

SOUTH AFRICA / JUDGMENT

Commissioner for the South African Revenue Services v Esibonga Investment (Pty) Ltd and Others (16177/21) [2022] ZAWCHC 144 (29 July 2022)

[2022] ZAWCHC 144

COURT

Western Cape High Court, Cape Town

BEFORE

Thulare

CASE / FILE NUMBER

16177/21

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IN THE HIGH COURT OF
SOUTH AFRICA
(WESTERN CAPE
DIVISION, CAPE TOWN)
CASE NO: 16177/21
In the matter between
THE
COMMISSIONER FOR THE SOUTH
APPLICANT
AFRICAN
REVENUE SERVICES
AND
ESIBONGA
INVESTMENT (PTY) LTD
FIRST RESPONDENT
SIVALUTCHMEE
MOOLIAR N.O
SECONDEND
RESPONDENT
EBRAHIM
MEHNAAZ N.O.
THIRD RESPONDENT
ITAI

CHATAURWA
FOURTH RESPONDENT
LIONEL
MARAY TABANI MUHLANGA
FIFTH RESPONDENT
TERRENCE
MUDIWA MUSARURWA N.O.
SIXTH RESPONDENT
PARTSON
MUNYARADZI N.O.
SEVENTH RESPONDENT
GARY
OWEN WATSON
EIGHT RESPONDENT
LESLEY
WATSON
NINTH RESPONDENT
TAKUDZA
TALENT MUSVANGA
TENTH RESPONDENT
SIMON
TAVAGUTA HOMENGA
ELEVENTH RESPONDENT
TANYARDZWA
JOY NYAMARAI
TWELFTH RESPONDENT
FABIOLA
GONYE
THIRTEENTH
RESPONDENT
AMOS
PHIRI
FOURTHEENTH RESPONDENT
LIZAAN
ENGELBRECHT
FIFTHEETH RESPONDENT
LYTON
REID
SIXTEENTH RESPONDENT
GALARD
MASANGO
SEVENTIETH RESPONDENT
DENSON
MUVANDI

EIGHTEETH RESPONDENT

Date of Hearing: 19 May 2022

Date of Judgment: 29 July 2022 (to be delivered via email to the respective counsel)

JUDGMENT

THULARE J

- [1] On the return day a rule nisi the 11th and 12th respondent (the respondents) opposed the confirmation. A provisional order as envisaged in section 163 of the Tax Administration Act, 2011 (Act No. 28 of 2011) (the Act) was granted amongst others over an immovable property which fell within the estate of the respondents, and further, a curator bonis (the curator) was appointed over the estate of the respondents.
- [2] The respondents opposed the confirmation on the basis that there was no evidence that their assets were reliable assets in terms of section 163 of the Act, that the preservation order was unnecessary and that the relief obtained exceeded the bounds section 163 of the Act. The applicant (SARS) in its reply contended in limine that the respondents erred in opposing the confirmation and that their relief lay in section 163(9) of the Act, and that the respondents' failure to adequately explain the connection of the first respondent (Esibonga) rendered it imperative that their entire estate remain under curatorship in the hands of the curator.
- [3] The issue was whether the rule nisi stood to be discharged in respect of the respondents.
- [4] The background facts on Esibonga and the involvement of most of the respondents in this matter, including the respondents in this application, are contained in my judgment dated 2 December 2021 and are not worth repeating. The respondents' case was that the application related to the tax affairs of Esibonga and that the respondents had no knowledge in regard to Esibonga's business, income tax affairs, debtors or otherwise. Upon receipt of the rule nisi, the respondents proposed to settle the matter in order to secure the release of their home from the order and tendered a guarantee to SARS backed by immediately available cash funds to be held by their attorneys trust account. SARS did not respond to the proposal.
- [5] The respondents received communication from the curator that all their rights, title and interest to all property, including money, had been divested as set out in the preservation order. The respondents' case was that the position adopted by the curator was that he had been effectively appointed curator over all of their assets was not borne out by any of the facts set out in the founding affidavit and that the curator had, on an ex parte basis taken control of their entire lives without any basis to do so and without their knowledge.

- [6] The respondents' case was further that their estate was not a realizable asset for the purpose of section 163 of the Act as there was no jurisdictional basis for SARS to lay claim thereto to satisfy Esibonga's case. This was so because the tax debt concerned was that of Esibonga and that the respondents had no affiliation with Esibonga and that according to them there was no case made out in the founding affidavit that they should be liable for its debts. The submission was that the high water mark of SARS' case was that the respondents may be indebted to Esibonga in terms of the provisions of the Insolvency Act, 24 of 1936, and that, should the liquidators of Esibonga claim such monies this could be utilized to satisfy Esibonga's tax debt. The assets that formed the subject of the preservation order appeared to be their entire estate whereas SARS contended that only monies paid to attorneys on their behalf by Esibonga should form the basis of the preservation order. These monies were payments made to a firm of attorneys in connection with the transfer of their home. There was no case made out that any of their other assets should be preserved to satisfy Esibonga's tax debt.
- [7] The case was further that SARS did not make out a case that there was any risk that the respondents' home would be dissipated to obstruct the collection of Esibonga's tax debt. There was also no basis provided that any of the other assets in their estate would be dissipated. The offer to place the sum, equal to the amount paid by Esibonga to attorneys in connection with the transfer of their home, in trust with their attorneys to serve as security for any claims that SARS and/or Esibonga's liquidators may have against them would ameliorate any risk of prejudice to SARS pursuant any dissipation of any of their assets.
- [8] The respondents' case was that the order exceeded the ambit of an order in respect of specific assets that may be realizable in order to satisfy a tax debt, in that it vested their entire estate in the curator which included shareholding of loan accounts, bank accounts, member's interests, movable and immovable assets that they may own. Effectively SARS had without their knowledge caused their entire estate to vest in the curator without any basis therefor and the relief also exceeded that foreshadowed in the supporting affidavits. The purpose of the application was restricted to preserve the immovable and movable properties of the respondents specified in schedule A to the notice of motion and the only asset in schedule A in which the respondents had interest was their home. The order that was granted exceeded the provisions of section 163 of the Act and the purpose of the application as set out in SARS founding affidavit and in the context it constituted an abuse and stood to be set aside.
- [9] Section 163 (4) (b) of the Act provides:
- "163 Preservation order*
- (4) The court to which an application for a preservation order is made may-

