IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: B5917/2023

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE: 10 May 2024

SIGNATURE

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	Applicant
and	
BHEKINKOSI NICHOLUS BUTHELEZI	First Respondent
EMHLOPE INTOMBI HOLDINGS (PTY) LTD	Second Respondent
SIBUSISO GERALD NCUBE	Third Respondent
KHANJRA AYYUBIA RUHULAMIN	Fourth Respondent
KHANJRA COAL (PTY) LTD	Fifth Respondent

ARTINOS SHOSHORE	Sixth Respondent
PHAMART COAL SUPPLIERS (PTY) LTD	Seventh Respondent
MOHIT VERMA	Eighth Respondent
RAMP RESOURCES (PTY) LTD	Ninth Respondent
PETER ROBERT PONTON	Tenth Respondent
DISTINCTIVE CHOICE 1277 CC	Eleventh Respondent
ADVANCE INDUSTRIAL SOLUTIONS (PTY) LTD	Twelfth Respondent
KWANDA DHALMINI	Thirteenth Respondent
QUELME LOGISTICS CC	Fourteenth Respondent
BLACK ROCK RESOURCES (PTY) LTD	Fifteenth Respondent
BRUCE MSIZI MHLANGA	Sixteenth Respondent
ZANELE GLORIA MHLANGA	Seventeenth Respondent
BM COAL (PTY) LTD	Eighteenth Respondent
GOLDEN ROYAL CONSTRUCTION (PTY) LTD	Nineteenth Respondent
ABRAM MOLOTSTI MAPHOTO	Twentieth Respondent

RAISIBE EVELYN MAPHOTO	Twenty First Respondent
SETUMISHI BUILDING CONSTRUCTION AND ENTERPRISE CC	Twenty Second Respondent
UNIT 7 RENA (PTY) LTD	Twenty Third Respondent
WELLINGTON NYAPADI	Twenty Fourth Respondent
SAIDI KARIYATI	Twenty Fifth Respondent
SOLOMON MANYELETI LAMOLA	Twenty Sixth Respondent
MANYELETI CONSULTING (PTY) LTD	Twenty Seventh Respondent
MAGOGUDI CONSTRUCTION PROJECT CC	Twenty Eighth Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 10 May 2024.

JUDGMENT

UNTERHALTER J

[1] The applicant, the Commissioner for the South African Revenue Service (SARS) sought and obtained a provisional preservation order (the preservation

order) in terms of s 163 of the Tax Administration Act 28 of 2011 (TAA) against 28 respondents. The preservation order was granted on 24 October 2023 by Koovertjie J against all the respondents. Among the respondents cited were the 20th – 23rd respondents: Mr Maphoto, Mrs Maphoto, Setumishi Building Construction & Enterprise CC (Setumishi), and Unit7Rena (Pty) Ltd (Unit7) (collectively, the Setumishi respondents). Mr and Mrs Maphoto are husband and wife. Mrs Maphoto is a member of Setumishi and was a director of Unit7. The Setumishi respondents, as they were entitled to do in terms of the provisional preservation order, have anticipated the return day of the preservation order. They seek to have the preservation order discharged. SARS moves to have the preservation order made final as against the Setumishi respondents.

[2] The Setumishi respondents raised an objection to the preservation order that requires consideration at the outset. Section 163(1) of the TAA requires that a senior SARS official may authorise an *ex parte* application to the high court for the preservation of assets. That authority, for present purposes, contemplates that there is an amount of tax that is due and payable or that the official on reasonable grounds is satisfied that an amount of tax may be due or payable. We are here concerned with the second type of authorisation. The Setumishi respondents contend that the senior SARS official, Mr Posthumus, who authorised the *ex parte* application that resulted in the preservation order, failed to aver that he was satisfied that an amount of tax may be due and payable. Hence the application was defective from the outset and must be dismissed.

