REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: 2020/35696 [P]

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

1 March 2021

DATE

RT SUTHERLAND

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE

Applicant

IN RE:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE

Applicant

and

HAMILTONN HOLDINGS (PTY) LTD	First Respondent
HAMILTONN PROJECTS CC	Second Respondent
MOK PLUS ONE (PTY) LTD	Third Respondent
ABOMPETHA (PTY) LTD	Fourth Respondent
FELIHAM (PTY) LTD	Fifth Respondent
THABISO HAMILTON NDLOVU	Sixth Respondent

The order and judgment are uploaded to Caselines on 1 March 2021 and the parties notified by email and that constitutes the deemed date of delivery.

THE ORDER

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(1) The Provisional order of 10 September 2020 is confirmed and made final.

(2) The respondents shall bear the costs, including the costs of two counsel, jointly and severally, the one paying the others to be absolved.

JUDGMENT

SUTHERLAND ADJP:

Introduction

[1] On 20 September 2020, the applicant, (SARS) obtained, *ex parte*, from Potterill ADJP, a provisional preservation order against all six respondents, as contemplated in section 163 of the Tax administration Act.[1] This judgment addresses the question whether, on the

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[1] Section 163 of the Tax Administration Act 28 of 2011provides:

(1) A senior SARS official may, in order 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 the official on reasonable grounds is satisfied may be due or payable, authorise an *ex parte* application to the High Court for an order for the preservation of any assets of a taxpayer or other person prohibiting any person, subject to the conditions and exceptions as may be specified in the preservation order, from dealing in any manner with the assets to which the order relates.

[Sub-s. (1) substituted by s. 57 *(a)* of Act 39 of 2013 (wef 1 October 2012).]

(2) *(a)* SARS may, in anticipation of the application under subsection (1) seize the assets pending the outcome of an application for a preservation order, which application must commence within 24 hours from the time of seizure of the assets or the further period that SARS and the taxpayer or other person may agree on.

[Para. *(a)* substituted by s. 57 *(b)* of Act 39 of 2013 (wef 1 October 2012).]

(b) Until a preservation order is made in respect of the seized assets, SARS must take reasonable steps to preserve and safeguard the assets including appointing a *curator bonis* in whom the assets vest.

[Para. *(b)* substituted by s. 57 *(c)* of Act 39 of 2013 (wef 1 October 2012).]

(3) A preservation order may be made if required to secure the collection of the tax referred to in subsection (1) and in respect of-

(a) realisable assets seized by SARS under subsection (2);
(b) the realisable assets as may be specified in the order and which are held by the person against whom the preservation order is being made;
(c) all realisable assets held by the person, whether it is specified in the order or not; or
(d) all assets which, if transferred to the person after the making of the preservation order, would be realisable assets.

[Sub-s. (3) amended by s. 57 *(d)* of Act 39 of 2013 (wef 1 October 2012).]

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

(a) make a provisional preservation order having immediate effect;
(b) simultaneously grant a rule *nisi* calling upon the taxpayer 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 for the purpose of discharging the provisional preservation order if 24 hours' notice of the application has been given to SARS; and
(d) upon application by SARS, confirm the appointment of the *curator bonis* under subsection (2) *(a)*or appoint a *curator bonis* in whom the seized assets vest.

[Para. *(d)* added by s. 57 *(g)* of Act 39 of 2013 (wef 1 October 2012).]

(5) A preservation order must provide for notice to be given to the taxpayer and a person from whom the assets are seized.

(6) For purposes of the notice or rule required under subsection (4) *(b)* or (5), if the taxpayer or other person has been absent for a period of 21 business days from his or her usual place of residence or business within the Republic, the court may direct that it will be sufficient service of that notice or rule if a copy thereof is affixed to or near the outer door of the building where the court sits and published in the *Gazette*, unless the court directs some other mode of service.

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

(a) authorising the seizure of all movable assets;
(b) if not appointed under subsection (4) *(d)*, appointing a *curator bonis* in whom the assets vest;

[Para. *(b)* substituted by s. 57 *(h)* of Act 39 of 2013 (wef 1 October 2012).]

(c) realising the assets in satisfaction of the tax debt;
(d) making provision as the court may think fit for the reasonable living expenses of a person against whom the preservation order is being made and his or her legal dependants, if the court is satisfied that the person has

this, the Return Day, the order should be confirmed or be discharged. The order resulted in the seizure of several assets including the freezing of banking accounts and the removal of vehicles.

