to the granting of the preservation order and the setting aside thereof ...*”.

[8] At the commencement of hearing argument in the matter, the court was informed that none of four points *in limine* which have up to then featured in the papers (and in extensive heads of argument, on which the court had prepared as it was obliged to do), would be proceeded with. This included the concession

that Mr Shabangu could not represent Majestic Silver or the (then) BRP. This much was also confirmed by the BRP's response to a request by Mr Shabangu, made after the launch of the anticipation application and the receipt of SARS's opposition thereto, for consent to continue with opposition to SARS's application on behalf of the company. The papers indicated that, in response to that request, purportedly made in terms of section 133 of the Companies Act, Mr Cassim declined to do so, stating his fear that such consent may be perceived to compromise his obligations of being impartial and independent. He preferred to wait until the then original return day of 1 June 2023, rather than take active steps to anticipate that return day.

[9] This left an unforeseen anomaly as the return day in respect of the principal (and largest) tax debtor would only take place on 1 June 2023 (in the unopposed motion court) but the anticipated return day in respect of the remainder of respondents had, by direction of the deputy judge president, been set down for hearing in a different court on 29 May 2023. This court was assuaged regarding its concern about this anomaly by assurances that there was no indication that there would be any opposition on 1 June 2023 on behalf of Majestic Silver and the BRP. At the court's request, the parties undertook to inform the court as to the outcome of the matter on 1 June 2023. As it turns out, the issue of opposition on behalf of Majestic Silver and the BRP took an unexpected turn on 31 May 2023, when a notice of intention to oppose confirmation of the preservation order was delivered on behalf of the company and the BRP. This led to an extension of the rule nisi against them to 31 August 2023, with costs and with directions to file opposing papers by 30 June 2023. Lo and behold, on 29 June 2023 the opposition was withdrawn.

[10] The procedural anomaly has now further been exacerbated by new opposition being raised by the new BRP's mentioned in paragraph 4 above.

They have now, by notice dated 14 September 2023 indicated that, despite this court having granted leave to SARS on 14 February 2023 in terms of section 133 of the Companies Act to proceed with its application¹, the point should be revisited, presumably in opposition to the setting aside of the business rescue proceedings, being relief sought by SARS on the return day². As mentioned earlier, the relief sought against Majestic Silver and the (new) BRP's has followed its own trajectory, separate from that of the preservation order anticipated by the remainder of taxpayers.

[11] Having cleared the decks of the procedural aspects pertaining to the role-players and their positioning in the various skirmishes, one can deal with the issues pertaining to the confirmation or discharge of the preservation orders against the remaining taxpayers. Their fate still remained, despite the extended separate rule nisi involving Majestic Silver, closely linked to the outstanding tax debt owed by it.

Summary of the preceding chronological history and the extent of the outstanding tax debt which led to the application for a preservation order

[12] Pursuant to income tax and VAT audits of the Trust for the 2006 to 2010 tax years, an assessment was made by SARS on 27 September 2012.

[13] Shortly thereafter, SARS re-assessed Mr Shabangu's nil income tax returns and issued an additional assessment in an amount of R6,4 million on 29 November 2012.

[14] From 2013 onwards SARS' Enforcement Investigative Audit unit has attempted to finalise investigative audits into the tax affairs of Majestic Silver,

¹ Par 26 of the order of Le Roux, AJ

² Par 27 of the order of Le Roux, AJ

the Trust and Mr Shabangu, which audits still remain active due to outstanding information and documentation.

[15] In July 2019 Mr Mahlangu submitted an application to compromise tax debts in terms of section 200 of the TAA in respect of himself and “the Shabangu Group” of companies, including the Trust. This application was declined on 9 October 2019.

[16] On 14 October 2019 a fresh application to compromise tax debts together with a deferral of payment was made, which was followed up with a meeting with the SARS Debt Management officials dealing with the tax affairs of Mr Shabangu and the Shabangu Group. The applications were declined on 15 January 2020 for failure to meet the requirements of section 168 of the TAA.

