

SOUTH AFRICA / JUDGMENT

Sookoo and Another v Commissioner for the South African Revenue Service and Another (49048/2021) [2025] ZAGPPHC 370 (15 April 2025)

[2025] ZAGPPHC 370

COURT

North Gauteng High Court, Pretoria

BEFORE

Janse van Nieuwenhuizen

CASE / FILE NUMBER

49048/2021

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Policy

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case Number: 49048/2021

(1)

REPORTABLE: YES

(2)

OF INTEREST TO OTHER JUDGES: YES

(3)

REVISED: NO

DATE: 15 APRIL 2025

SIGNATURE: JANSE VAN

NIEUWENHUIZEN J

In

the matter between:

VISHEN
AQEEL SOOKOO
First
Applicant
SPIRIT
OF AFRICAN MARKET (PTY)
LTD
Second Applicant
and
THE
COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE
SERVICE
First
Respondent
JACQUES
VAN WYK
N.O.
Second Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

Preservation order granted under section 163 of the Tax Administration Act 28 of 2011 (“the Act”) – whether scope of the preservation order can extend beyond the original purpose for which it was granted. Held that the preservation order is only in respect of the tax liabilities identified in the application in terms of section 163(1) and not in respect of other unrelated tax liabilities.

Introduction

- [1] On 25 October 2021, Mabuse J issued a provisional preservation order in accordance with the provisions of section 163 of the Tax Administration Act, 28 of 2011 (“the Act”) in respect of the assets of the applicants. The provisional order was confirmed on 16 January 2023.
- [2] The applicants contend that there is no longer a basis for the preservation order to remain in force and prays for a declaratory order to this effect.
- [3] The second respondent, cited in his official capacity as the court appointed curator to preserve the assets of the applicants, does not oppose the relief claimed herein.

Background

[4] Pieter Willem Posthumus (“Posthumus”), employed by the first respondent, the Commissioner for the South African Revenue Service, as an Executive responsible for Tactical Analysis and Investigations: Criminal and Illicit Economic Activities deposed to the affidavit in support of the preservation application. For ease of reference the first respondent will be referred to as SARS.

[5] The basis for obtaining the preservation order was explained in the affidavit as follows:

“7. The preservation order is sought based on the on-going investigations by the CIEA Division, which focus on identifying and addressing non-compliance with the tax Acts administered by the Commissioner. The focus of the aforementioned includes, inter alia, the tax compliance of companies and persons who were contracted by the South African Government departments to supply Personal Protective Equipment (“PPE”) in the fight against the Covid-19 pandemic.

45. The Commissioner seeks to preserve the respondent’s assets in order to secure collection of any Value-Added Tax (“VAT” or “output tax”), Income Tax and/or any other taxes that may be payable by the respondents from the amounts, inter alia, received by Khagiso Afrika in its First National bank account number 6[...] which was paid by the South African Police Service (“SAPS”) for the procurement of PPE through tender. Such amounts were immediately transferred by Khagiso Afrika to the respondents as it will be detailed further below.

49. The current investigations into the tax affairs of the respondents are premised on the funds received by Khagiso Afrika through a tender for the procurement of PPEs which was awarded by the SAPS,

51. As a result of the aforementioned tender, Khagiso Afrika received payment from SAPS totalling an amount of R 134 410 900, 00 but failed to charge and declare VAT and the gross income to SARS. Instead, on receipt of these amounts, Khagiso Afrika immediately transferred sizeable amounts successively to other respondents who in turn, failed to declare and pay any attendant taxes from such amounts.

52. I am satisfied on reasonable grounds that there is a substantial amount of tax that may be due and payable by the respondents, in excess of

R 85 989 667, 12 (“the probable tax liability”). Further that a preservation order is required in order to prevent the realisable assets of the respondents or any other person against whom the probable tax liability may be collected, from being disposed or removed, thereby frustrating the collection of such tax.” (own emphasis”)

[6] An amount of R 11 130 000, 00 was paid by Khagiso into the bank account of the second applicant on 15 and 16 April 2020 and SARS calculated the second applicant’s probable tax liability as follows:

Gross income received (VAT inclusive)

R 11 130 000, 00

Gross Amount (Less VAT)

R 9 678 260, 87

Estimated VAT prejudice

R 1 403 778, 13

Estimated Income Tax prejudice

R 2 709 913, 04

Total prejudice

R 4 113 691, 17

[7] The citation of the first applicant as a respondent in the application, is explained as follows:

"XIII. SPIRIT OF AFRICA

168. Spirit of Africa's sole director is Mr Sookoo and he was appointed on 24 June 2020, the same day the erstwhile director, Mr Thabasum Mohammed ("Mr Mohammed") resigned.