[2] All the respondents oppose the confirmation. The 6th respondent Hamilton Ndlovu. (Ndlovu) deposed to two answering affidavits on behalf of all respondents. He is the sole director of the first Respondent, Hamiltonn Holdings (Pty) Ltd (HH) and the sole member of the second respondent. Hamiltonn Projects CC (HP). The third respondent, Mok Plus One (Pty) Ltd (Mok) whose sole director is Sechaba Mokone and the fourth respondent. Abompetha (Pty) Ltd (Abompetha) whose directors are Thuthuka Kunene and Kagiso Sekgaolelo are entities and persons who, says Ndlovu, have a close relationship with him and collaborate in business. The fourth respondent, Feliham (Pty) Ltd (Feliham) has as its sole director, Felicia Sekate, who Ndlovu identifies as his fiance. They too, says Ndlovu, collaborate in business with him. The common cause facts as adduced in evidence bear out a

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disclosed under oath all direct or indirect interests in assets subject to the order and that the person cannot meet the expenses concerned out of his or her unrestrained assets; or

(e) any other order that the court considers appropriate for the proper, fair and effective execution of the order.

(8) The court making a preservation order may also make such further order in respect of the discovery of any facts including facts relating to any asset over which the taxpayer or other person may have effective control and the location of the assets as the court may consider necessary or expedient with a view to achieving the objects of the preservation order.

(9) The court which made a preservation order may on application by a person affected by that order vary or rescind the order or an order authorising the seizure of the assets concerned or other ancillary order if it is satisfied that-

(a) the operation of the order concerned will cause the applicant undue hardship; and

(b) the hardship that the applicant will suffer as a result of the order outweighs the risk that the assets concerned may be destroyed, lost, damaged, concealed or transferred.

(10) A preservation order remains in force-

(a) pending the setting aside thereof on appeal, if any, against the preservation order; or

(b) until the assets subject to the preservation order are no longer required for purposes of the satisfaction of the tax debt.

(11) In order to prevent any realisable assets that were not seized under subsection (2) from being disposed of or removed contrary to a preservation order under this section, a senior SARS official may seize the assets if the official has reasonable grounds to believe that the assets will be so disposed of or removed.

(12) Assets seized under this section must be dealt with in accordance with the directions of the High Court which made the relevant preservation order.

symbiotic relationship among the respondents. The probabilities are that they are all alter egos of Ndlovu. Among other companies in which Ndlovu has an evident interest and are part of the "Ndlovu circle" of businesses is most notably Kgodumo Mokone Trading Enterprises (Pty) Ltd (Kgodumo) to which reference is made hereafter.

[3] The business in which these several entities are engaged is the sale of various goods exclusively to various organs of state. Their declared scope is wider than that, but the account of their business transactions given by Ndlovu shows the more modest and limited de facto scope. An extensive list of transactions is provided in the answering affidavit to substantiate the supposed legitimacy of their trading activities and not a single private sector customer is mentioned.

[4] The demand for goods specifically relevant to combatting the covid crisis resulted in contracts to supply goods to the National Health Laboratory Service (NHLS) being awarded to HH, to Mok, to Abompetha and to Feliham at virtually the same time. Kgodumo also got a similar contract.

[5] The Hawks are apparently investigating these contracts to determine whether they are vitiated by improprieties. That investigation is of no relevance to the section 163 order. There is some controversy about whether SARS knew that a few days before it got the provisional preservation order, it already knew that the Hawks were to raid the respondents. SARS deny knowledge prior to the raid. In my view, nothing turns on whether SARS knew or not. No part of SARS's case is premised on any unlawfulness in the contracts between NHLS and any of the respondents.

[6] The issues in dispute were crystalised by the parties and agreed to in a practice note. These are the key questions for decision.

6.1 In relation to the *ex parte* application, did SARS fail to disclose material information which, had it been communicated to the judge, could have resulted in her refusing the order?

6.2 Did SARS make out a cogent case for a section 163 Order? Of the three key elements pertinent, one is common cause, ie, the assets seized are indeed "realisable" assets as contemplated in section 163(1). The other two elements are whether the official who formed the opinion that an order was required acted reasonably, and moreover, has it been shown that the order was indeed required to prevent the frustration of the collection of TAX and VAT that was likely to be due as contemplated in section 163(1).

[7] The approach of the court is that as set out comprehensively in *Commissioner, South African Revenue Service v Tradex (Pty) Ltd & Others* 2015 (3) SA 596 (WCC) and no need repetition of those dicta is necessary.

[8] Ancillary to these points are the questions whether any tax is indeed due by the respondents, and whether the assets seized so exceed the sum of likely tax due and as a result the order is overbroad.

