REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: **55059/2014**

31/3/2017

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

..... 31/3/2017
SIGNATURE DATE

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	APPLICANT
and	
NORMAN MOLUBI TLOUBATLA	1ST RESPONDENT
MANTOMA NERIA TLOUBATLA	2ND RESPONDENT
MAGNIFIED DESIGNS (PTY) LTD	3RD RESPONDENT
GEORGIA AVENUE INVESTMENTS 36 (PTY) LIMITED	4TH RESPONDENT

HIGH VOLTAGE PROTECTION SYSTEMS (PTY) LTD	5TH RESPONDENT
LETHLABILE CIVILS (PTY) LTD	6TH RESPONDENT
NORMAN MOLUBI TLOUBATLA N. O. in his official capacity as Trustee of the **NORMAN MOLUBI TLOUBATLA FAMILY TRUST** (Registration number IT1230/09)	7TH RESPONDENT
SIPHO JEFFREY RAMOROTO N. O. in his official capacity as Trustee of the **SIPHO JEFFREY RAMOROTO FAMILY TRUST** (Registration number IT1230/09)	8TH RESPONDENT
NORMAN MOLUBI TLOUBATLA N. O. in his official capacity as Trustee of the **NORMAN MOLUBI TLOUBATLA FAMILY TRUST** (Registration number IT1939/2010)	9TH RESPONDENT
MANTOMA NERIA TLOUBATLA N. O. in her official capacity as Trustee of the **MANTOMA NERIA TLOUBATLA TRUST** (Registration number IT1939/2010)	10TH RESPONDENT
PAULUS MAHLANGU	11TH RESPONDENT
LETTA TEBOGO MAHLANGU	12TH RESPONDENT
BRICKWEILL BUSINESS ENTERPRISE (PTY) LTD	13TH RESPONDENT
IJIMA TRADING ENTERPRISES (PTY) LTD	14TH RESPONDENT
LETHUKUKHANYA BUSINESS ENTERPRISE	15TH RESPONDENT

(PTY) LTD	
UBUHLE PRODUCTS 1 (PTY) LTD	16TH RESPONDENT
KAGISO JABOSIGO	17TH RESPONDENT
CBK MARKETING RESOURCES AND CONSTRUCTION (PTY) LTD	18TH RESPONDENT
LUCKY THEMBINKOSI MLANGENI	19TH RESPONDENT
SHINING FUTURE TRADING AND PROJECTS 158 CC	20TH RESPONDENT
PATRICK MAKHUBALO JUSTICE HLONGWANE	21ST RESPONDENT
20TH AVENUE GENERAL DEAL CC	22ND RESPONDENT
THEVANESEN PADIACHY	23RD RESPONDENT
CATALIST CAPITAL (PTY) LTD	24TH RESPONDENT
VALOCORP INVESTSMENTS (PTY) LTD	25TH RESPONDENT
MAATTOUK ALAA	26TH RESPONDENT
SADECOM IMPORT AND EXPORTS (PTY) LTD	27TH RESPONDENT
OWEN PERRY	28TH RESPONDENT
GRAND PROJECT CONSTRUCTION (PTY) LTD	29TH RESPONDENT
NHLANHLA DAVID NDLOVU	30TH RESPONDENT
VALOFIELD INVESTMENTS (PTY) LTD	31ST RESPONDENT
FRANK ABT	32ND RESPONDENT
BYRON AHMED	33RD RESPONDENT

JUDGMENT

MALI J

[1] The applicant, Commissioner of the South African Revenue Service ("*SARS*") an institution responsible for administering the provisions of, various tax legislation seeks confirmation of a provisional preservation order which was granted on 29 July 2014 by the order of Ledwaba DJP of this honourable court. The amount involved is more than R154 million arising from fraudulent Value Added Tax ("VAT") refunds. The application is in terms of Section 163 (4) of the Tax Administration Act, 28 of 2011 ("TAA"). The order sought is against the 1st to the 12th, 14th, 16th to the 22nd, 24th, 25th and 28th to 33rd respondents.