[17] On 21 February 2020 Mr Shabangu and the Shabangu Group once again applied for a compromise of tax debt, which application was declined in 10 June 2020 for yet again failing to meet the requirements of the TAA.

[18] On 29 June 2020 Mr Shabangu and the Shabangu Group made another application to SARS, this time for an installment payment arrangement. This was followed by a revised application on 4 August 2020, which the SARS accepted on 7 August 2020.

[19] Apparently this payment arrangement was not feasible as on 11 December 2020 Mr Shabangu and the Shabangu Group applied for an extension to submit a new application for deferral of the outstanding tax debt. This was pursuant to an unsuccessful damages claim pursued by Mr Shabangu in the Supreme Court of Appeal against the Department of Public Works, the outcome of which Mr Shabangu had hoped would lead to a settlement and payment of his

and the Shabangu Group's total tax debt. This application was declined on 15 March 2021.

[20] By the end of that year, and after various correspondences and meetings with SARS, Mr Shabangu for the first time claimed that a forensic auditor would be appointed to evaluate the tax liability.

[21] When nothing was forthcoming in this regard, the Commissioner obtained the civil judgments referred to in paragraph 3 above on 1 March 2022. Two days later Mr Naude (the short-lived BRP) wrote to SARS, indicating that a tax expert would be appointed "to verify the accuracy of the assessments".

[22] Some three weeks later, Majestic Silver wrote to SARS, again requesting a deferral of payment, a suspension of the payment obligations while the deferral is considered and a withdrawal of the civil judgment. This was followed in April 2022 by similar requests by the Trust and other members of the Group.

[23] The various requests were all considered and declined on 9 September 2022. By this time Majestic Silver was already in business rescue. SARS therefore informed the BRP on 20 September 2022 by way of a claims summary that Majestic Silver's tax liability was at that time R 36 301 688,44 with the last two cycles of VAT returns then still outstanding. Since the second meeting of creditors in terms of the business rescue proceedings on the next day, 21 September 2022, urgent enquiries made to the BRP by SARS via its attorneys, inter alia regarding payment, remained unanswered until the publication of the business rescue plan on 17 October 2022.

[24] The business rescue plan was not adopted at the meeting held on 14 November 2022 at which time the meeting was postponed to 30 November

2022 to afford creditors the opportunity to consider a fresh proposal by ABSA, who is Majestic Silver's largest creditor. The meeting was thereafter postponed from time to time with no resolution by the time of the granting of the preservation order on 14 February 2023.

[25] At the time of the granting of the preservation order, the total tax debt of the relevant taxpayers amounted to R65 493 725,18. Despite prior intimations of a possible forensic audit, none has materialised and there is no current pending challenges to the already issued assessments. As things stand, the tax liability of the taxpayers, including the Trust and Mr Shabangu, is undisputed. The question now is whether assets should be preserved (and liquidated by the curator) in order to discharge these debts and to prevent an under-recovery of the tax debts.

The law relating to preservation orders under section 163 of the TAA

[26] The section itself provides as follows:

“163(1) A senior SARS official may, in order to prevent any realizable assets from being disposed 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 my manner with the assets to which the order relates ...

(1) The court to which an application for a preservation order is made may –

(a) make a provisional order having immediate effect;

(b) simultaneously grant a rule nisi calling upon the tax payer or other person upon a business day mentioned in the rule to appear and to show cause why the preservation order should not be made final;

(c) upon application by the taxpayer or other person, anticipate the return day ...

(d) upon application by SARS, confirm the appointment of the curator bonis ...

(7) The court, in granting the preservation order may make ancillary orders regarding how the assets must be dealt with, including -

(c) realizing the assets in satisfaction of the tax debt ...”.

[27] The respondents have branded a judgment by Rogers J in *SARS v Tradex (Pty) Ltd and Others*³ (*Tradex*) as having “... a direct bearing on this matter and constitute good authority regarding a court’s approach to preservation orders in terms of section 163 of the TAA”.