The basis for the order being sought by SARS

[9] First, an overview of how this matter began is useful. Ndlovu is solely responsible for SARS taking an interest in his affairs and that of the respondents. He thrust himself out of obscurity by doing two things. First, in May 2020, he bought five luxury vehicles at the about

same time as certain of the other respondents received payment for lucrative contracts with the NHLS. The collective value of the cars is said to be about R10.5m. Then he bragged about this feat on social media. Apparently, there are people at SARS who trouble to follow social media. They looked at his tax affairs and were impressed that Ndlovu had spared SARS the burden of reading any tax returns since 2016. They referred the big spender to the Illicit Economy Unit who have a keen interest in mismatched income and expenditure phenomena. They delved into Ndlovu's affairs, including his banking accounts. What was observed were flows of money to and from one or other of the respondents and to elsewhere and other incongruent cashflows into one or other respondent which did not ostensibly have a rational business purpose. No less interestingly, the Tax and VAT affairs of the several respondents were not in order. Not only were returns outstanding, some for several years, but the income streams, especially payments from the NHLS contracts, to the several respondents could not be matched with the VAT that would, by inference, be due and payable. Moreover, some of the respondents had declared themselves to be dormant yet were supposedly trading during the period of dormancy.

[10] The Illicit Economy Unit looked especially at the NHLS transactions. The four respondents who had the contracts had received huge sums from NHLS. On 31 March HH got paid 7.2m. On 24 April, Abompetha got paid R17.4m and on the same day Feliham got paid R7.2m. Mok got paid R17.8m on 29 April. What was not visible was any money paid by these respondents to produce or acquire the goods sold. Mok paid R17.7m to Ndlovu. Abompetha paid sums totalling R17.460m to Ndlovu. Feltham paid R14.990m into same Ashburton account into which HH made a R30m deposit. HH, among other transactions, bought luxury vehicles. In addition, after the order was granted, it was discovered that Kgodumo had a contract with NHLS and paid the proceeds to HP. Of these funds, R20m was

then moved to the Sue and Ed Trust, controlled by Ndlovu, about which more is said hereafter.

[11] An estimate was made by SARS of the likely revenue, in its opinion, that was due from tax liability and VAT, based on the data available.

11.1 HH: Tax R11.042m and VAT R5.248m.

11.2 HP: Tax R1.398m and VAT R874,000.

11.3 Mok: VAT R2.391m

11.4 Abompetha: VAT R2.391

11.5 Feltham: VAT R1.889m

11.6 Ndlovu: Tax for the years Y2017 to Y2021: R36, 840m. (of which R23,341.292 was due only in the Y2021, an aspect addressed hereafter.)

[12] The state of the respondents' tax affairs was non-compliant as regards Provisional Tax and VAT. This is, per se, not disputed although the scale of non-compliance is disputed. The view taken by SARS is thus:

12.1 HH: No VAT returns after Y2020/03. Inadequate disclosure of output VAT in Y2020/03 to Y2020/03. Registration as a VAT Vendor in Y2017 was late. Inadequate tax returns for Y2017 until Y2019. The data reflected income in Y2017 of R1.243m yet a nil income was declared. The same pattern occurred in Y2018 and Y2019. The bank account reflects income in every year from Y2017 to Y2021: ie, R1.519m; R2.457m; R2.233m; R33,421m; R10.915m. An estimate of the minimum VAT owed was R5,248m. An estimate of the minimum Tax owed was R11.042m.

12.2 HP: No VAT returns made after Y2020/05. Inadequate VAT output declaration from Y2019/03 until Y2020/05. Registration as VAT vendor, in 2019, was late. Inadequate income declarations from Y2017 until Y2019. Income tax outstanding: R1.398m. VAT liability: R2.391m.

12.3 Mok: Late registration as VAT vendor in Y2020. No output VAT paid in Y2020 and Y2021. Inadequate income declaration in Y2018 and Y2019. In Y2021 despite a declaration of income of R2m it declared a nil first provisional Tax liability.

12.4 Abompetha: Late registration as a VAT vendor in Y2021. No output VAT paid in Y2021. Estimated VAT liability R2.282m.

12.5 Feliham: Late registration as VAT vendor on Y2018. No output VAT paid in Y2021. No Income declaration for Tax from Y2017 to Y2018. No Tax return Y2019. Estimated VAT liability: R1.889.

12.6 Ndlovu: No tax returns for Y2016 to Y2019. Yet both HH and HP deducted his remuneration in their returns. Demands had been made by SARS in June 2020 to rectify non-compliant status. Penalties had been imposed for the delinquency. Over the period Y2017 – Y2021, based on the bank accounts, Ndlovu had a gross income of R72,590m. The estimated tax liability was estimated thus: 2017: R1.211m; 2018: R3.103m; 2018: R5.045m; 2020: R4.132m; 2021: R23.341m.

