

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

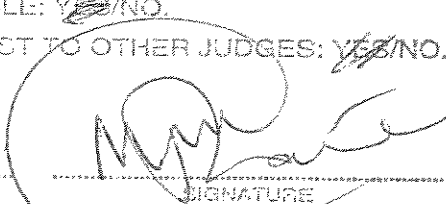
(1) REPORTABLE: ~~YES~~/NO.

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

(3) REVISED.

01/12/2014

DATE



SIGNATURE

Case No: 49274/2014

Date heard: 29 September 2014

Date of order: 01 October 2014

Reasons for judgment: 01 December 2014

In the matter between:

THE COMMISSIONER FOR THE
SOUTH AFRICAN REVENUE SERVICES

Applicant

and

| | |
|---|----------------------------|
| AFRICA CASH AND CARRY (PTY) LTD | 1 st Respondent |
| AFRICA CASH AND CARRY (CROWN MINES) (PTY) LTD | 2 nd Respondent |
| MOHAMMED EDREES HATHURANI | 3 rd Respondent |
| EDREES AHMED HATHURANI | 4 th Respondent |
| IQBAL AHMED HATHURANI | 5 th Respondent |
| CASSIM AYSEN | 6 th Respondent |
| EDREES AHMED HATHURANI N.O. | 7 th Respondent |
| (In his capacity as trustee for the time being of the Edrees Hathurani Family Trust (No. IT1919/97)) | |
| IQBAL AHMED HATHURANI N.O. | 8 th Respondent |
| (In his capacity as trustee for the time being of the | |

| | |
|---|-----------------------------|
| Edrees Hathurani Family Trust (No. IT1919/97)) CASSIM AYSEN N.O. (In his capacity as trustee for the time being of the Edrees Hathurani Family Trust (No. IT1919/97)) | 9 th Respondent |
| YOUSHA TAYOB N.O. (In his capacity as trustee for the time being of the Edrees Hathurani Family Trust (No. IT1919/97)) | 10 th Respondent |
| IQBAL AHMED HATHURANI N.O. (In his capacity as trustee for the time being of the Iqbal Ahmed Hathurani Family Trust (No. IT725/06)) | 11 th Respondent |
| AYESHA HATHURANI N.O. (In his capacity as trustee for the time being of the Iqbal Ahmed Hathurani Family Trust (No. IT725/06)) | 12 th Respondent |
| FAROUK SHARIEF N.O. (In his capacity as trustee for the time being of the Iqbal Ahmed Hathurani Family Trust (No. IT725/06)) | 13 th Respondent |
| MOHAMMEED EDREES HATHURANI N.O. (In his capacity as trustee for the time being of the Mohammed Edrees Hathurani Family Trust (No. IT7027/06)) | 14 th Respondent |
| ZENOBIA KHAN N.O. (In his capacity as trustee for the time being of the Mohammed Edrees Hathurani Family Trust (No. IT7027/06)) | 15 th Respondent |
| FAROUK SHARIEF N.O. (In his capacity as trustee for the time being of the Mohammed Edrees Hathurani Family Trust (No. IT7027/06)) | 16 th Respondent |
| CASSIM AYSEN N.O. (In his capacity as trustee for the time being of the Cassim Aysen Family Trust (No. IT724/06)) | 17 th Respondent |
| FOZIA KHAN N.O. (In his capacity as trustee for the time being of the Cassim Aysen Family Trust (No. IT724/06)) | 18 th Respondent |

IMTIYAZ AYSEN N.O.

19th Respondent

(In his capacity as trustee for the time being of the
Cassim Aysen Family Trust (No. IT724/06))

REASONS FOR JUDGMENT

A.M.L. PHATUDI J:

Introduction

[1] The provisional preservation order (order) was issued in terms of the provisions of section 163 of the **Tax Administration Act 28 of 2011** (TAA) with a return date of 28 August 2014. The order was extended to 29 September 2014 on the respondent's application.

[2] In an unopposed motion court for the 29 September 2014, the respondents applied for the postponement of the matter to 09 February 2015 which will effectively extend the order to said date. The parties who sought an extension of the order are all respondents (Hathurani respondents) except for the respondents 6, 9, 17, 18 and 19. The applicant opposed the application. The parties handed up both the substantive application and the opposing affidavit from the bar. I then stood the matter down to Wednesday 01 October 2014, which was my next unopposed motion sitting day.

[3] Having heard counsel for the parties, I confirmed the order. These are the reasons for the confirmation of the order.

