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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG PROVINCIAL DIVISION, PRETORIA

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- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED: **NO**
- (4) Date: 16 January 2023 Signature: _____

CASE NO: 49048/2021

In the matter between:

**COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE SERVICES**

Applicant

And

KHAGISO AFRIKA HOLDINGS (PTY) LTD
[Registration Number: 2[...]]

1st Respondent

KIMBERLEY DANIELLE ANANTHAN

2nd Respondent

[Identity Number: 9[...]]

ZAMAHLI GROUP HOLDINGS (PTY) LTD

3rd Respondent

[Registration Number: 2[...]]

JADORE MIGLIORE (PTY) LTD

4th Respondent

[Registration Number: 2[...]]

LEEANN MAGDALENE DEVAR

5th Respondent

[Identity Number: 8[...]]

ZIMDEHLA PROJECTS (PTY) LTD

6th Respondent

[Registration Number: 2[...]]

GOLDEN MILE TRADING 571 CC

7th Respondent

[Registration Number: 2[...]]

JAN HENDRIK VAN VUUREN

8th Respondent

[Identity Number: 7[...]]

PARVILOR (PTY) LTD

9th Respondent

[Registration Number: 2[...]]

RODNEY MPHO MOROLE

10th Respondent [

Identity Number: 7[...]]

ERESA (PTY) LTD

11th Respondent

[Registration Number: 2[...]]

JOHANNES FREDRIK JANSE VAN RENSBURG

12th Respondent

BRUMMER

[Identity Number: 8[...]]

AFRIKA BALLISTIC TECHNOLOGIES (PTY) LTD

13th Respondent

[Registration Number: 2[...]]

XOLANI COLLEN MZOBE

14th Respondent

[Identity Number: 8[...]]

INBINATHAN KISTIAH

15th Respondent

[Identity Number: 8[...]]

CONNELIA CAPITAL HOLDINGS (PTY) LTD

16th Respondent

[Registration Number: 2[...]]

AES LIGHTING (PTY) LTD

17th Respondent

[Registration Number: 2[...]]

PRANISHA BAGBATSING

18th Respondent

[Identity Number: 8[...]]

GLOBAL TECH INNOVATIONS (PTY) LTD

19th Respondent

[Registration Number: 2[...]]

NITESH DEONANNAN

20th Respondent

[Identity Number: 7[...]]

SPIRIT OF AFRICA MARKET (PTY) LTD

21st Respondent

[Registration Number: 2[...]]

VISHEN SOOKOO

22nd Respondent

[Identity Number: 8[...]]

JUDGMENT

NYATHI J

A. INTRODUCTION

[1] The applicant herein, the Commissioner for the South African Revenue Service (“SARS”) obtained a provisional preservation order in terms of section 163 of the Tax Administration Act 28 of 2011 (hereafter “the TAA”). The provisional preservation order was granted *ex parte* and in chambers as envisaged by the TAA, by the Honourable Justice Mabuse on 25 October 2021.

[2] The provisional order was granted in respect of all realizable assets listed in Schedules A, B and C of the court order. A *curator bonis* was also appointed.

[3] A return date was set, and later extended to 23 May 2022.

[4] Prior to the extended return date, on 7 April 2022, the twenty-first (“SOA”) and twenty-second respondents (“Mr Sookoo”), launched an urgent anticipation application seeking inter alia a discharge from the provisional preservation order. This urgent anticipation application was heard by this court on 28 April 2022 with the Honourable Madam Justice Van der Schyff determining that the matter was not urgent in respect of these respondents. They were ordered to pay the costs consequent upon that application.

[5] The applicant now seeks an order confirming the provisional preservation order in terms of section 163 of the TAA as against the following respondents:

5.1 7th Respondent;

5.2 8th Respondent;

5.3 9th Respondent;

5.4 10th Respondent;

5.5 14th Respondent;

5.6 Spirit of Africa Market (‘SOA’); and

5.7 Mr Sookoo

[6] SARS further seeks an order confirming the securities provided by the remaining respondents regarding their probable tax liability that may be raised by SARS after it concludes its audit investigations, with the curator *bonis* maintaining limited supervisory powers over the security provided and these respondents undertaking not to dispose, encumber or alienate the assets tendered as security.

- [7] Only the 21st and 22nd respondents are opposing the relief sought. In fact, the SOA and Mr Sookoo seek the discharge of the rule and the dismissal of the application for a preservation order, with costs on a punitive scale.

SUMMARY OF RELEVANT FACTS

The following facts are gleaned from the applicant's founding affidavit.