[28] After having considered the various meanings of the wording of the section in question, the learned judge (as he was then) concluded (at par [35] of that judgment) “SARS is required to show, I think, that there is a material risk that assets which would otherwise be available in satisfaction of tax will, in the absence of a preservation order, no longer be available. The fact that the taxpayer bona fide considers that it does not owe the tax would not stand in the

³ 2015 (3) SA 596 (WCC).

way of a preservation order if there is a material risk that realizable assets will not be available when it comes to ordinary execution. An obvious case is that of a company which, believing it owes no tax, proposes to make a distribution to its shareholders”.

[29] In the present case, the indebtedness of the taxpayers are beyond doubt. Relying on *Tradex* however, the respondents argue that, despite proving indebtedness “*it remains for the applicant to demonstrate an appreciable risk that assets available for the collection of tax will be diminished*”. This appears to be a correct summation of the law if that “diminishing” will result “... *in the frustration of the collection of the full amount of tax ...*” (to resort back to the wording of the section).

Ad the risk of dissipation

[30] SARS has made extensive allegations regarding the apparent dissipation of assets by Majestic Silver rather than making payment of its taxes. Its own repeated applications for deferral of payment whilst paying other creditors or making inter-company transfers within the Shabangu Group are examples hereof but, as the consideration of the preservation order of Majestic Silver (represented by its current BRP’s) is, as previously explained, not before this court, I should make no pronouncements thereon. There are, however, instances relating to the conduct of Majestic Silver which involve either Mr Shabangu or the Trust. I shall refer to the most prominent of those hereunder.

[31] Mr Shabangu was used to drawing R300 000.00 per month for himself from Majestic Silver’s accounts as a “management fee”. He continued doing so despite a BRP having been appointed to manage the business of Majestic Silver. This apparently led to differences of opinion between him and the first BRP and the withdrawals have since been stopped. Also, where Majestic Silver has

failed or refused to deliver its VAT reconciliation or to make VAT payments, these have now been made since Mr Naude has been replaced as BRP. SARS' argument is that, unless control over Majestic Silver's finances is placed outside the control of Mr Shabangu, as in the case of a BRP or the court appointed curator, payments constituting dispositions will continue to be made to other parties than to SARS. I yet again point out that SARS' objective is to have the business rescue proceedings terminated on the extended return day of the preservation order against Majestic Silver. This would then also allow the liquidation of assets of that taxpayer in order to effect payment of tax to take place as contemplated in paras 15 and 16 of the preservation order.

[32] What exacerbates the issue of withholding of tax, is that significant portions of Majestic Silver's unpaid tax debt are made up of unpaid PAYE and UIF payments. This means that Majestic Silver is retaining funds deducted from its employees and, rather than paying these funds over to SARS, pay other creditors.

[33] SARS has already, in an attempt to prevent the above, appointed Majestic Silver's bankers as third parties as provided for in the TAA in an attempt to collect payment to SARS in respect of monies paid into Majestic Silver's accounts, but to no avail. Majestic Silver, on its own version as disclosed to the curator, owes ABSA R121 million in respect of loans for which Majestic Silver had bonded various immovable properties, a further R43 million on a term loan and yet another R3 million in respect of vehicle finance. In addition, Majestic Silver was, at the time of disclosure to the curator, indebted to the City of Tshwane for over R15 million in respect of accounts due relating to its various immovable properties.

[34] A further fear of dissipation was the increase of "investment in associates" of about R11 million in the period leading up to Mr Shabangu

placing Majestic Silver in business rescue. This means that assets have been transferred from the principal taxpayer in the matter under consideration, to other entities in the Shabangu Group, at the instance of Mr Shabangu as the group's controlling mind. At the same time, Mr Shabangu, being another taxpayer under consideration, has not discharged his own tax debt of some of R21, 5 million. In similar fashion, Majestic Silver's "related party loans" have increased with millions of Rands.