[2] The 11th, 12th, 14th, 16th to the 22nd, 24th, 25th, 26th and 27th respondents were unrepresented at the hearings of the application.

[3] A final preservation order was granted against the 26th and 27th respondents on 15 September 2015. On 30 November 2015 the 13th, 15th and 23rd to 25th respondents were released from the preservation order. The reason for their release was that the applicant discovered that 13th and 15th respondents had been finally wound up on 13 June 2014 and that the 23rd respondent was deceased. The 23rd respondent was the sole director of the 24th and 25th respondents. The applicant is pursuing its claims in the insolvent estate of the deceased.

[4] The application was heard on 16 and 17 May 2016. The matter was postponed in respect of the 19th and 20th respondents to afford them opportunity to obtain funds from the *Curator Bonis* in order to engage services of a legal representative. In the circumstances the provisional order against the said respondents was extended to 30 June 2016.

[5] The said respondents have a connection in that the 19th respondent is the sole director of the 20th respondent. The hearing of the application proceeded in respect of other respondents. The 19th respondent is a former SARS employee.

[6] During the hearing of the application the applicant undertook to request the *Curator Bonis* to compile a further report within 14 (fourteen) days to be made available to the 1st -10th respondents, as well as the 28th, 29th, 32nd and 33rd respondents. The purpose of the report was to enable the respondents concerned to determine whether or not the launch of application by the applicant was still desirable in the event that there were no further assets discovered by the *Curator Bonis.*

[7] The abovementioned report was served to the respondents concerned on 2 June 2016 and only reached my clerk on 8 February 2017 even though it bears the stamp of Registrar of the High Court dated 27 June 2016. The said respondents did not challenge the report of the curator.

[8] It is appropriate to place on record that when I did not receive the report on time I instructed my clerk to make enquiries with the registrar and with the attorneys of record of the applicant. Regrettably the report was not forthcoming until 8 February 2017.

[9] In the meantime the application was set down for hearing against the 19th and 20th respondents and on 1 March 2017 I heard the said application. Therefore this judgment incorporates the application brought against the 19th and 20th respondents.

[10] The 1st respondent is a businessman and the 2nd respondent's husband, who is a businesswoman. The 3rd, 4th, and 5th respondents are entities under the control of the 1st respondent. The 6th respondent is an entity under the control of the 2nd respondent.

[11] The 7th, 8th, 9th, and 10th respondents are family trusts under the control of the 1st respondent. The 11th respondent is an adult male person married to the 12th respondent an adult female person. The 11th respondent is the director of 13th and 14th respondents. The 13th, 14th and 15th respondents are limited liability companies duly registered under the company laws of the Republic of South Africa. The 12th respondent is the director of the 15th respondent, a limited liability companies duly registered under the company laws of the Republic of South Africa. The 16th respondent is also under the control of the 11th respondent.

[12] The 17th respondent is an adult male person, the sole director of the 18th respondent, a limited liability company duly registered under the company laws of the Republic of South Africa. The 19th respondent is an adult male person and a member of the 20th respondent , a close corporation duly registered within the company laws of the Republic of South Africa.

[13] The 23rd respondent was an adult male person, now deceased, and was a sole director of the 24th and 25th respondent , limited liability companies duly registered within the company laws of the Republic of South Africa.

[14] The 26th respondent is an adult male businessman and a director of the 27th respondent, a limited liability company duly registered within the laws of the Republic of South Africa. The 28th respondent is a businessman and who is a director of the 29th respondent, a company with limited liability duly registered within the company laws of the Republic of South Africa.