- [8] During the state of disaster declared as a result of the Covid-19 pandemic, the first respondent, Khagiso Afrika Holding (Pty) Ltd ("Khagiso Afrika") was awarded a tender by the South African Police Service ("SAPS") for the procurement of Personal Protective Equipment ("PPE"), for a supply of respiratory masks at R30.94 per mask, 5 litre disinfectants at R1 225.80 per unit and sanitised wipes at R480.00 per unit.
- [9] Between 24 March 2020 to 25 April 2020, Khagiso Afrika issued about 23 invoices to SAPS without charging any output VAT on the supply of masks. The amounts charged on each invoice varied from R97,200.00 to R58,674,000.00.
- [10] During the period from 02 April 2020 to 4 May 2020, and consequent upon Khagiso Afrika having issued the above-mentioned invoices, SAPS paid into Khagiso Afrika's First National Bank account number 6[...], a total amount of R134,470,900.00 from SAPS.
- [11] Immediately on receipt of the funds from SAPS, Khagiso Afrika immediately funnelled about R108, 873, 194.50 of the above-mentioned amount to other respondents herein. On 15 and 16 April 2020 the total amount of R11,3 million is

paid into SOA's account by Khagiso Afrika. On that same date the exact same amount is paid over by SOA into the account of Eco-Solution Project Management (Pty) Ltd ("Eco-Solutions") without declaring any output VAT from the aforementioned amount.

[12] During the relevant tax period (04/2020), SOA submitted its VAT201 return declaring a total output VAT of R47,961.00.

[13] SARS calculated the probable VAT liability payable from the aforementioned payment from Khagiso Afrika to be R4,113,691.17, excluding the understatement penalties leviable of up to 200% of the under-declared probable tax, a 10% penalty and interest for the late payment of taxes.

[14] On 25 October 2021 Mabuse J granted the provisional preservation order and appointed a curator *bonis*. The rule *nisi* is opposed by the 21st and 22nd Respondents.

[15] On 7 December 2021 the curator advised that "*respondent 22 has provided sufficient security to satisfy any potential SARS tax assessment.*"

B. ISSUES FOR DECISION

[16] Did SARS meet the requirements for making a final preservation order in terms of section 163 of the TAA?

- [17] Was there any basis for holding Mr Sookoo personally liable for any debt owed by SOA?
- [18] Did SARS fail to disclose a material fact to the court that granted the provisional preservation order, to wit, that SOA had no assets at the time when the order was granted? And;
- [19] If, flowing from the lack of assets to preserve, there could be no risk of dissipation of assets?
- [20] In the final analysis, the crisp question therefore, is whether or not the provisional order should be made final.

D. DISCUSSION

- [21] As stated above, Khagiso Afrika is the main company in this intricate scheme. It was the recipient and main distributor of funds to the other companies including SOA. Having received payment of R134, 410, 900.00 from the SAPS tender for PPEs Khagiso Afrika paid out a total of about R108, 873, 194.50 of those funds to associated companies. SOA alone received R11, 130, 000.00 in two tranches.
- [22] The sole director of SOA is Mr Sookoo who has full access and direct control of its FNB Bank account. The applicants have in their founding affidavit in support of the preservation application conceded that SOA failed to declare any Value Added Tax (VAT) emanating from these payments. This, notwithstanding that SOA was a

registered VAT vendor under the Value-Added Tax Act No 89 of 1991, and was accordingly obliged to declare output VAT concerning these amounts.

[23] The respondents have attempted to downplay the seriousness of their conduct and the legal ramifications relating to failures to comply with their statutory obligations and to declare output VAT. In an attempt to justify their failures, the applicants are now contending that the net result of the relevant transaction was that SOA played the “connecting middleman” between supply and demand and that it made not a cent of profit therefrom.

[24] The abovementioned contention by the respondents is not based on any known legal or tax principles and ignores that the obligation to declare amounts for VAT or income tax purpose is statutorily imposed and not voluntarily made and certainly not dependent on whether a taxpayer made or realized any profit or not.

[25] SARS’ audit is still on-going and has not been concluded. SARS is yet to issue a letter of audit findings, a matter that will take place after the audit has been concluded in accordance with SARS’ internal procedures. What is however apparent from the above, is that VAT liability is likely to ensue from inter alia the above transactions, which may be due or payable by SOA. The further issues arising may relate to liability for income tax.

E. Synopsis of relevant facts and modus operandi

[26] Khagiso Afrika was awarded a tender by SAPS for the procurement of PPEs, for a supply of respiratory masks at R30.94 per mask, 5 litre disinfectants at R1,255.80 per unit and sanitised wipes at R480.24 per unit;

[27] Between 24 March 2020 to 25 April 2020, Khagiso Afrika issued about 23 invoices to SAPS without charging any output VAT on the supply of masks. The amounts charged on each invoice varied from R97,200.00 to R58,674,000.00.