- (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.”

[10] A rule nisi was granted. It called for the respondents to show cause why the preservation order should not be made final. The respondents answered

the call, which the court made at the instance of SARS. They are proper before the court. SARS cannot be heard to now seek to refer

them to section 163(9). SARS has a provisional order in its favour. It does not have a final preservation order. SARS argument that the proper procedure was for the applicant to seek relief as envisaged in section 163(9), and not as per an order granted in its favour is simply untenable.

[11] There were monies, R200 900-00 to be precise, paid to attorneys by Esibonga on behalf of the respondents, and it was payments in connection with the transfer of their home. Esibonga's tax debt is not in dispute. Section 163 (1) of the Act authorizes the preservation of any assets of a taxpayer or other person. The person to whom monies are paid or on whose behalf monies are paid by a taxpayer, for reasons unknown to the taxpayer, without more, is indebted to the taxpayer and may be such “other person” as envisaged in section 163. The circumstances entertained a reasonable belief that Esibonga used the respondents to hide its assets. SARS should be allowed to investigate in furtherance of the collection of outstanding taxes. The respondents' assets were under the circumstances, susceptible to a provisional order against them. The suggestion that there was no case made out that any of their assets should be preserved to satisfy Esibonga's debt stands to be rejected.

[12] In my view, it was necessary to place the respondents' property beyond their control and into the hands of the curator pending the outcome of the application for the order [Fraser v Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae [2006] ZACC 24; 2007 (3) SA 484 (CC)]. The purpose of that preservation order was to secure the collection of tax. The purpose of the curator was to investigate the whereabouts of Esibonga's assets and the assets of the respondents, amongst others, and to take control thereof in order to secure the collection of tax. The various transactions of Esibonga and the involvement of the respondents formed part of a *modus operandi* intended to hide assets realizable for purposes of satisfying Esibonga's tax debt to SARS and the full facts regarding these transactions remained to be investigated. SARS, through the curator, needed to investigate how and on what basis the R200 900-00 was placed at the disposal of the respondents or for their benefit. The appointment of a curator was necessary.

[13] The only applicable transaction in respect of the respondents was for the property, defined as Unit 13, Fourway Crest (ST27340/2019). The firm of attorneys identified from the bank statements of Esibonga were Kapp van Wyk van Zyl, Krugersdorp, for the amount already indicated. It must be borne in mind that SARS case against the respondents was that they were operating an illegal money laundering scheme. Esibonga was a conduit for that purpose. SARS is entitled to exercise due diligence in order to ensure that it does not find

itself entangled in dirty money to cleanse the respondents on a tax evasion scheme. SARS has a duty to have and show care and conscientiousness in their work and in how they execute their responsibilities. Section 237 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) (the Constitution) provides as follows:

“Diligent performance of obligations

237. All constitutional obligations must be performed diligently and without delay.”

[14] The respondents elected not to set out any facts which may stand as a valid answer to the money laundering allegations, or at least provide a satisfactory explanation for Esibonga to pay for its transactions and the source for the money it intended to use as security. In an alleged illegal money laundering and unlawful tax evasion scheme, a person in the position of the respondents in my view, owes it to SARS to answer allegations of impropriety and an explanation of their dealings with the conduit which is the tax debtor, as part of SARS’s purpose, which is to ensure the effective and efficient collection of tax. The respondents were wrong to expect to show SARS the money, and for SARS to look the other side and walk away. The respondents clearly do not understand our values as a country. Section 1 (c) of the Constitution provides as follows:

“Republic of South Africa

1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:
- (c) Supremacy of the constitution and the rule of law.”

In the battle for the soul of SARS, the rule of law must trump shekel.

[15] In my view, the Court order dated 01 October 2021, which was the rule nisi, spoke for itself and meant what it said. The provisional order was granted in respect of the respondents’ specified assets as set out in terms of Schedule A which was attached to the judgment. It was also in respect of that immovable property that the Registrar of Deeds was authorized to register caveat notices. In this context, I understand the curator to also have been appointed to take control of that property, and in whom the rights, title and interest vested, including but not limited to what was further set out in that order. Schedule A, in respect of the respondents, was Unit 13, Fourway Crest (ST27340/2019).

[16] For these reasons I make the following order:

1. The provisional preservation order against the respondents in respect of Unit 13, Fourway Crest (ST27340/2019) is confirmed.
2. The respondents to pay the costs

DM THULARE

JUDGE OF THE HIGH COURT

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Prepared on 14 October 2026 · Esheria