IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No.121282/2023

(1) REPORTABLE: ~~YES~~**/NO**

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

(3) REVISED

DATE: **15 October 2024**

SIGNATURE:.

In the matter between:

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

NGWANE ROUX SHABANGU **First Respondent**
(ID: 7[...])

NOMZAMO PERSERVERENCE SHABANGU (NEE MAHLANGU) N.O **Second Respondent**
(ID: 8[...])

AND

Case No: 121275/2023

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

And

NGWANE ROUX SHABANGU N.O **First Respondent**
(ID: 7[...])

PROE SHABANGU N.O **Second Respondent**

(ID: 7[...])

STEMBILE ALPHONISA SHABANGU N.O **Third Respondent**
(ID: 5[...])

NOMZAMO PERSERVERENCE SHABANGU **Fourth Respondent**
(NEE MAHLANGU) N.O
(ID: 8[...])

(IN THEIR CAPACITIES AS TRUSTEES FOR THE TIME BEING OF THE ROUX SHABANGU FAMILY TRUST)

Coram: Millar J

Heard on: 19 September 2024

Delivered: 15 October 2024 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the CaseLines system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 15 October 2024.

JUDGMENT

MILLAR J

[1] On Monday 10 June 2024, 4 applications were enrolled for hearing on the unopposed roll. The Commissioner for the South African Revenue Service (SARS) was the applicant in all 4 matters. Two of the applications were for

the liquidation of companies[1] and the other two for the sequestration of the joint estate of Mr. and Mrs. Shabangu and the Roux Shabangu Family Trust (the Trust) respectively.

[2] Opposition to the applications manifested for the first time when counsel appeared for the companies and Mr. and Mrs. Shabangu and the Trust at the hearing. The basis for the opposition was that unpaid tax debts and the subsequent acts of insolvency, which had precipitated the applications had been discharged. No papers had been filed in answer to the applications and this submission was made from the bar. I enquired from counsel what the basis of this submission was, and he informed me that he had been instructed to make the submission. Mr. Shabangu was present in court and confirmed that this was his instruction.

[3] In consequence of this, I took the view that the interests of justice demanded that the respondents in the four applications be given an opportunity to file affidavits in support of the submission. The applications were all stood down to 12 June 2024 to afford them time to do so. I also gave directions with regard to the filing of further papers by SARS. They did so.

[4] Instead of cutting the Gordian knot, the stand down only served to tighten it and so the parties subsequently agreed on time periods for the filing of further papers, and I agreed to hear all four as opposed applications on 19 and 20 September 2024. The applications were not consolidated and the fact that they were to be heard at the same time was a matter of convenience for the parties and the court.

[5] When the matters were called on 19 September 2024, no papers had been filed in respect of either of the companies and these two applications were dealt with on an unopposed basis.[2] Counsel, who appeared for the

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1 *Commissioner for the South African Revenue Services v JB Holdings (Pty) Ltd* (2023/121445) and *Commissioner for the South African Revenue Services v Soronko Bulk Handling* (Pty) Ltd (2023/121336).

2 In the *Soronko* matter, I granted an order for the final winding up of the company. In the *JB Holdings* matter, an application to intervene was brought by the employees of the company who

respondents did so only in respect of the two sequestration applications. There was also an application brought by the beneficiaries of the Trust to intervene in the application for its sequestration.

[6] Having regard to the provisions of the Trust Deed, in terms of which none of the trust assets vest in any beneficiary, the application (and interest claimed) was predicated solely on the fact that the beneficiaries are residents in a property owned by the Trust. Accordingly, it could not be said at this stage, that there was in fact any direct and substantial interest in the proceedings for the provisional sequestration of the Trust.

[7] Mindful of the fact that SARS was only seeking a provisional order, I granted an order that the application for intervention be postponed *sine die* on the basis that if I were to refuse the provisional order, the intervention would be superfluous and if I were to grant it, then it could be brought at the appropriate time.

[8] This judgment concerns only the two sequestration applications.

[9] It is apposite at the outset to state that although application was made for the sequestration of the joint estate of both Mr. and Mrs. Shabangu, SARS did not persist in seeking an order for the sequestration of Mrs. Shabangu.

[10] Despite their having entered into a civil marriage and their being no evidence of either the conclusion or registration of an ante nuptial contract, the Shabangu's disputed that they are married in community of property and that it is competent for SARS to claim the sequestration of a joint estate. SARS for its part took the view that the provisions of section 21 of the Insolvency Act[3] would afford the *concursus creditorum* sufficient protection if the order

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indicated that they wished to oppose the winding up. I then granted the application to intervene and also granted a provisional winding up order in respect of *JB Holdings*.