FACTS

[15] The undisputed facts are that the matter commenced with audit of the 3rd and 6th respondents by the applicant. The outcome of the preliminary investigation by SARS revealed that the 3rd respondent received VAT refunds in the amounts of R3, 853 157.78 and R7, 022 858.47 respectively from SARS for the period January 2011 to June

2013. The 1st respondent claimed refunds on behalf of the 3rd respondent.

[16] The analysis of the bank accounts of the 3rd respondent revealed that the company's main source of income originated from VAT refunds that SARS paid out to the 13th, 15th and 18th respondents. None of the said respondents carried out any work and none of them issued any invoices in which they charged VAT, therefore they were not entitled to any VAT refunds. During the period of April 2007 to March 2014 the 13th respondent received VAT refunds amounting to R35, 359 827.76. During the period of October 2008 to March 2014 the 15th respondent received VAT refunds amounting to R61, 677,567.90. During the period of April 2010 to February 2014 the 18th respondent received VAT refunds amounting to R47, 048 103,35.

[17] In the chain of distribution of the said R 154 million the 19th, 20th, 22nd, 24th, 25th, 28th, 29th, 17th, 31st and 32nd (a former SARS employee) respondents received a total of about R12 million emanating from fraudulent VAT refunds paid to the 18th respondent. The 33rd third respondent received payments to the amount of R730,000.00 from the 1st respondent and or the entities related to the 17th respondent. The 1st respondent was responsible for submitting returns on behalf of the 18th respondent. It is not in dispute that 18th respondent would be paid refunds by SARS to its bank account on monthly basis. In turn within a period of two or three days the 18th respondent would make payments to the 3rd respondent. The 3rd respondent would

subsequently pay to the 22nd and 20th respondents. It is not in dispute that 11th respondent through 13th respondent , wound up at the time of writing this judgment received funds from the so called 1st respondent's clients. The funds were paid into the bank account of the 13th 11th respondent transferred 70% of the said payments to the companies controlled by the 1st respondent. 11th respondent received R97 million through the said scheme 11th respondent withheld 30% of the funds. The total amount received by the 11th was probably distributed to the entities and the wife of the 11th respondent, 12th respondent. 22nd respondent received payments from 3rd and 18th respondents. It will be remembered that 21st respondent is the director of 22nd respondent, hence the order is sought against both respondents.

[18] At the time of the provisional preservation order only a small percentage of the VAT amount paid to the respondents could still be traced by SARS in the form of assets belonging to various respondents. The latest report of the curator bonis dated 2 June 2016 point to difficulties and inhibitions in finding more assets because of the respondents' failure to cooperate with the curator.

LAW

[19] Section 163(1) of TAA provides:

"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."

[20] Section 163(3) of TAA provides that a preservation order may be made if required to secure the collection of tax. Section 163 (3)(c) of TAA provides that a preservation order may be made in respect of all realisable assets held by the person, whether specified in the order or not. Furthermore Sections 163(7) and (8) provides for ancillary orders that a Court may make when granting the preservation order, regarding how the assets may be dealt with, including the appointment of a *curator bonis* in whom the assets shall vest and the discovery of any facts relating to any asset over which the taxpayer or other person may have effective control and the location thereof. See **THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE v CANDICE-JEAN VAN DER MERWE**[1]

[21] Section 182(1) of TAA provides that a person (referred to as a transferee) who receives an asset from a taxpayer who is a connected

[1] [2015] ZASCA 86 at paras 25 and 26.

person in relation to the transferee without consideration or for consideration below the fair market value of the asset is liable for the tax debt of the taxpayer.

[22] Section 183 of TAA provides that if a person knowingly assists in dissipating a taxpayer's assets in order to obstruct the collection of a tax debt of the taxpayer, the person is jointly and severally liable with the taxpayer for the tax debt to the extent that the person's assistance reduces the assets available to pay the taxpayer's tax debt.