[3] Mr Posthumus deposed to a confirmatory affidavit in the *ex parte* application. He stated that he is a senior SARS official and that he authorises the application for a preservation order. He then references the supporting affidavit of Ms Seopela and states: 'I confirm the contents thereof'. This supporting affidavit is a lengthy document. Ms Seopela's affidavit sets out the amount of tax that may be due in respect of each of the Setumishi respondents, and the basis for her computation. Mr Posthumus deposed to a further confirmatory affidavit in which he confirmed the correctness of the replying affidavit of Mr Klingenberg in so far as its contents related to him. Mr Klingenberg sets out the

potential tax liability of the Setumishi respondents.

[4] The affidavits of Mr Posthumus do not in terms state that on reasonable grounds he is satisfied that an amount of tax may be payable by the Setumishi respondents. However, in confirming the contents of Ms Seopela's affidavit in the context of his authorisation of the application, he is advancing reasonable grounds upon which it can be inferred that he was satisfied that a basis existed to authorise the application. Those grounds are supported by his further confirmatory affidavit in respect of what Mr Klingenberg has had to say concerning the tax liability of the Setumishi respondents. Mr Posthumus' confirmatory affidavits were deposed to by him to support his authorisation of the application. Those affidavits advance reasons for the tax liability of the Setumishi respondents. They could only have been advanced in support of his authorisation of the application if he was satisfied that they provided reasonable grounds to consider that tax may be due or payable by the Setumishi respondents. And the affidavits upon which Mr Posthumus relies do, as I shall explain, provide reasonable grounds upon which Mr Posthumus was placed in a position to form that view. On this analysis, Mr Posthumus' affidavits set out a sufficient basis upon which he authorised the application for the preservation order in compliance with s 163(1).

[5] In the course of argument, I raised the question as to whether Mr Posthumus should be afforded an opportunity to clarify his position. This he has done in a further affidavit. He there made it plain that his reliance on the contents of the affidavit of Ms Seopela permitted him to be satisfied on reasonable grounds that he should authorise an application to seek the preservation order. Counsel for the Setumishi respondents was doubtful that such an affidavit could rescue what was not plainly stated in the founding affidavit. I am doubtful that this is so, as authority is generally capable of ratification. But I need not decide this aspect of the matter because, as I read Mr Posthumus' most recent affidavit, he simply clarified what he had already stated as to the basis upon which he authorised the application. I therefore find that the application brought by SARS for a preservation order was authorised in conformity with s 163(1).

[6] I turn next to consider the contention of the Setumishi respondents that the application of SARS for the preservation order was predicated upon the involvement of the respondents, including the Setumishi respondents, in an unlawful syndicated scheme concerning the transportation and sale of coal to Eskom. SARS, they submit, failed to establish a relationship between the Setumishi respondents and the other respondents cited in the application. Nor, it is argued, has SARS established how the Setumishi respondents participated in, and benefitted from, the syndicated scheme. SARS in its answering affidavit in the anticipation application reversed course and no longer relied upon the involvement of the Setumishi respondents in the scheme to support the preservation order. The Setumishi respondents argue that this change is fatal to the case of SARS. If the preservation order was procured on the basis of the Setumishi respondent's participation in a scheme, for which there is no evidence, the preservation order must be dismissed.

[7] The position of SARS is this. The extent of the respondents' participation in the unlawful has not been determined. It remains the subject of investigation. It was referenced in the supporting affidavit to provide background information. The preservation order was sought on the basis of the failure by each of the respondents to comply with their obligations under the tax legislation, as to which a detailed case was made out.

[8] Even if, as the Setumishi respondents contend, SARS placed reliance upon the scheme to secure the preservation order, it does not follow that the absence of proof that the Setumishi respondents participated in the scheme or benefited from it would render the preservation order insupportable. A fair reading of the affidavit filed in support of the preservation order indicates that SARS relied upon a case that identified breaches by each of the Setumishi respondents of their obligations to render full and truthful tax returns reflecting their taxable income, and, in the case of Unit 7, its failure to charge or declare VAT on the supplies it made. This case does not rest upon the unlawful scheme. The issue is thus whether the breaches alleged by SARS warranted the imposition of the preservation order, without regard to the alleged scheme. The invocation of the scheme in the supporting affidavit of SARS is not dispositive of the case

brought by SARS for the preservation order.