[13] The nub of the opinion formed by the SARS officials was that Ndlovu used these entities as his alter egos to spread potential liabilities and evade the scale of liability from

progressive tax scales. The income derived from the NHLS contracts by Mok, Abompetha and Feliham were channelled to HH. There was a need to probe these transactions and the respondents' tax affairs to determine who was the true beneficiary and what was the genuine tax and VAT liability of each respondent.

[14] This account of the tax affairs of the respondents is hardly in dispute although the accuracy of SARS's figures are, in certain aspects, challenged. However, these proceedings are not concerned to decide disputes of fact. The quibbles raised in the affidavits by the respondents take the matter no further. So-called experts engaged by the respondents to contradict the perspectives advanced by SARS are also unhelpful and in argument any reliance thereon was abandoned. Their reports, in any event, fail to resemble expert reports and are, moreover, not from an independent source. At the interim stage of the evaluation of the liability of the respondents the fact that there are contending views on quantum of Tax or VAT owing and due is not dispositive of the issue at hand.

Was there a material non-disclosure?

[15] The respondents allege that a material non-disclosure occurred in the *ex parte* hearing. A duty to disclose any material fact that might be relevant to the absent adversary's interest is trite. To that issue I now turn.

[16] What is argued to be the material information? The contention is that before the order was granted on 10 September 2020, all the respondents were already engaged in putting right any inadequacies in their tax affairs. This effort was omitted from the affidavits put before the court when the provisional order was granted. Moreover, the fact that PAYE was paid prior to the order being taken was not mentioned. Why should these omissions matter?

[17] These facts which the respondents complain would have made a potential difference between the order being granted or not, would not in my view, have made any material impression of the evaluation of the application. Against the panoply of tax irregularities, factual oddities and absence of apparent commercial rationale, exhibited by the common cause facts, these details are peripheral. In any event much of the effort to regularise non-compliance was pursuant to a demand made by SARS on 26 June 2020. There is no indication that the regularisation efforts were spontaneous. The contention is thus lacking in cogency.

[18] A second argument was advanced that, taking the founding affidavit as gospel, the allegations made were completely unsubstantiated because the bank statements were not attached for the judge to scrutinise. It is true that the source documentation upon which the opinion was expressed was not before the court in the *ex parte* proceedings. The contention is, however, not well founded. What was set out was an account of the various respondents' tax status, their degree of compliance and a summary account of the mismatch between declared income and apparent tax liability. This pattern of behaviour married to the conspicuous consumption and cash flow movements are all aspects that inform an impression, which in my view, reasonably, is one that the respondents are splurging without regard to making provision for or paying what they owe to the fiscus. The notion that the judge would, in this context, scrutinise the bank statements to check the arithmetic, is far-fetched. Accordingly, the criticism is misplaced.

Does the case made out meet the requirements of section 163?

[19] A major contention of the respondents is that, at best, the case of SARS is aimed at showing a 'possible tax liability' and this is wrong. What is needed is a 'probable' liability. In my view this is mere semantics: it matters not what label is used as a shorthand, rather what matters is whether the opinion formed that the collection of revenue was likely to be imperilled having regard to the conspectus of facts and circumstances known at the time. This notion of 'possible/probable' tax liability need not trouble us again.

[20] Allied to this notion is the complaint that SARS has not computed the tax and VAT liability accurately and has exaggerated what could be due. It is correct that in respect of Ndlovu's personal income and potential tax liability there is an unexplained anomaly that *prima facie* seems to exaggerate the quantum due. However, the contention that this anomaly vitiates the estimate is at cross purposes with the provisions of section 163. The very premise of the section and the utility of the preservation order is that the true tax liability is unknown and remains to be determined. The officials can, on the basis of the fragmentary information available, at best, make an estimate, and self-evident practicality dictates that the estimate should be generous rather than conservative because the purpose is to ensure that all due tax shall be collected. A sensible estimate ought generically, to result in a reduction of the amount thought owing upon the completion of the whole audit exercise. A dispute of fact about the sum of the estimate in interim proceedings is futile. If hardship because of the seizure of assets has resulted, the section makes provision for relief. As the curator remarks, no such relief has been sought, as yet.

[21] The critical question is whether reasonable grounds exist to believe that there is a real risk of assets being dissipated and thereby frustrate the fiscus's attempt to collect what is due.