[3] 24 of 1936 which provides in section 21(1) in particular that: "*The additional effect of the sequestration of the separate estate of one of two spouses who are not living apart under a judicial order of separation shall be to vest in the Master, until a trustee has been appointed, and, upon the appointment of a trustee, to vest in him all the property (including property or the proceeds thereof which are in the hands of a sheriff or a messenger under a writ of attachment)*

sought were granted. This was a pragmatic approach and obviated the need for any consideration of, or need to make a finding in respect of, the marital status of Mr. and Mrs. Shabangu.

[11] In respect of the applications for the sequestration of the estate of Mr. Shabangu and the Trust, it was not placed in issue that there was a debt due, that it was unsatisfied and that acts of insolvency had been committed.

[12] The basis upon which the two applications were opposed was a legal one - that there would be no advantage to the creditors of Mr. Shabangu or the Trust if the sequestration orders sought were to be granted.

[13] How then did the position change so materially from the assertion on 10 June 2024 that the tax debts had been discharged, to the concession that the debts remained unsatisfied, and that Mr. Shabangu and the Trust had committed acts of insolvency?

[14] On 11 June 2024, Mr. Shabangu and the Trust filed affidavits as directed by the court. SARS answered in regard to Mr. Shabangu and the Trust. In a nutshell, what transpired was that disputes were raised on the SARS system as to the veracity of the amounts upon which the applications had been brought. This was done in respect of the two companies and Mr. Shabangu by resubmitting returns for previously unchallenged assessments and in so doing procuring a recalculation and new tax assessment.

[15] SARS had reacted immediately to these resubmissions but in so doing had created a situation where although the resubmissions were assessed to have been meritless, the right to object in terms of the Tax Administration Act[4] (TAA) was engaged. This in and of itself made it impossible for the applications to be adjudicated on 12 June 2024 as the time for the objections had not yet expired.

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of the spouse whose estate has not been sequestrated (hereinafter referred to as the solvent spouse) as if it were property of the sequestrated estate, and to empower the Master or trustee to deal with such property accordingly, but subject to the following provisions of this section."

[4] 28 of 2011.

[16] In regard to the Trust, although no proof of payment was placed before the court, there was reference to a sale of shares, payment for which had been earmarked for the discharge of the tax debt. I will return to the sale of shares when dealing with the argument relating to advantage to creditors.

[17] Despite the parties having agreed upon a timetable for the further filing of papers in the matter, a series of unfortunate events occurred which prevented the respondents from doing so. By the time the hearing commenced however, the parties had all complied. The respondents sought condonation for their non-compliance. This was not opposed, and the hearings proceeded.

[18] When the applications were heard, the existence of the tax debt and the acts of insolvency were common cause. I need not deal with the circumstances surrounding the manner in which the reassessments were procured. It suffices to state that Mr. Shabangu laid the fact that this had been done at the door of a consultant engaged by him. SARS, quite understandably, given the timing of the resubmissions on 10 June 2024, took the view that this was nothing more than a desperate and contrived attempt to delay the proceedings.

[19] Thus, on 19 September 2024 it was not in issue that Mr. Shabangu was indebted to SARS in the sum of R1 335 760.40 and the Trust in the sum of R7 046 501.10. It was similarly not in issue that both had committed acts of insolvency.[5]

[20] Section 10 of the Insolvency Act provides that a court may grant a provisional order for sequestration:

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[5] A number of acts of insolvency were alleged by SARS which included, in respect of both Mr. Shabangu and the Trust the acts referred to in sections 8(e) and (g) of the Insolvency Act. Section 8(e) provides that it is an act of insolvency if a debtor *"makes or offers to make arrangement with any of his creditors for releasing him wholly or partially from his debts*" and section 8(g) *"if he gives notice in writing to any one of his creditors that he unable to pay his debts.*" In the present case both occurred in a letter sent to SARS on 29 June 2021.

"If the court to which the petition for the sequestration of the debtors estate has been presented is of the opinion that prima facie-

(a) The petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section nine; and

(b) The debtor has committed an act of insolvency or is insolvent; and

(c) There is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated'

It may make an order sequestrating the estate of the debtor provisionally."

[21] It was argued on behalf of both Mr. Shabangu and the Trust that despite the indebtedness and acts of insolvency, the court should find that the issue of a provisional order for their sequestration should not be granted as there was no 'advantage to creditors' in doing so.