169. As directors, both Mr Sookoo and Mr Mohammed had full access and direct control of the Sprit of Africa's FNB account number 6[...]."

[8] In conclusion, SARS summarised the basis for the application as follows:

"183. Therefore, I submit that after Khagiso Afrika had transferred the funds to other respondents the remaining balances in its FNB account are insufficient to meet its probable tax liability. Consequently, a preservation order is required to prevent any further dissipation of funds by following up and preserving funds received from Khagiso Afrika by other respondents.

184. I am advised that the preservation of the funds paid out by Khagiso Afrika, which are now in the possession of other respondents, constitute a ground for granting a preservation order.

185. Furthermore, the respondents who received funds from Khagiso are liable to be assessed for the non-declaration of income and other tax payable therefrom.

187. It is not entirely known at this stage what the other respondents did with the money received from Khagiso Afrika and what further assets they own. Therefore, upon granting of the preservation order and the appointment of a curator bonis, the curator bonis will be able to investigate each respondent with a view of determining what further assets the respondents own and trace any funds that may have been dissipated." (own emphasis)

Declaratory relief

Applicants' case

- [9] The declaratory relief is based on two assessments performed by SARS. The first assessment dated 30 June 2023, pertains to the income tax liability of the second applicant for the period 2019 – 2021. The assessment determined that the income tax payable for the 2020 tax period is R 2 605 226, 00 and for the 2021 tax period R 3 635 717,
00. Penalties and interest were added resulting in a total liability of R 6 282 438, 58.
- [10] The second assessment dated 18 July 2023, pertains to a VAT audit performed on the second applicant's VAT submissions for the period 04/2020 to 10/2021. In terms of the assessment, the VAT payable for the period is R 624 957,
29. Once penalties and interest were added, the total VAT liability amounts to R 1 539 906, 18.
- [11] The applicants contend that the assessment went beyond the scope for which the preservation order was obtained. According to the applicants, the audit established that the second applicant did not owe SARS any debt resulting from the April 2020 PPE transaction with Khagiso. In the result, the basis on which the preservation order was obtained has fallen away and the applicants are entitled to the declaratory relief.
- [12] Insofar as the indebtedness for the remaining period is concerned, the second applicant disputes the totality of the assessments made and a dispute resolution process is underway.

Opposition by SARS

- [13] SARS does not deny that the second applicant does not owe any taxes in respect of the Khagiso PPE transaction but submitted that the preservation order is still required to collect the substantial amount of tax liability owed by the second applicant based on the assessments made by it. SARS, furthermore, stated that it has commenced with audit investigations into the tax affairs of the first applicant, and that there are reasonable grounds to believe that he too will owe income tax when SARS's audit has been completed.

Legal framework and discussion

- [14] The question whether the scope of a preservation order is confined to the purpose for which it was sought forms the crux of the dispute between the parties.
- [15] The parties agreed that the question could only be answered by interpreting section 163 of the Act that provides for a preservation of assets order.
- [16] Prior to considering the section, it is apposite to have regard to the principles applicable to the interpretation of statutes as outlined in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at par [18]:

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in

which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.¹⁵ The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.”

[17] Section 163(1) of the Act reads as follows:

“(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.”

[18] The section envisages two grounds on which an application for a preservation order may be sought:

18.1 firstly, when the full amount of tax is due and payable, which entails that the amount is known when the application is brought; and

18.2 secondly, when an official on reasonable grounds is satisfied that the full amount of a tax liability may become due and payable.