[28] During the period from 02 April 2020 to 4 May 2020, and consequent upon Khagiso Afrika having issued the above-mentioned invoices, SAPS paid into Khagiso Afrika's First National Bank account number 6[...], a total amount of R134,470,900.00 from SAPS.

[29] On receipt of the funds from SAPS, Khagiso Afrika immediately funnelled about R108,873,194.50 of such funds to the other respondents, as follows:

- 29.1 between 28 May 2020 and 13 July 2020, an amount of R5,731,623.00 was transferred into Zamahli Group Holdings (Pty) Ltd's FNB account number 6[...];
- 29.2 between 25 April 2020 and 18 May 2020, an amount of R2,467,744.00 was transferred into Jadore Migliore (Pty) Ltd's FNB account number 6[...];
- 29.3 between 02 April 2020 and 15 April 2020, an amount of R12,533,305.00 was transferred into Parvilor (Pty) Ltd's FNB account number 6[...];
- 29.4 between 04 April 2020 and 24 April 2020, an amount of R33,611,750.00 was transferred into Eresa (Pty) Ltd's FNB account number 6[...];
- 29.5 between 03 March 2020 and 28 July 2020, an amount of R8,198,509.50 was transferred into Cool Hashtag (Pty) Ltd's FNB account number 6[...];
- 29.6 between 25 April 2020 and 28 July 2020, an amount of R4,581,500 was transferred into Africa Ballistic Technologies (Pty) Ltd's FNB account number 6[...];
- 29.7 between 3 May 2020 to 28 July 2020, an amount of R7,214,358.00 was transferred into Calm Holdings (Pty) Ltd's FNB account number 6[...];
- 29.8 between 01 July 2020 and 13 July 2020, an amount of R3,746,925.00 was transferred into Connelia Capital Holdings (Pty) Ltd's FNB account number 6[...];

- 29.9 between 24 March 2020 to 24 April 2020, an amount of R2,380,000.00 was transferred into AES Lighting (Pty) Ltd's FNB account number 6[...];
- 29.10 between 30 March 2020 to 05 July 2020, an amount of R5,914,500.00 was transferred into Global Tech Innovations (Pty) Ltd's FNB account number 6[...]; and
- 29.11 between 15 April 2020 and 16 April 2020, an amount of R11,130,000.00 was transferred into SOA's FNB account number 6[...].

[30] The amount paid to SOA in the amount of R11,130 000.00 is particularly relevant in the present proceedings and the following is important in the adjudication of the present application:

- 30.1 On 16 and 17 April 2020, SOA paid the amount of R11,130000.00 to Eco-Solutions without declaring any output VAT from the aforementioned amount;
- 30.2 During the relevant tax period (04/2020), SOA submitted its VAT 201 return declaring a total output VAT of R47,961.00. The impression created was that the aforesaid represented the total taxable supplies, which is false. Thus SOA's declaration in its VAT declaration was false;
- 30.3 A false declaration in a VAT 201 return constitutes tax evasion as contemplated by section 235(1)(a) of the TAA. By making a false

declaration in its VAT 201 tax return SOA has contravened the aforesaid provisions;

30.4 SARS calculated the probable VAT liability payable from the aforementioned payment form Khagiso Afrika to be R4,113,691.17, excluding the understatement penalties leviable of up to 200% of the under-declared probable tax, a 10% penalty for **false declaration in its VAT 201 tax return** SOA has contravened the aforesaid provisions; **(emphasis added)**

30.5 SARS calculated the probable VAT liability payable from the aforementioned payment form Khagiso Afrika to be R4,113,691.17, excluding the understatement penalties leviable of up to 200% of the under-declared probable tax, a 10% penalty and interest for the **late payment of taxes**. Just based on the aforesaid, SOA's estimated VAT liability exceed R12 million. **(emphasis added)**

[31] SARS preliminary investigations into the assets of SOA as reflected in SARS' founding papers revealed that it owned the properties described below and as SARS is still investigating the assets of the respondents as part of its full investigations, namely:

31.1 an immovable property situated at 1[...] S[...] Street, A[...] Estate, Centurion. The aforementioned property is now valued at R800,000.00.

31.2 movable properties described as the Range Rover Evoque with vehicle letters and registration number N[...] and Mercedes Benz C190 with vehicle letters and registration number N[...].

[32] The respondents now contend that the above assets belong to Mr. Sookoo and his wife.