[22] The argument rested on two legs. The first was that SARS had immense powers in terms of the TAA and that as it was a preferent creditor, it ought to use the TAA to procure payment. An order for the sequestration of the estates of Mr. Shabangu and the Trust was a last resort until they had exhausted the measures afforded to them by the TAA and complied with it. They could not until they had done so, proceed with a sequestration application nor it could not be said there was any advantage to creditors. The second leg was that since preservation orders relating to the assets of both had been granted in favour of SARS in terms of section 163 of the TAA, there was in fact no advantage to creditors if the orders sought were to be granted. I intend to deal with each in turn.

[23] Firstly, the preamble to the TAA provides that the purpose for which it was enacted was to *inter alia "provide for the effective and efficient collection of tax"* and *"to provide for the recovery of tax".* It was argued for the respondents that SARS is to be distinguished from ordinary creditors in consequence of the fact that it had the machinery[6] of the TAA to pursue payment of outstanding taxes from not only the taxpayers themselves but also from third parties in certain instances.

[24] It was argued for the applicants that given the means made available to SARS to collect tax, it was obliged to follow the TAA to the 'letter' and that besides making out a case for sequestration in terms of section 10 of the Insolvency Act, it was required to lay the basis for and prove compliance with the TAA. Although there was no basis laid for it, the submission was made that the sequestration (and liquidation) applications were brought "*to destroy Mr. Shabangu's status as a businessman*."

[25] It was also argued that section 177(1) provides that "*A senior SARS official may authorize the institution of proceedings for the sequestration, liquidation, or winding up of a person for an outstanding tax debt."* On this basis, so the argument went, the authorisation was a necessary administrative decision as a precursor to the institution of any proceedings.

[26] The proposition was developed[7] as follows:

> *"The trigger decision to institute sequestration or winding-up proceedings, being an administrative act, can on first principles be subjected to High Court review and setting aside proceedings.* This can *for obvious practical reasons not be done by way of a formal review application launched in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2001 before the hearing of the sequestration or winding up application. Given the exigencies of this*

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6 See for example section 179 in terms of which a third party can be appointed to satisfy a taxpayer's debt or section 183 where a person who assists a taxpayer to dissipate assets to frustrate collection of a tax debt can be held liable.

7 In the heads of argument filed on behalf of both Mr. Shabangu and the Trust.

type of case, the review should rather be in the form of a reactive, sometimes called collateral, review taking the form of SARS as applicant setting out why the senior SARS official decided to have the proceedings launched and the court reviewing the decision when exercising its discretion whether or not to grant the application. Interrogating the decision in this manner is the correct remedy sought by the correct party in reaction to the compulsory nature of the decision in the right proceedings.

The requirement that the first official must comply with the rationality and reasonableness requirements of just administrative action is in substance the same as the element of demonstrating advantage to creditors in the case of sequestration applications and the overarching discretion of the court in all sequestration and winding up matters. Section 10(c) of the Insolvency Act expressly provides for the court to exercise a discretion in these applications. Focusing on sequestrations, the courts require that the applicant must state why the sequestration is to the advantage of creditors. SARS must consequently not only state why the sequestration of Mr. Shabangu's estate will be to the advantage of his creditors but should place the statement in the mouth of the senior SARS official who took the decision that the estate should be sequestrated." [Footnotes omitted].

[27] Put simply, the argument is that the decision by SARS to institute the proceedings is, by virtue of the TAA, subject to challenge on the basis of rationality. SARS, for its part, contended that this argument was without merit for the reason that the application was brought in the name of the Commissioner who is entitled by virtue of the TAA to do so.

[28] Furthermore, the manner in which the TAA goes about empowering the Commissioner to carry out his functions with regard to the bringing of such

applications does not render his internal delegations of authority and decision to authorise or institute proceedings[8] subject to review.

[29] There is no reviewable decision – any decision in regard to whether or not the estate of the debtor is to be sequestrated is one which can only be made by a court. This is explicitly recognized in section 178 which provides that *"Despite any law to the contrary, a proceeding referred to in section 177 may be instituted in any competent court and that court may grant an order that SARS requests, whether or not the taxpayer is registered, resident or domiciled, or has a place of effective management or a place of business, in the Republic."*

[30] On the question of whether there would be any advantage to creditors, it was also argued that there was no attempt by SARS to place before the court any evidence to suggest that there would be any free residue after the payment of SARS. Since SARS has a preference it could not be said that there was any advantage to creditors through sequestration as opposed to utilization of the machinery of the TAA to procure payment of the outstanding tax debts.