[9] I turn to consider whether there is a case made out that the breaches alleged by SARS require the confirmation of the preservation order. Central to the substantive defence offered by the Setumishi respondents is the claim that SARS has identified transactions as income, when they were short term loans extended and then repaid. The tax debts of the Setumishi respondents, upon which SARS relies, is claimed to be considerably overstated because short loans made by Mr and Mrs Maphoto to Setumishi and Unit 7 and then repaid should not have been treated as income.

[10] Before assessing this defence, SARS takes the point that although Mrs Maphoto claims to have been authorised to depose to the answering affidavits filed on behalf of Unit 7, she cannot have been so authorised because the resolution of Unit 7, upon which reliance is placed, was invalid. Mrs Maphoto had already resigned as a director of Unit 7 at the time that the resolution, bearing her signature as a director, was taken. The resolution, dated 17 October 2023, issues from a meeting of the board of directors of Unit 7 and reflects the signature of Mrs Maphoto. It appears that Mrs Maphoto had resigned as a director on 26 September 2023. Her concurrence thus had no efficacy. However, two other directors signed the resolution. SARS makes out no case that these directors could not authorise Mrs Maphoto to depose to affidavits on behalf of the company. The resolution also appointed attorneys to act for Unit 7 in the proceedings. No attack is made on that appointment. There is no showing by SARS that the resolution was invalid, even if it is shorn of Mrs Maphoto's concurrence. As a result, the objection cannot be sustained.

[11] The Setumishi respondents, as I have recounted, set out at some length in their affidavits the basis upon which they contend that the probable tax debt is considerably exaggerated by SARS. In the supporting affidavit, SARS alleged that the probable tax debt was R31 969 392.43. That was revised in SARS's replying affidavit to a probable tax debt of R14 730 446.95. In a supplementary answering affidavit, Mrs Maphoto references the further analysis of the tax advisors of the Setumishi respondents in respect of this probable tax debt. The

analysis engages an exercise for each of the Setumishi respondents comparing, for each tax period, the tax declaration, the amounts received as per third party data, and how much of the difference is not made up of income. Once the amounts, treated by SARS as income when they are not, are taken into account, it is claimed that the probable tax debt of the Setumishi respondents is R711 241, 97. A considerably reduced probable tax debt that should not have led SARS to make use of the drastic measures of the preservation order, but rather to use its ample powers of audit to secure payment of what may be found, ultimately, to be due and payable.

[12] What does the work in this analysis are the amounts received by the Setumishi respondents that are said not to be income, but short term loans extended and repaid. In the answering affidavit of the Setumishi respondents, Mrs Maphoto seeks to set out transactions that are not gross income. The exercise is a tabulation of the flow of funds, year by year, into the bank accounts of the Setumishi respondents.

[13] The difficulty with this exercise is the following. First, it is not apparent that each loan and every loan was repaid to the lenders, and how the net borrowings and repayments are reconciled in every year. Second, there is an absence of documentary evidence supporting loan agreements and the terms on which the loans were extended and repaid. Granted, these were loans provided to entities controlled by Mrs Maphoto, and some informality may be expected in such circumstances. But it would nevertheless be expected that at least the corporate entities, as separate persons, would have some documentation to support their agreement to the loan funding. Third, the financial statements of Setumishi and Unit 7 do not reflect that loans were made to them, and no provision is made for the repayment of the loan amounts. It was submitted that the short term nature of these loans would have meant that they were repaid over a short period and so have no nett impact on the financial position of Setumishi or Unit 7. It is however impossible on the papers to verify that the loans were all repaid in this way. And at least some working papers should have been available to substantiate this claim. In addition, loan repayments should have been reflected as operating expenses of Setumishi and Unit 7, but

their financial statements do not do so. Fourth, the income tax returns of Setumishi and Unit 7 do not record the loans that are now relied upon. Fifth, there is an absence of evidence to support the loans that are claimed to have been received from third parties, and these loans also cannot be reconciled with the financial statements of Setumishi and Unit 7. In sum, there is a paucity of corroborative evidence as to the loans made and repaid, beyond the say so of Mrs Maphoto. And the tax advisors employed by the Setumishi respondents do not offer further elucidation.