[33] Section 163 empowers SARS to approach the court on an *ex parte* basis to apply for an order to preserve any assets of a taxpayer or another person, subject to the conditions and exceptions as may be specified in the preservation order. The initial preservation order is usually a provisional preservation order which comes into effect immediately. The court will then grant a *rule nisi* which calls on the affected party or parties to appear on the return date to address it on why the provisional order should not be made final or discharged.

[34] For SARS to succeed in its application for a preservation order it has to meet the following requirements:

34.1 a tax amount should be due or payable or the SARS official should on reasonable grounds be satisfied that it may be due or payable;

34.2 there should be realisable assets, directly or indirectly linked to the respondents, from which SARS may collect the tax amount (owing

by the respondents or on reasonable grounds will be due and payable by them);

34.3 the realisable assets may be disposed of or removed which may frustrate the collection of the full amount of tax of these respondents; and

34.4 a preservation order is required in order to prevent the 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 on reasonable grounds the official is satisfied may be due or payable).

[35] The above-mentioned *modus operandi* by the respondents of funnelling funds immediately on receipt, points to clear proof of a disposal, removal or concealment of assets, alternatively, a propensity to dispose, remove or conceal assets of their assets.

[36] SARS's suspicion is that the above-mentioned transfer of funds between the respondents, were a mere ploy orchestrated to use juristic *persona* as conduits by creating multiple layers of transfers, before disposing of such funds.

[37] SARS's analysis and cross-referencing of the transactions contained in the above-mentioned bank statements of the respondents revealed that the descriptors in those statements are a ruse meant to conceal the true identity of the recipients of the funds transferred by these respective respondent companies. There are numerous examples of this scheme which SARS flagged as requiring further investigation.

- [38] One of the examples is: Khagiso Afrika's bank statements reflect payments made to AES Lighting described as "Blue Collar." Immediately on receipt of the funds, AES made payments described as "loan payments", "Yaya's lighting" and "Ashvir".
- [39] Furthermore, SOA bank statements annexed by Mr Sookoo in his founding affidavit to the application show a bank balance of R77,91, a clear indication that SOA immediately after it received funds from Khagiso Afrika there were no trading activities.
- [40] Clear evidence of inexplicable channelling of funds back and forth by and between the respondents in the preservation application is justification for the confirmation of a preservation order. In the present case, more than R108 million was channelled between the companies in a manner that points to dissipation. In particular, based on the disguised descriptions of the relevant transactions in the companies' bank accounts. It is noteworthy that the specific transaction to SOA was simply classified as "payment" in the bank accounts of Khagiso Afrika and SOA.

F. The law:

- [41] Section 163 (1) of the TAA regulates the grant of a preservation order and provides that: *"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."*

[42] The requirement to be met by SARS to succeed in its application for a preservation order are the following:

- 42.1 that a tax amount is due or payable or the official on reasonable grounds is satisfied may be due or payable;
- 42.2 there are realisable assets, directly or indirectly linked to the respondents, from which SARS may collect the tax amount (owing by the respondents or on reasonable grounds will be due and payable by them);
- 42.3 the realisable assets may be disposed of or removed which may frustrate the collection of the full amount of tax of these respondents; and
- 42.4 a preservation order is required in order to prevent the 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 on reasonable grounds the official is satisfied may be due or payable).

[43] In *Commissioner for the South African Revenue Service v Van Zyl*¹, the manner in which funds were questionably channelled through companies was similarly questionable. There the court held as follows:

“...I further find, on a conspectus of all the evidence and voluminous documentation, but in particular, with reliance on the vast sums of money which have been channelled back and forth between various entities and respondents, that SARS had been justified in being concerned about further such manipulation of funds and transfers, amounting to

¹ 2022 JDR 0305 (GP)

dissipation of assets from one taxpayer to another or to an undisclosed third party, all of which might frustrate the recovery of tax debts. Resorting to the mechanism created by section 163 of the TAA can, in these circumstances, not amount to an abuse of process.”²

[44] In the matter of *Commissioner, South African Revenue Service v Tradex (Pty) Ltd and Others*³ the court held as follows:

“I do not think that ‘required’ in s 163(3) entails proof of such an intention on the part of the taxpayer. However, SARS is required to show, I think, that there is a material risk that assets which would otherwise be available in satisfaction of tax will, in the absence of a preservation order, no longer be available. The fact that the taxpayer bona fide considers that it does not owe the tax would not stand in the way of a preservation order if there is the material risk that realisable assets will not be available when it comes to ordinary execution. An obvious case is that of a company which, believing it owes no tax, proposes to make a distribution to its shareholders.”