[31] Having regard to the provisions of section 10(c) of the Insolvency Act, it was argued by SARS that the *"reason to believe"* that the sequestration would be to the advantage of creditors should be interpreted as contemplating something less than establishing a *prima facie* case. I was referred to *Bruwil Konstruksie (Edms) Bpk v Whitson NO & Another*[9] in which the court held that the meaning of the word "reasonable", in regard to the powers of a trustee as set out in section 69 of the Insolvency Act, "*contemplates a lesser burden than a prima facie case in a court of law, otherwise there would be hardly any purpose in the section."* This is consonant with the view expressed in *Meskin and Co v Friedman*[10]

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8 See for example 6(3)(c) and 11(2) of the TAA.

9 1980 (4) SA 703 (T) at 711A-E.

10 1948 (2) SA 555 (W) at 558 and 559, quoted with approval in *Lynn & Main Inc v Naidoo & Another* 2006 (1) SA 59 (N) at para [36].

"The phrase "reason to believe", used as it is in both these sections, indicates that it is not necessary, either at the first or at the final hearing, for the creditor to induce in the mind of the Court, a positive view that sequestration will to be financial advantage of creditors. At the final hearing, though the Court must be "satisfied", it is not to be satisfied that sequestration will be to the advantage of creditors, but only that there is reason to believe that it will be so."

And

"In my opinion, the facts put before the Court must satisfy it that there is a reasonable prospect – not necessarily likelihood, but a prospect which is not too remote – that some pecuniary benefit will result to creditors. It is not necessary to prove that the insolvent has any assets. Even if there are none at all, but there are reasons for thinking as a result of enquiry under the Act some may be revealed or recovered for the benefit of creditors, that is sufficient."

[32] It is the case for SARS that Mr. Shabangu is in control of a complex corporate structure of which the Trust is a part and that through this control, despite the non-payment of his debts, he continues to enjoy, what was argued, a lavish and luxurious lifestyle. Having regard to the fact that both the assets of Mr. Shabangu and the Trust are subject to preservation orders in terms of section 163 of the TAA, it is somewhat inexplicable that Mr. Shabangu has been able to finance and maintain such lifestyle in circumstances where the source of his funds is unknown and undisclosed by him. There is nothing before the Court to explain this.

[33] It is not in dispute between the parties that the assets of both Mr. Shabangu and the Trust are subject to a section 163 preservation order[11] with Mr.

[11] *Commissioner for the South African Revenue Services v Majestic Silver Trading 275 (Pty) Ltd & Others* (B445/2023) [2023] ZAGPPHC 1791 (11 October 2023) a judgment which confirmed the preservation orders against the trustees of the Trust in their representative capacities and in respect of Mr. Shabangu personally

Hannes Muller as the duly appointed *curator bonis* for those assets.[12] Additionally, it is not in dispute that those assets and the curatorship predate the launch of the present proceedings or that no directions had been given by the court in regard to any transactions involving the disposal of those assets.[13]

[34] Despite all his assets and those of the Trust being placed under curatorship and SARS having squarely raised his lavish lifestyle in its founding papers, Mr. Shabangu failed to deal with the allegations or to disclose the source of the funds from which his lifestyle is financed. SARS, for its part set out steps taken by it in terms of the TAA to procure payment. It suffices for purposes of this judgment to state that those steps yielded no results for SARS.

[35] It seems to me, having regard to these facts alone, that there would be an advantage to creditors for the granting of the order sought.[14]

[36] However, after the preservation orders had been granted, Mr. Shabangu purported to enter into an agreement on behalf of the Trust on 8 March 2024. The agreement, an annexure to his answering affidavit in both sequestration matters, purported to sell and transfer claims by the Trust as a shareholder in Villa Del Country Estate (Pty) Ltd and also to dispose of 50% of the shares held by the Trust in it.

[37] Somewhat bizarrely, although the agreement was only signed on 8 March 2024, its effective date was recorded as being 19 December 2023 some 4 months before that. Either way, the purported sale (whether it was entered into on 19 December 2023 or 8 March 2024) was entered into at a time when Mr. Shabangu and the other Trustees of the Trust knew that the property of the Trust was subject to a preservation order and could not be dealt with, save with the consent of Mr. Hannes Muller or by direction of the court.

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[12] Appointed in terms of section 163(2)(b).

[13] Section 163(12) of the TAA provides that *"Assets seized under this section must be dealt with in accordance with the directions of the High Court which made the relevant preservation order."*

[14] *Orestisolve Pty Ltd t/a Essa Investments v NDFT Investment Holdings Pty Ltd & Another* 2015 (4) SA 449 (WCC).