[19] From the facts it is clear that SARS relied on the second ground when it applied for the preservation order. The PPE award made by SAPS to Khagiso constituted the reasonable ground on which the application was launched. This much was confirmed by Posthumus in the answering affidavit filed on behalf of SARS, to wit:

“7. The preservation application was made pursuant to preliminary investigations conducted by the Commissioner into the tax compliance of the respondents in the preservation order. These respondents were involved in questionable awards made by the South African Police Service (“SAPS”) to Khagiso as a part of the procurement of Personal Protective Clothing (‘PPE’s’), during the National Disaster caused by the Covid-19 pandemic.”

[20] Subsequent to the investigation by SARS, it became clear that the second applicant did not have a tax liability in respect of the Khagiso transaction. The ground for obtaining the preservation order, therefore, seized to exist.

[21] In the aforesaid circumstances, section 163(10)(b) provides that a preservation order will no longer be in force and effect if the assets subject to the preservation order are no longer required for the purpose of the satisfaction of “the tax debt”.

- [22] Having regard to the section as a whole, it appears that “the tax debt” referred to in section 163(10)(b) is the tax amount that was due and payable or on reasonable grounds may become due and payable as envisaged in subsection (1). Subsection (3) lends support to the aforesaid interpretation; in that it states that “a preservation order may be made if required to secure the collection of the tax referred to in subsection (1).” (own emphasis”).
- [23] Mr Sigogo SC, counsel for SARS, did not agree. Mr Sigogo relied on the definition of a “tax debt” in the Act, to wit “an amount referred to in section 169(1).” Section 169(1) in turn provides that “an amount of tax due and payable in terms of a tax Act is a tax debt due to SARS for the benefit of the National Revenue Fund.”
- [24] Mr Sigogo submitted that the tax due and payable by the second applicant is a “tax debt” that falls within the ambit of section 163(10)(b). According to Mr Sigogo, the fact that the tax debt was not the subject matter of the preservation order is of no consequence. As long as a taxpayer is indebted to SARS, a “tax debt” exists and the preservation order remains intact.
- [25] In order to determine the context in which a “tax debt” is defined in the Act, it is apposite to have regard to the structure of the act. Section 169 that defines a “tax debt” is contained in Chapter 11 which regulates the recovery of tax in general.
- [26] Section 163 is contained in Chapter 10 which regulates the payment of tax and only applies in defined circumstances. In order to invoke the provisions of the section, SARS needs to meet the requirements contained in section 163. The purpose of section 163 is manifestly confined to these requirements.
- [27] In the aforesaid context, a “tax debt” for purposes of section 163, must be interpreted within the confines of the section.
- [28] In casu the preservation order was obtained at the behest of the Tactical Analysis and Investigations: Criminal and Illicit Economic Activities section of SARS. The “criminal and illicit economic activity” that formed the subject matter of the investigation was, on the version of Posthumus: “the questionable awards made by the South African Police Service (“SAPS”) to Khagiso as a part of the procurement of Personal Protective Clothing (“PPE’s”), during the National Disaster caused by the Covid-19 pandemic.”
- [29] The application was not based on the payment of tax liabilities that falls outside the scope for which the preservation order was obtained. Chapter 11 is applicable to the recovery of tax and should be utilised to recover any tax liability that does not fall within the scope of the investigation for which the preservation order was obtained.
- [30] Should SARS be of the view that the present tax debt of the second applicant or the probable tax debt of the first respondent meets the requirements of a preservation order, SARS is at liberty to apply for such an order. It is, however, inconceivable that a preservation order that was obtained for a specific purpose will be in force ad infinitum and may be utilised by SARS for any future tax debt that may become due and payable.

[31] In the result, I am satisfied that the applicants are entitled to a declarator on terms prayed for in the notice of motion and to a cost order as prayed for.

ORDER

The following order is granted:

1. It is declared that the preservation order issued on 16 January 2023 is no longer in force in relation to the assets of the applicants.
2. The first respondent is ordered to pay the costs of the application including the costs of counsel on scale C.

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

DATE HEARD:

25 February 2025

DATE DELIVERED:

15 April 2025

APPEARANCES

Counsel for the Applicants: Mastenbroek Instructed by: Ulrich Roux Attorneys For the First Respondent: Sigogo SC (with him Kapila) Instructed by: Majang Inc

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