

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 2406/2021
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.
DATE: 24/11/2023

In the matter between:

THE COMMISSIONER OF THE SOUTH AFRICAN
REVENUE SERVICE

Applicant

and

MPHO PHAKATI	First respondent
KRAFT MEDICAL (PTY) LTD	Second respondent
LSP OILS (PTY) LTD	Third respondent
BENBEN TECHNOLOGIES (PTY) LTD	Fourth respondent
VERBIZEST (PTY) LTD	Fifth respondent
L A BROTHERS TRADING (PTY) LTD	Sixth respondent
STODASAT (PTY) LTD	Seventh respondent
LSP BULK (PTY) LTD	Eighth respondent
MPHO PHAKATI N.O.	Ninth respondent
LINDA PHAKATI N.O.	Tenth respondent
KEFILOE LEHLOHONOLO KGOMA N.O.	Eleventh respondent

JUDGMENT

van der Westhuizen, J

- [1] On or about 21 January 2021, the applicant obtained a preservation order by a judge in chambers presumably in terms of the provisions of section 163 of the Tax Administration Act, 28 of 2011 (the Act) and a return date was stipulated in the order.
- [2] Without the preservation order being served upon the respondents, they apparently obtained knowledge thereof and in terms of the provisions of Rule 6(6) of the Uniform Rules of Court, read with the provisions of section 163(4)(c) of the Act, set the matter down on an urgent basis to anticipate the return date of the order. The anticipated return date was 16 February 2021.
- [3] On the anticipated return day, the parties had come to an agreement and an agreed order was made an order of court. That order so granted, reads as follows:

“1. *The preservation order granted ex parte by Her Ladyship Justice Basson on 21 January 2021 is discharged against the first, second and ninth to eleventh respondents, with an understanding and agreement between those respondents and the applicant that;*

1.1 *The applicant will issue instruction to the curator bonis for the release of the banking facilities of the first, second and ninth to eleventh respondents;*

1.2 *The first, second and ninth to eleventh respondents will within 24 hours of regaining control of their banking facilities, pay over into the trust account of Wiese & Wiese Inc Attorneys the amount of R1 322 062.12 as security for the first, second and ninth to eleventh respondents' future income tax and valued-added-tax liability, if any;*

1.3 *The second respondent's tax liability including, but not limited to its value-added-tax (VAT) and income liability, to be determined by the applicant, is not limited to the security amount furnished by the first, second and ninth to eleventh respondents;*

1.4 *The second respondent must ensure that:*

1.4.1 *A public officer on its behalf attends to the nearest SARS branch office on or before the 22nd of February 2021 to finalise its VAT registration;*

1.4.2 *Its VAT returns are submitted to SARS within 10 business days of its registration as a VAT vender;*

1.4.3 *Payments of VAT is made to SARS, within 10 business days of its registration as a VAT vender;*

1.4.4 *Its Income Tax Returns are submitted timeously and it must pay the required income tax when same becomes due.*

2. *Costs are reserved."*

[4] The issue for consideration by this court when the matter was called and argued, related to the reserve costs as per the order recorded on 16 February 2021. In passing, the respondents, first, second and ninth to eleventh, in their heads obliquely referred a another reserved order as to costs in respect of a compelling order against the applicant to file its heads of argument within ten days of the grant of the compelling order. Those reserved costs were not dealt

with other than the initial oblique reference thereto in their heads of argument. Neither was it pertinently raised in oral argument.

- [5] During the exchange of e-mails between the parties prior to the hearing of the matter, the applicant tendered party and party costs. The first, second and ninth to eleventh respondents however insisted on a punitive scale, that of attorney and client.
- [6] The purpose of reserving costs, in particular in interlocutory proceedings, is if there is a real possibility that information may be put before the court which eventually disposes of the action or the application which may be relevant to the exercise of a discretion in regard to them.¹
- [7] The first, second and ninth to eleventh respondents filed answering affidavits in response to the *ex parte* preservation order granted on 21 January 2021 prior to setting down the matter on the anticipated date. All the facts relevant to a decision on the merits of the *ex parte* preservation order were before the court at that stage. However the parties settled their disputes in the manner recorded in the order referred to earlier. By agreement the preservation order was discharged, although subject to certain undertakings on the part of the said respondents. That matter became moot. Effectively, the matter was finalised.
- [8] It is further recorded in the aforementioned passage referred to in the case of *Martin NO, supra*, that ‘... where the issues affecting interlocutory costs are clear, the Court then dealing with matter should not choose an easy way out to shift the task to another Court.’
- [9] It is clear that the *ex parte* preservation application became moot on the anticipated date where the parties had come to some resolve of the disputes. It was that court that was tasked to exercise a discretion in respect of the costs of that application. There remained no issue to be considered by a

¹ *Martin NO v Road Accident Fund* 2000(2) SA 1023 (WLD) at 1026H-1027A and the authorities cited there

different court. All the relevant facts were before that court in respect of the exercising of a discretion in respect of costs. There was no real possibility that information may be put before the court which may be relevant to the exercise of a discretion in regard to the issue of costs.

[10] No new or further facts were placed before this court which may be of relevance in respect of the exercise of discretion in respect of costs. It follows that the application in respect of the reserved costs cannot succeed.

I grant the following order:

1. The application in respect of the reserved costs of the *ex parte* preservation application and the anticipated return day is struck off for mootness with costs.

C J VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

On behalf of Applicant:	Adv J Fourie
Instructed by:	Ledwaba Mazwai Attorneys

On behalf of Respondent:	Adv M Louw
Instructed by:	Wiese & Wiese Inc.

Judgment Reserved on:	03 October 2023
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Judgment Handed down:	24 November 2023
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