Clearly, neither Mr. Shabangu nor the Trustees of the Trust regarded themselves bound by the preservation order.

[38] In *ABSA Bank Ltd v Chopdat* [15] the court held that *"A creditor who undertakes the sequestration of a debtor's estate is not merely engaging in private litigation; he initiates a juridical process which can have extensive and indeed profound consequences for may other creditors, some of whom might be prejudiced if the debtor is permitted to continue to trade whilst insolvent."*

[39] In *Mercantile Bank Limited A Division of Capitec Bank Limited v Ross and Another*[16] the court held that *"It would be an absurdity not to sequestrate an estate of a person who is unable to pay his debts because that would be allowing him or her to continue to enter into contracts with unsuspecting and innocent members of the public who will have no recourse against him since he or she does not have assets which when realized would not be to the benefit of creditors."*

[40] In the present matter, it is readily apparent that notwithstanding the granting of a preservation order, Mr. Shabangu and the Trustees of the Trust have simply ignored it. The blatant disregard for the preservation order is egregious and makes plain the necessity for the granting of an order for provisional sequestration. It is the conduct of Mr. Shabangu as a "businessman" which imperils the *concursus creditorum* in both his personal and the Trust's estate. It will in my view be to the advantage of creditors for the provisional sequestration orders sought to be granted.[17]

[41] While both applications were initially enrolled for hearing on the unopposed roll, they subsequently became opposed. The manner in which the affairs of both Mr. Shabangu and the Trust, together with the other entities, have been conducted have made what would otherwise have been relatively straight forward sequestration applications more complex. Both SARS and Mr.

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[15] 2000 (2) SA 1088 (W) at 1092I – 1093A.
[16] 2023 JDR 1353 (GJ) at para [30].
[17] Para [31] *supra*, *Liberty Corporation Ltd v Moosa* 2023 (5) SA 126 (SCA) at para [27]; See also *Ex Parte Packer* 1933 GWLD 34.

Shabangu and the Trust were represented by two counsel and given what is at stake, the engagement of two counsel by both parties was a reasonable precaution. For this reason, I intend to make the order for costs that I do.

[42] In the circumstances, it is ordered:

[40.1] In case number 2023/121282 for the sequestration of Ngwane Roux Shabangu.

[40.1.1] The estate of Ngwane Roux Shabangu, the First Respondent, is placed under provisional sequestration in the hands of the Master of the High Court Pretoria.

[40.1.2] A ***rule nisi*** is issued, calling on the First Respondent and all persons interested to show cause on **Monday 25 November 2024** as to why the estate of the First Respondent should not be placed under a final order of sequestration.

[40.1.3] This order is to be served by the Sheriff of the Court on the First Respondent personally and on all registered Trade Unions representing the employees of the Respondent, if any, the Master of the High Court Pretoria and the South African Revenue Services as prescribed in the Insolvency Act.

[40.1.4] The costs of the application are to be costs in the sequestration, which costs are to include the costs consequent upon the engagement of two counsel, in respect of Advocate CAA Louw on scale B and in respect of Advocate MP Van Der Merwe SC on scale C.

[40.2] **In case number 2023/121275 for the sequestration of the Roux Shabangu Family Trust (IT4848/05).**

[40.2.1] The estate of the Roux Shabangu Family Trust (represented by the First to Fourth Respondents in their capacities as the appointed Trustees of the Trust), is placed under provisional sequestration in the hands of the Master of the High Court Pretoria.

[40.2.2] A ***rule nisi*** is issued, calling on all persons interested to show cause on **Monday 25 November 2024** as to why the estate of the Trust should not be placed under a final order of sequestration.

[40.2.3] This order is to be served by the Sheriff of the Court on the First to Fourth Respondents personally and on all registered Trade Unions representing the employees of the Roux Shabangu Family Trust, if any, the Master of the High Court Pretoria and the South African Revenue Services as prescribed in the Insolvency Act.

[40.2.4] The costs of the application are to be costs in the sequestration, which costs are to include the costs consequent upon the engagement of two counsel, in respect of Advocate CAA Louw on scale B and in respect of Advocate MP Van Der Merwe SC on scale C.

[40.2.5] The application for intervention is postponed *sine die*.

A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:	19 SEPTEMBER 2024
JUDGMENT DELIVERED ON:	15 OCTOBER 2024

IN CASE NO. 121275/2023 (THE TRUST) & 121282/2023 (PERSONAL)

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IN CASE NO. 121275/2023 (THE TRUST)

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