Factual Background

[4] On 10 July 2014, The Commissioner for the South African Revenue Service (the applicant) obtained a provisional preservation order granted in chambers by Bertelsmann J.¹ Cloete Murray of Sechaba Trust (Pty) Limited (Sechaba Trust) was appointed as *curator bonis* with rights, title and interest in all the assets of the First and Second respondents would rest including but not limited to shareholding, loan accounts, members interest, movable and immovable assets and without limiting the generality of these assets, (first and second respondents 'known assets').²

[5] On the 25 July 2014, the sixth, seventeenth, eighteenth and nineteenth respondents entered their notice of intention to oppose the order. They, on 26 August 2014 withdrew their opposition. Hathurani respondents recorded their opposition on the 25 August 2014. Flowing from the engagement in respect of postponement of the matter and extension of the order from 28 August 2014, by agreement, Bam J extended the order to 29 September 2014 subject to the following conditions:

'3. That the first, second, third, fourth, seventh, eight, tenth, eleventh, twelfth,, thirteenth, fourteenth, fifteenth and sixteenth respondents is ordered to provide the

¹ The order reads: '2. That, in terms of the provisions of section 163 of the Tax Administration Act 28 of 2011 ("the Tax Administration Act"), the following provisional preservation order is issued, with immediate effect, pending the return date. 3. That the respondents be called upon to show cause, if any, on the return date, being 28 August 2014 at 10h00, why the order should not be made final.'

² Clause 4 of Bertelsmann J order reads: 'That Mr Cloete Murray of Sechaba Trust (Pty) Ltd is appointed to act as *curator bonis* (hereinafter referred to as the "*curator bonis*") in whom the rights, title and interest in all the assets of the first and second respondents will vest, including, but not limited to, and shareholding, loan accounts, members' interest, movable and immovable assets and without limiting the generality of these assets, the assets listed in Schedule A hereto ("the first and second respondents' known assets").'

applicants, in writing, with any proposed amendments to the provisional order by no later than 16h00 on Friday, 5 September 2014.

4. That in the event of the first, second, third, fourth, seventh, eighth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth and sixteenth respondents wishing to oppose the confirmation of the provisional order granted on the 10th of July 2014, they are ordered to file any answering affidavits by no later than 16h00 on Monday, 15 September 2014.' Hathurani respondents sought further extension of the order to 09 February 2015, thus this application.

The law

[6] It is trite law that an applicant in an application for a postponement seeks an indulgence. There are non-exhaustive jurisdictional factors that are to be considered in granting a postponement. Some of them are that the (i) application for postponement must be made timeously, if not, the (ii) reason for the lateness of the application for postponement be set out, (iii) the conduct of parties and/or legal practitioners' play of the oldest tricks in the book of terminating their legal representatives mandate or of the legal representatives' withdrawal from the case with a view to persuade the court to grant a postponement because the party would then be unrepresented. Van der Westhuizen J penned in **Shilubana and Others v Nwamitwa**³ that in **Lekowane and Another v Minister of Justice and Constitutional Development**⁴ the Constitutional Court 'added the following factors to be considered in granting a postponement: (1) the broader public interest; and (ii) the prospects of success on the merits.'

³ 2007 (5) SA 620 CC in paragraph [11]

⁴ 2007 (3) BCLR 280 CC in paragraph [17]

Evaluation

[7] I deem it necessary to deal with some of the jurisdictional factors.

(i) The application for postponement must be made timeously

It is common cause that Hathurani respondents were served with the order on 11 July 2014. Three days before the return day, Hathurani respondents applied for the postponement of the matter and an extension of the order. Such postponement was granted with the extension of the rule to 29 September 2014. They were ordered to provide the applicant with any proposed amendments to the provisional order by no later than 16h00 on Friday 05 September 2014. There is neither evidence nor submissions advanced by Hathurani respondents of compliance with the order.

[8] Hathurani respondents were further ordered to file answering affidavit (if any) opposing confirmation of the provisional preservation order by no later than 16h00 on Monday 15 September 2014. The respondents failed to file their answering affidavit. They instead, file this postponement application on the day of hearing for confirmation of the order. The reason they advance is to grant them the opportunity to deal meaningfully with the papers and to file answering affidavit. The reason(s) advanced for the previous postponement is similar if not the same as the one now advanced. They now seek 'four weeks to file an answering affidavit.'

[9] Counsel for Hathurani respondents submitted that the new attorney was appointed on 10 September 2014. He pointed out that it was

practically impossible for the attorney to complete his task within the limited time available. The Hathurani respondents' "new" attorney failed to apply for condonation of non-compliance with the time limits set out in the provisional preservation order as extended. No such condonation is sought herein.