[45] The court in the *Tradex* matter further held⁴ that: *“The existence of material risk that assets will be diminished is, as I have said, the obvious example. It is in such circumstances that the court could conclude that preservation would confer a ‘substantial advantage’ (i.e. over the position that would prevail without the order) and that there was thus ‘an element of need’ (cf. the Clutchco case supra)”*

[46] Mr Sookoo’s affidavit is styled also as an answering affidavit to the SARS’s founding affidavit in the preservation application, it however, does not engage with the

² *Commissioner for the South African Revenue Service v Van Zyl* 2022 JDR 0305 (GP) at p22, para 9.20,

³ *Commissioner, South African Revenue Service v Tradex (Pty) Ltd and Others* 2015 (3) SA 596 at p606B-D

⁴ At p606 E-F

allegations made by SARS in its founding affidavit. Mr Sookoo's response is to state that:

46.1 SOA had no assets to be preserved and the assets listed in SARS' founding affidavit in the preservation application belong to him and not SOA;

46.2 that there was no risk of dissipation as SOA did not have assets to preserve; and

46.3 lastly, that because SARS had not concluded its audit raising a tax debt, there is no risk for holding him personally liable.

[47] Mr Sookoo's submissions do not hold water due to the following: It is undisputable that SOA received the R 11 130 000.00 from Khagiso Afrika. It follows that SOA is likely to be assessed and held liable for VAT and Income Tax.

[48] By virtue of Mr. Sookoo being under preservation, the provisions of section 163(3)(b) of the TAA have been met insofar as the assets registered in his names are concerned;

[49] In terms of section 163(1) read with section 163(3) of the TAA, the assets preserved by the provisional preservation order extend beyond those of the affected assets set out in the provisional order and even those that are not specified in the order including assets if transferred to the respondents in the preservation application, would be realisable even after the preservation order has been granted. Mr Sookoo is related to SOA and any of his assets attached for preservation, are for SOA's imminent tax liability;

[50] By his own admission, Mr Sookoo has played an active role in the payment of the R11,130,000.00 to SOA and then immediately from SOA to Eco-Solutions, and therefore he may be held jointly and severally liable for SOA's imminent tax liability as envisaged by sections 155 and 180 of the TAA;

[51] As in the case of the other respondents, the bank accounts of SOA shows no business activity until SAPS started paying Khagiso and the funds were round tripped between the respondents and other entities that SARS is also in investigating. This points to the propensity to dissipate assets by SOA, and such eventuality is in any event confirmed by Mr Sookoo's statement that SOA currently has a mere R77,91 in its bank account, the more reason for SARS to preserve assets of related persons and entities from which SOA's tax liability may be paid.

G. Conclusions

[52] Mr Sookoo's assertion that he merely played an intermediary role is patently untrue, he seems to be actively involved in and has intimate knowledge of the business affairs of SOA including a few PPE deals SOA concluded. He also played an active role in all the engagements between SARS and SOA.

[53] Mr Sookoo's defence that SARS has failed to disclose a material fact to the court that granted the provisional preservation order, to wit, that SOA had no assets at the time the order was made is intended to mislead. The systematic funnelling of funds was designed to achieve this scenario amongst other objectives.

[54] Having regard to all the above facts it is clear that the applicant has made a case for the confirmation of the provisional preservation order against the SOA and Mr. Sookoo.

H. Costs

[55] As is customary, costs shall follow the cause. Nothing justifies a different decision in this case.

I. Order

- (i) The provisional preservation order granted on 25 October 2021 against SOA and Mr. Sookoo, is hereby confirmed with costs.

- (ii) A draft order was agreed upon as regards the remainder of the respondents in totality, with more specific provisions is hereby made an order of court and incorporated by reference. It is annexed hereto marked "X".

J.S. NYATHI
Judge of the High Court
Gauteng Division, Pretoria

Date of Judgment: 16 January 2023.

Date of hearing: 23 May 2022

Appearances

On behalf of the Applicant: Majang Attorney

Counsel: Adv. Lindelani Sigogo SC
with him: Adv. Lindeni Kalipa

On behalf of Respondents 11 and 12: Kruger & Okes Inc Attorneys

Counsel: Adv. H.P. West SC

On behalf of Respondents 1-6, 13-16, 19-20: Shaun Pillay Attorneys

Counsel: Adv. Rudolf Maastenbroek
With him: Adv. M. Van der Westhuizen

On behalf of Respondents 21 and 22: Ulrich Roux attorneys

Counsel: Adv Rudolf Mastenbroek
With him: Adv Mariq van der Westhuizen

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 16 January 2023.