[35] Mr Shabangu's involvement in the Shabangu Group and the Trust has, to date, not benefited any tax recovery. So, for example, is Mr Shabangu the sole director of JB Property Fund (Pty) Ltd which owes the Trust almost R9 million. None of these funds have been repaid to the Trust to be utilized for the payment of tax debts. Mr Shabangu is also the sole director of JB Holdings (Pty) Ltd (in fact Mr Shabangu is a director of 65 companies), who is the sole shareholder of Majestic Silver. Despite this, that shareholder has exerted no pressure on Majestic Silver to pay to taxes.

[36] In the initially proposed business rescue plan in respect of Majestic Silver, a previously undisclosed asset of the Trust was championed as the solution to Majestic Silver's problems. The proposal was this: it was alleged that the Trust owned previously undisclosed shares in a "related entity" (according to the BRP Cassim), being Villa Del Country Estate (Pty) Ltd. The proposal in the plan was that these shares would be sold for an amount of R110 million of which R92 million would be lent to Majestic Silver. In Mr Cassim's report, he indicated, that *"... insofar as the offer may not be bona fide and, in order to avoid any unnecessary delays, I have made provision for the scenario that, in the event that the shares are not sold before the end of April 2023, the plan provides for the realization of all and/or certain of Majestic's assets and/or business and/or equity ..."*. Needless to say, neither the sale of shares nor

the influx of R92 million has materialised. Although the business rescue plan has not yet been approved, the BRP report confirms exactly what SARS fears: the only controls that prevent the dissipation (or at least alienation) of assets of Majestic Silver, is the current business rescue proceedings and the overarching control exercised by the court appointed curator in terms of the preservation order.

[37] Turning now more directly to the risk of recovery of tax debt from Mr Shabangu. There is no dispute that he controls a vast number of companies and is the controlling mind of the Shabangu Group. The extent of his personal shareholding of members of the Group is unknown. He owns an immovable property at 332 Sandalwood Drive, Newlands, Pretoria which had been purchased for R1. 25 million and which is bonded to Standard Bank for the same amount. There are no less than 15 vehicles linked via eNatis records to Mr Shabangu. None of the deferrals of payment of tax made by Mr Shabangu could be approved due outstanding tax returns. None of the third party or so-called agency appointments issued by SARS have netted anything. Of those bank statements of Mr Shabangu which SARS had managed to obtain, it became clear that Mr Shabangu spends up to R 1 million per month on personal expenses such as clothes, restaurants, hotels, purchases at Makro as well as paying the financing of the purchase of luxury vehicles such as a BMW X7 M5 and a BMW X6 M Competition. In comparison to this ongoing expense from only partially disclosed income, Mr Shabangu has only paid R75 000.00 of his total outstanding debt of over R21 million. SARS fears that, if a court appointed curator is not finally appointed to take control over and realise Mr Shabangu's assets, the recovery of tax debt will be frustrated.

[38] The Trust has an outstanding arrears income tax debt of just under R7 million. At the time the Trust made a previous application for deferral of

payment of tax, it had made a transfer of R 3, 46 million of its funds to JB Property Fund (Pty) Ltd (under the control of Mr Shabangu) which it had not disclosed to SARS. Despite the refusal of the deferral application, no tax payment has taken place since. The Trust owns certain immovable property, being an erf in Doornkloof 391 JR purchased for an amount of R1, 9 million but bonded to Lamna Financial (Pty) Ltd for R4 million; an erf in Irene Extension 49 purchased for R3,1 million and bonded to Nedbank for the same amount; and two unbonded properties in Siyabuswa D Extension 2 and Riamarr Park, Bronkhorstspuit, purchased for far lesser amounts (R195 000.00 and R200 000.00) respectively. According to management statements of the Trust obtained by SARS, the Trust does not appear to have any movable assets. This leaves the debt due to it by the related entity referred to above and the previously undisclosed, but allegedly vastly valuable and easily disposable shares in Villa Del Country (Pty) Ltd as the only realizable assets. SARS fears that if control is not exercised by way of a final preservation order, taking control of these assets out of the hands of the Trust (and Mr Shabangu), the recovery of unpaid tax debts will be compromised.