[14] SARS has also identified irregularities in the VAT returns submitted by Unit 7. Unit 7, on the analysis offered by SARS, in its VAT returns claimed input tax but disclosed no output tax, notwithstanding the supplies it made. The claimed input tax in respect of capital goods also does not appear to chime with the company's financial statements and income tax returns. This has resulted in what SARS describes as 'estimated income VAT prejudice'. The Setumishi respondents, and in particular Unit 7, have not properly dealt with these averments.

[15] I have had regard to *eTradex*[1] and *Hamilton*[2]. A preservation order is an intrusive order. It is not to be granted simply because a taxpayer is liable or is likely to become liable for tax. The purpose of the order is set out in s 163(1). It is to prevent any realisable assets from being disposed of or removed which may frustrate the collection of the full amount of tax that is due or payable or which a senior SARS official, on reasonable grounds, is satisfied may be due or payable. The preservation order must be required to secure the collection of tax. It does not suffice that the order may simply have some utility. One way to assess what is required is to consider what risks might arise absent the grant of such an order, on the evidence before the court.

[16] The Setumishi respondents contend that SARS has failed to make out a case that there is risk of the removal or dissipation of assets. The businesses

[1] *Commissioner, South African Revenue Services v eTradex (Pty) Ltd 2015 (3) SA 604 (WCC)*
[2] *Commissioner, South African Revenue Service v Hamilton Holdings (Pty) Ltd & others [2021] ZAGPPHC 138*

conducted by Setumishi and Unit 7 require their assets to remain in place. The transactions in issue were conducted in the ordinary course of business. And there is no risk of the removal of assets to frustrate the collection of tax.

[17] This case, however, is not simply a dispute as to the quantification of tax liability. There has been a failure to declare taxable income and render proper returns. The defence offered by the Setumishi respondents as to the loans made and repaid has not been adequately established to negate the shortfall of declared taxable income. This is compounded by what appears to be a deliberate failing to calculate the correct amount of VAT and make proper VAT returns. Once this is so, the Setumishi respondents are burdened with the likelihood that they have sought to hide from SARS their true taxable income and the extent of the liability of Unit 7 to pay VAT. In other words, the conduct of the Setumishi respondents is not likely to have resulted from inadvertence, insouciance or negligence. Rather, they contend that their returns are supportable, when they are not. And this gives rise to the risk that their deliberate obfuscation of their tax liability will extend to the treatment of their assets which will be used by SARS to collect the full amount of tax owing by the Setumushi respondents.

[18] This risk is compounded by the fact that the relationship between the Setumushi respondents is in essence a family enterprise. The manner in which loans were paid and repaid, on the version of the Setumishi respondents, indicates little respect for any formal separation between these respondents. The *curator bonis* in his affidavits has drawn attention to the manner in which inter account transfers have taken place between the Setumishi respondents and their use of shared expenses. It requires little foresight to mark out the risk that the Setumishi respondents could apply the same disregard for their separate personhood to move assets and mask their proper disclosure, as they have done with respect to their tax returns.

[19] In these circumstances, I consider that a preservation order was required, and remains so. This is not an ordinary case of a dispute over a tax liability that may be payable. It is a case in which SARS has set out evidence that the Setumishi

respondents have sought to evade their tax liability. That evidence has not been satisfactorily rebutted. And in such circumstances, a preservation order is required because there is an appreciable risk that the Setumishi respondents will treat their assets which will be used to satisfy their tax liability in the same way that they sought to hide from sight their taxable income and VAT liability.