[10] Court rules, court orders and practice directives are there to be complied with. Non-compliance thereof cannot be condoned unless an indulgence has been granted. The non-compliance puts a serious hurdle in the way of the parties' path of finalising the matter. Bosielo AJ (as he then was at the Constitutional Court) penned in **Grootboom v NPA**⁵ that 'it is axiomatic that condoning a party's non-compliance with the rules of court or directions is an indulgence.' An indulgence, that is, allowing someone to enjoy a desired pleasure, can only be granted where a party has furnished a full and satisfactory explanation of the circumstances he found himself.

[11] Considering the evidence on record and submissions made, I find no good and strong reason for the Hathurani respondents' failure to file their application for postponement timeously. Their attorney had from, at the least, 10 September 2014 to the latest, 23 September 2014, (being the closing day for enrolment of matters on unopposed motion roll for the 29 September 2014) to file the application for condonation and postponement. The attorney knew, or reasonably expected to have known that the matter will be enrolled on the unopposed motion roll for the 29 September 2014. There is no reason advanced as to what

⁵ 2014 (2) SA 68 CC at paragraph [20]

hindered him from 10 to 23 September 2014 to file the application for postponement.

(ii) The “oldest trick” of withdrawal as attorney of record and/or termination of the legal representatives’ mandate.

[12] It is stated in **Erasmus Superior Court Practice**⁶ that ‘[j]udicial officers have a duty to the Court system ... the public and the parties to ensure that this abuse is curbed by ... refusing a postponement. Mere withdrawal by a practitioner or the mere termination of a mandate does not ... entitle a party to a postponement as of right.’

[13] The appointment of attorneys whose mandates are terminated and or legal representatives for Hathurani respondents on the day before the hearing of the matter fits well within the “old trick” like a hand in a glove that warrant a refusal of a postponement.

(iii) The broader public interest

[14] **Section 163 (1) of Tax Administration Act (TAA)** provides that ‘[a] senior SARS official may authorise an *ex parte* application to the High Court for an order for the preservation of any assets of 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.’

⁶ B1 – 306 B-1 footnotes omitted

[15] TAA further states in section 163 (4) that

'The court to which an application for a preservation order is made may –

(a) ...

(b) ...

(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.'

[16] SARS (the applicant) is tasked with the duty to collect the revenue from the taxpayers. Section 163 provides for the procedure at the applicant's disposal, of preserving assets of the tax payers to avoid the frustration of tax collection. A preservation order is not a tax collection step but a mere preservation of assets that can be realised at a later stage.

[17] The applicant is required to show, when applying for preservation order, that there is material risk that assets that would otherwise be available in satisfaction when needed at execution stage.

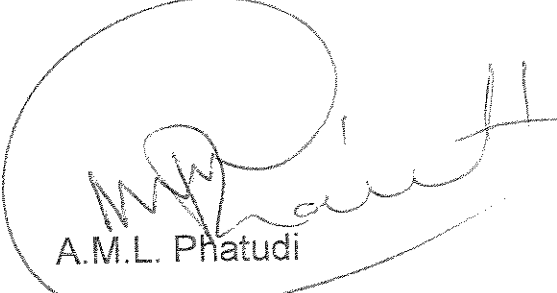
[18] It is not in dispute that Hathurani respondents are either tax payers and or shareholders of the tax payer. This is evident by the withdrawal of opposition to the preservation order by the Sixth, Ninth, Seventeenth to Nineteenth respondents.

[19] Collection of taxed monies from tax payers is, in my view, a public interest. Public interest overrides that of an individual. All what the applicant need to establish is *prima facie* that the respondent will or is likely to dissipate the assets with the intention of defeating the applicant's

claim. The applicant's counsel submitted that the applicant has in its disposal, affidavits that indicate the intention of the part of Hathurani respondents to dissipate the assets. He submitted that postponement of the provisional order by another four months and 2 weeks will not be in the interest of justice. Postponement of the order is tantamount to holding of the applicant at ransom. In any event, section 163 does provide for remedies at the respondents' disposal.

[20] It is trite that costs follow the event. The applicant succeeded with preservation of the respondents' assets. The applicant is thus entitled to costs occasioned by this application.

[21] The reasons mentioned herein prompted me to make the order I made on the 01 October 2014.



A.M.L. Phatudi
Judge of the High Court

On behalf of the Applicant:

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