Given the picture that emerges would a reasonable observer suspect that the behaviour of the respondents presented a threat to revenue collection? In my view these are the salient factors:

21.1 The delinquency in the rendering of tax returns is an obvious and strong indication that the taxpayer is, at best, irresponsible and, at worst, is hiding income. When that conduct occurs over several years the inference of deliberate resistance to the payment of tax due becomes even stronger.

21.2 The diversion of huge sums of money among various businesses supports the inference of them all being mere alter egos of one person and implies, strongly, that shady dealings are likely. The principal cash flows have been described already.

21.3 The spendthrift behaviour of Ndlovu; That 5 luxury cars acquired, at virtually one go, is evidence of consumption on a grand scale and gives rise to the inference that the assets under his control are unlikely to be deployed to the fiscus and are more likely to be devoted to immediate and extravagant gratification of material wants depleting what is available to pay tax liabilities, present and future.

21.4 The storage of a huge sum in an investment vehicle with international links, like Ashburton, in the context of the whole, hints at a readiness to export the wealth or deploy it elsewhere at the opportunity arises. It is true that holding reserve funds in an investment vehicle gives rise to no reasonable adverse inference, per se, but the context colours the inferences that are appropriate. None of these respondents have any infrastructure or assets to speak of; they are mere conduits to procure a flow of money

from state tenders. Since the order, not one of the respondents has tried to trade. The prospect of 'capital reserves' being ploughed back into the businesses is nil.

21.5 The episode of the buying of a house in Bryanston is of especial interest in showing the risk of dissipation. R20m was paid by HH to the Sue and Ed trust which thereupon concluded a purchase agreement for a house. The property sale agreement was then novated to have it registered in the name of a company notionally unrelated to Ndlovu; ie Ziason Kaihatsu (Pty) Ltd. The controlling mind of this convoluted transaction was Ndlovu. The modus operandi speaks to a likely process of secreting assets or insulating them from retrieval.

[22] In my view, the opinion that a preservation order was required was wholly reasonable and appropriate.

[23] It is necessary to scrutinise the order to assess that it is appropriate to the circumstances. The essential complaint is that order appropriates more value in assets that the likely tax liability. Can this be determined at the interim stage?

[24] The heart of this contention is located in the fact that a large portion of the liability is for the Y2021. At the time of the hearing and the writing this judgment, the second provisional payments on tax are not yet due, but at least 5 of the 6 VAT payment periods have fallen due. When the order was granted on 10 September 2020, the first provisional tax payment due dates had passed unpaid and at least 4 of the 6 VAT payment periods had fallen due, either unpaid or the correct sum due was in dispute. Plainly most of the liabilities which were due by 10 September had not been paid. The contention of the respondents is therefore

thin and in the context of the circumstances is of no great moment. Moreover, at a purely practical level the revenue derived in Y2021 is likely needed to address the arrears liabilities too.

[25] Of course, the opportunity to offer an explanation to refute the impression created by the objective facts existed. But the answering affidavits are bereft of any materially helpful allegations. The high point is that they were intent on paying what shall fall due. This is belied by the duration of the non-compliance. The cash flows which objectively show that the several corporate respondents are mere fronts for Ndlovu to whom all money seeps like oil to a sump is telling; the answer offered to explain that flow is that the various entities assist one another with loans. However, loans for what? They are mere conduits. If the respondents could have explained a rational business model they would have done so. They have not.

[26] It is likely that the estimated liability is higher than what shall eventually be determined. That does not establish overbroadness.

Conclusions

[27] The order is required as contemplated in section 163.

[28] There was no material non-disclosure in the *ex parte* application.

[29] The order is not overbroad.

The Costs

[30] There was a grievance articulated that a costs award against a respondent in *ex parte* proceedings is inappropriate. These costs must be distinguished from the expense of paying the curator's costs and an order that the respondent pay those amounts. In my view, it is

preferable in an *ex parte* application to seek merely an order that the respondent show cause on the return day why it should not pay the legal costs rather than make an order at that time. However, because the proceedings are interim it makes no practical difference as that costs order can be revisited on the Return Day. In the circumstances where the order is confirmed. the controversy evaporates.

The Order

1. The Provisional order of 10 September 2020 is confirmed and made final.
2. The respondents shall bear the costs, including the costs of two counsel, jointly and severally, the one paying the others to be absolved.

ROLAND SUTHERLAND
Acting Deputy Judge-President, Johannesburg
Gauteng Division of the High Court of South Africa

Date of Hearing: 22 February 2021
Date of Judgment: 1 March 2021

For Applicant:
Adv C Naude,
with her, Adv K Ramaimela and Adv I Hlalethoa
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For First to Sixth Respondents:
Adv L Sigogo,
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