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[20] The Setumishi respondents submit that there was no justification for the appointment of the *curator bonis* and that he has exercised his powers to compromise the business conducted by Setumishi and Unit 7. They complain that the *curator bonis* has failed to pay taxes and honour debit orders, and more generally to co-operate with the Setumishi respondents. The *curator bonis* has filed affidavits and preliminary reports. The affidavits set out a detailed rebuttal of the complaints levelled against him. As important, a case has been made out that the *curator bonis* has introduced procedures for the payments made by the Setumishi respondents; he has regulated the relationship between the Setumishi respondents and taken measures to ensure proper accounting. This will assist to determine the tax liability of the Setumishi respondents and ensure that assets are properly disclosed that may be used to satisfy such liability. On the evidence, this appointment has not caused either Setumishi or Unit 7 to be significantly compromised in their business prospects. I find that the appointment of the *curator bonis* was warranted, and remains so.

[21] The Setumishi respondents complain that SARS, and in particular Mr Posthumus who authorised the application, has breached the duty to preserve the secrecy of taxpayer information contrary to s 69(1) of the TAA. This has occurred because once SARS was not in a position to rely upon the Setumishi respondents' participation in an unlawful scheme with the other respondents, there was no basis to disclose the taxpayer information of the Setumishi respondents to the other respondents cited in the application. SARS answers this complaint by invoking s 69(2)(c) of the TAA. This provision states that the disclosure of taxpayer information is not prohibited by a person who is a current SARS official if done by order of court. The court order granted by Koovertjie J required the order, together with a copy of the application, to be served on all the respondents. The application disclosed the tax information of the Setumishi

respondents to the other respondents cited. And thus, SARS submits, the disclosure was lawful because it was done under the authority of a court order.

[22] SARS' submission is technically correct. But it fails to square up to the fact that once SARS apprehended that it could not maintain that the Setumishi respondents formed part of the unlawful scheme, there was every reason to make some provision in the order to protect the Setumishi respondents from having their taxpayer information disclosed to the other respondents. This SARS did not do. SARS sought and procured a court order that did not provide this protection, perhaps still considering, when the order was sought, that there was a sufficient basis to link all the respondents to the scheme. I consider however that this want of care on the part of SARS cannot serve to invalidate the preservation order. That would be a disproportionate sanction given, as I have found, that the preservation order was and remains a justified measure.

[23] In the course of the oral argument before me, some time was devoted to the duration of the preservation order, and whether security might not be given in substitution of the order. The parties have engaged one another on the question of security and have not come to terms. I do not consider it appropriate to resolve their differences on this issue. However, I emphasised to SARS' counsel that a preservation order of the kind before this court is an intrusive order that should not endure for any longer than necessary. SARS indicated that it would not require the protections afforded by the preservation order beyond 31 July 2024, and I propose to so limit its duration.

[24] In the result the following order is made:

(i) The provisional preservation order of 24 October 2023 ('the preservation order') as against the 20th, 21st, 22nd and 23rd respondents is confirmed and made final;

(ii) The preservation order shall endure until 31 July 2024 in respect of these respondents;

(iii) The costs of opposing the preservation order shall be paid by the 20th, 21st, 22nd and 23rd respondents jointly and severally, the one paying the others to be absolved, including the costs of two counsel

UNTERHALTER J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

APPEARANCES

COUNSEL FOR THE APPLICANT:	ADVOCATE M MEYER & ADVOCATE MOLEA
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COUNSEL FOR THE 21ST, 22ND, 23RD AND 24TH RESPONDENTS:	ADVOCATE L SIGOGO SC & ADVOCATE E MKHAWANE
INSTRUCTED BY:	MGIBA KGABI ATTORNEYS
DATE OF HEARING:	02 MAY 2024
DATE OF JUDGMENT:	10 MAY 2024