The respective taxpayers' reasons why the preservation order should not be made final

[39] The respective taxpayers' reasons for the discharge of the provisional preservation order have been succinctly summarized in heads of argument delivered on their behalf. It is worth quoting it:

“57. In an affidavit delivered in support of the anticipation of the return date provided for in the order, the respondents contend, inter alia, that the order stands to be set aside on 3 main grounds:

57.1 the applicant was not justified in seeking the order on an ex parte basis;

57.2 the applicant did not, in its founding affidavit in the preservation application, make out a case for the granting of an order in terms of section 163 of the TAA; and

57.3 the order was sought for an ulterior purpose, being a purpose other than to prevent any realizable assets from being disposed of or removed, which may frustrate the collection of the full amount of the tax payable to the applicant”.

Ad the ex parte nature of the initial application

[40] The first of the respondents’ contentions is not so much based on the ex parte nature of the initial application, but the accusation that, in having approached the court on an ex parte basis, SARS had not displayed the required *uberrima fides*. This, in turn, is based on the accusation that SARS had not made full disclosure in its affidavit of the preceding events.

[41] The ex parte application consists of some 620 pages. Of this, the founding affidavit comprises of 95 pages and it is supported by three confirmatory affidavits, two by SARS specialists and one by one of SARS’s attorneys. The confirmatory affidavits were necessary to confirm the interactions with the taxpayers as well as the applications, reports and correspondence exchanged, which formed part of the annexures to the founding affidavit.

[42] The alleged non-disclosures complained of by the respondents which were ultimately argued, principally relate to three aspects. These were the 10 year history of “interactions” between the parties, the issue of a “trigger event” being the business rescue plan of 17 October 2022 and the delay between that date and the date of the ex parte application as well as the alleged non-disclosure of the civil judgments against Majestic Silver and the Trust in March 2022. The rest of the argument was that SARS had disclosed “only the bare minimum” and had not explained why it hasn’t proceeded with execution.

[43] Dealing with the “bare minimum” issue first I think it can hardly be said in the circumstances that 600 pages constitute a “bare minimum”. The complaint by the respondents that the founding affidavit only referred to annexures in a general fashion, leaving it to the court to “trawl” through the annexures may be procedurally valid, but does not mean that insufficient disclosure had been made. A perusal of the founding affidavit and the references to annexures indicate that even this criticism has been overstated.

[44] Similarly, where references has been made to the “interactions” over 10 years without detailing every step of every interaction or every detail of every deferral application or its rejection, does not, in the context of this case, amount to a non-disclosure or any attempt at preventing relevant facts to come to the attention of the court. Significantly, the respondents have not produced a single “smoking gun” which had not been disclosed and which would have meant the end of the application.

[45] The highwater-mark was the reference to the civil judgments obtained against Majestic Silver and the Trust. Upon scrutiny of the affidavits afresh, in addition to that which had already been summarized in paras 12 – 25 above, it appears that the compliant is not actually that the civil judgments had not been disclosed (they had, in paragraphs 48, 50, 51, 90.2 of the founding affidavit and

in par 14 of Annexure SARS 12 thereto) but that no attachment had taken place in pursuance thereof. SARS has explained the interaction with the taxpayers' attorney from shortly after the judgments have been taken, including the taxpayers (unrealized) threat of rescission, up to the business rescue proceedings, sufficiently to my mind.

[46] Similarly, the delay between the judgments and the initial business rescue plan proposed and the subsequent events have also, to my mind, sufficiently been explained by SARS, even with reference to its frustration at the proposed inflow of R92 million which would have extinguished all the respondents' tax debts not having materialised.

[47] The second objection by the taxpayers centers around the lack of proof of actual dissipation and the accusation that execution, rather than section 163 procedures, would have been more appropriate. As to the former, actual dissipations have taken place (examples of which I have referred to in the paragraphs dealing with Mr Shabangu's expenses, his control over the Shabangu Group and the Trust) but moreover, from a reading of the papers and the various discrepancies in the accounts of the taxpayers, particularly that of Mr Shabangu and the members of the Shabangu Group itself, it appears that assets, particularly in the form of transfers and loans, regularly take place, either before or after applications for compromise or for deferral of payment of tax, without any actual payment ever being made to SARS. In similar fashion as where a curator in an insolvent estate takes control of the estate to secure some benefit for creditors, the movement of money out of the account of a taxpayer without justification or record keeping being disclosed to SARS upon enquiry, create the reasonable apprehension that the collection of tax debts may be frustrated if a curator is not appointed. The past history of "interaction" with SARS to which the respondents refer, have certainly not proven the opposite,

resulting therein that SARS' fear of dissipation rather than payment, is reasonable.

[48] In expansion of their argument against the existence of a fear of dissipation, the respondents refer to the fact that they have, more than once, tendered security for payment of the tax debts. These tenders were every time, however, not from assets which SARS now seek to attach, but by way of tenders from third parties over which SARS has no control. Of the tenders one was made by LB Tax Consulting on 27 January 2020 in support of one of the deferral applications. It was made on behalf of Mr Shabangu "and all related/connected companies". It referred to a then outstanding tax debt of R39 403 395,80 and proposed that, pending the finalisation of the litigation between members of the Shabangu Group and the Department of Public Works (from which Mr Shabangu believed sufficient funds would be realised to pay all tax debts), portions 2 and 7 of the Farm Groothoek 106 belonging to Zedbee Plaza (Pty) Ltd would be sold for R16 million and that "a part payment will be made towards a tax debt". In the end, no sale took place, no payment was made and by 15 December 2022 that property became bonded in the amount of R4 million, despite the deferral having been accepted by SARS (in respect of the Trust) on 7 August 2020. The second "tender" by way of a sale was the one contained in the business rescue plan already referred to in respect of the Del Villa Del Country Estate (Pty) Ltd property (and the shares of the trust held therein) as referred to in para 36 above.

[49] As for the last point of objection to the preservation order being made final, the "ulterior motive" alleged by the respondents appears to be the allegation that SARS seeks to, under the guise of a preservation order, obtain an "execution mechanism". There is nothing "ulterior" or clandestine about SARS' application. In its notice, it already envisaged that, after assets have been

seized and preserved by the curator, the court will be requested to authorise the sale and disposal thereof to pay tax debts. I am mindful of the comments made by Rogers J in *Tradex* at par [73] that section 163 is in itself not an execution mechanism. The learned judge continued in his judgment after this comment to refer to the levying of execution “in the ordinary manner”. Whilst this is of course so, I do not find that course to be a bar to the combination of relief sought in this matter. What would it benefit SARS to attach the various properties Mr Shabangu and the Trust (most of which are encumbered) and to proceed bit by bit to attempt to sell them when it appears that there are other assets (shares and funds) which can only be traced and secured by a curator and which can then constitute a viable recovery of tax debt, particularly where previous attempts of execution via third party appointments of the taxpayers’ bankers have failed? I find that the matter is distinguishable on the facts from that in *Tradex* and that the additional relief, in conjunction with a final order in terms of section 163 of the TAA, is justified in this case. I certainly do not find that the taxpayers’ accusation of an ulterior motive is justified, let alone that SARS’ attempts to recover tax in this manner should result in a discharge of the preservation order, which is what the respondents claim.

The order against Mrs Shabangu

[50] No allegation of dissipation of assets have been made against the eighth respondent, Mrs Shabangu and, although she may be a taxpayer, she does not have an outstanding tax debt.

[51] SARS’ only reason for having cited Mrs Shabangu in this matter is that SARS is unsure as to whether she and Mr Shabangu were married to each other in community of property or not. SARS says it could not locate an ante-nuptial contract registered in the Deeds Office and, as a result, suspected that the marriage may be in community of property.

[52] SARS, however, in the founding affidavit filed on its behalf, already conceded that, in all returns delivered by Mr Shabangu, he has indicated that he was married out of community of property. This has been accepted by SARS over the years and it has not made any allegation that any assets have been distributed by Mr Shabangu to Mrs Shabangu and neither has SARS made out a case against her as an “other person” as contemplated in section 163 of the TAA.

[53] The court is therefore left with Mr Shabangu’s version, coupled with a vague inference made by SARS that a joint estate may be involved. Although it is so that the Shabangus have not, in their affidavits expressly dealt with their marital property regime, in their replying affidavits it was indicated that Mrs Shabangu was independently represented by attorneys (and not by Mr Shabangu as he has been doing in respect of the other respondents or as one may have expected as the counterpart of a joint estate) and she has delivered a confirmatory affidavit in this regard.

[54] Despite the fact that the property marital regime issue of Mr and Mrs Shabangu may therefore not have been dealt with unequivocally, I find that SARS has not, both in respect of the issue of a possible joint estate and in respect of the requirements of section 163 of the TAA regarding dissipation, satisfied the onus on its in respect of Mrs Shabangu. It must follow that the preservation order against her should be discharged, with costs.

[55] In respect of the other two taxpayers, that is Mr Shabangu and the Trust, I find that the defences put up by them have not convinced the court that the preservation order should not have been granted and should not be made final. This includes the additional relief initially sought by SARS, included in paragraph 15 and 16 of the preservation order. In this regard I also find no cogent reason why costs should not follow the event.

Orders

[56] The following is made.

1. The provisional preservation order granted on 14 February 2023 against the third, fourth, fifth and sixth respondents (in their capacity as trustees of the Roux Shabangu Family Trust) and against the seventh respondent is confirmed.
2. The provisional preservation order granted on 14 February 2023 against eighth respondent is discharged.
3. The *curator bonis* is authorised, in order to give effect to this order in respect of taxes due by the Roux Shabangu Family Trusts and Mr Ngwane Roux Shabangu (the taxpayers) in terms of a tax assessment of such a taxpayer, to dispose of any or all such taxpayer's assets, by means of auctions or out of hand sales, in order to secure the collection of taxes and in satisfaction of such taxpayer's tax debts and to hold those proceeds in trust pending an application by the applicant to have those proceeds declared executable for the tax debts of any of the taxpayers.
4. The auctions and/or out of hand sales referred to above should take place on the following basis:
 - 4.1 Any auction sale must be advertised, at the very least, as well as ins required in the event of a sale in execution, and in the case of moveable assets, an advertisement must be published at least five (5) business days in advance of the auction;

- 4.2 Any out of hand sale may take place without prior notice, but such sale will only take effect after expiry of four (4) business days after notice of the sale has been given to any of the taxpayers who may have an interest in the said assets;
- 4.3 None of the encumbered assets over which a financial institution has real rights, in the form of mortgage bonds, shall be realized and sold and transferred by the *curator bonis* without the consent and authorization of the relevant financial institution.
5. The third, fourth, fifth and sixth respondents in their aforesaid capacities and the seventh respondent, jointly and severally, are ordered to pay the costs of the Commissioner of the South African Revenue Service in respect of the application against them, including the costs of the anticipated opposed return day.
6. The Commissioner of the South African Revenue Service is ordered to pay the costs of the eighth respondent, including her costs incurred in respect of the opposed anticipated return day.
7. It is noted that the provisional preservation order granted against the first and second respondents has been dealt with separately from the orders against the remaining respondents by way of separate orders and extended return dates.

N DAVIS
Judge of the High Court

Gauteng Division, Pretoria

Date of Hearing: 29 May 2023

Judgment delivered: 11 October 2023

APPEARANCES:

For the Applicant: Adv M P van der Merwe SC together
with

Adv A Louw

Attorney for the Applicant: Mac Robert Inc Attorneys, Pretoria

For the Respondents: Adv D van Niekerk

Attorney for the Respondents: Burrows Attorneys, Sandton