POINT IN LIMINE

[23] Ms Dauds, Counsel for the 1st to 10th respondents raised a point *in limine* regarding the interpretation of section 163 of TAA. The submission is that the applicability of section 163 is premised on the existence of a tax debt in respect of the parties against whom the preservation order is sought. Counsel's basis are that SARS's application is premised on the application of section 182 and 183 read with Section 190 (5) of TAA. In essence it is only the 3rd respondent whom received or was paid VAT refund by SARS, therefore preservation orders could not arise against the 1st to 10th respondents but for 3rd respondent. According to the respondents there is no tax due by the respondents and therefore the jurisdictional prerequisite necessary for the court to grant the final order, has not been met.

[24] Counsel further argued that cash is not an asset as envisaged in section 182 and 183 of TAA, because SARS paid cash to the 3rd

respondent it did not transfer any assets. While a preservation order is intended to preserve assets to secure the collection of tax due, no debt in the form of value- added tax as envisaged in section 190(5) of TAA ever arose is likely to arise in respect of the above respondents for a preservation order to be justified against them.

[25] The counsel's submission is that section 163 does not relate to people who received the money but who are not VAT vendors. In essence the submission is that applicability of section 163 is premised on the existence of a tax debt founded against the respondents. The counsel's submission during the hearing of the application is that the 3rd respondent is the only respondent that was paid out the refund by SARS because it was a VAT vendor and had submitted VAT returns.

[26] Despite the concession that the fraudulent VAT refunds were paid to the 3rd respondent, according to Counsel there is no case for preservation order. This is because the assets found by the curator are nowhere near to the value of R154 Million. With respect this argument is flawed because it is common cause that the amount of R154 million was distributed to various respondents and the latest *curator bonis* report as referred to above lists to recovery challenges.

[27] It was further contended that SARS never paid refund to the respondents who were registered as trusts and or as trustees, viz 7th, 8th, 9th, 10th respondents. The 4th and 5th respondents although they were vendors they were never paid refunds. It was therefore

submitted that section 190 (5) is not applicable because the trust and or trustees were neither VAT vendor and there was no refund paid to either trust.

[28] In respect of the 4th and 5th respondents and that the applicant's application cannot be founded through the application of section 182 and 183 of TAA because section 182 requires a transfer of asset for no value. According to the submissions made by counsel, there was no transfer of asset, because cash is not an asset. The cash advances referred to in 13.3 above do not constitute assets. Furthermore as the other respondents do not have shareholding or control of the trusts the requirement of connected person as envisaged in section 182 are not met. In the case of **Van der Merwe** *supra*, (see page 6) a preservation order was granted in respect of monies and monies held by other persons, whether connected or not. The relevant subsection states:

"(iv) any monies held on trust by Perold & Associates and/or Bill Tolken Hendrickse in the name of or for the benefit of Candice van der Merwe or in the name of any other person or entity on whose behalf Candice van der Merwe is accustomed to give instructions in respect of such monies;"

[29] It is common cause that monies are assets. Furthermore in the present matter monies were transferred to the 1st respondent's family trusts and related entities on the instructions of the 1st respondent.

[30] It was further submitted on behalf of the respondents, that section 163 of TAA is not applicable because there were no assets to dissipate and no case has been made that the respondents knowingly assisted in the dissipation of assets. It was reiterated that there were no assets identified even on applicant's own version based on the curator's report. Therefore there was lack of advantage for the fiscus. Ms Dauds later conceded that all the points she raised in her argument during the hearing were never raised in her heads of argument but for the misapplication of section 163 through section 190.

[31] In buttressing her argument in respect of the misapplication of section 163. Ms Dauds referred to the case of **COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE v TRADEX (PTY) LTD AND OTHERS**[2] wherein SARS application for the confirmation of preservation order was dismissed. Counsel referred to page 603 paragraph E, where SARS had submitted that it's auditing of the respondents' tax affairs was far advanced but not finalised. Counsel further referred at page 606 paragraph C where the court stated:

"However, Sars is required to show, I think, that there is a material risk 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."

[2] 2015 (3) SA 596 WCC

[32] Ms Dauds's application of Tradex *supra* above is misplaced. In Tradex *supra* the central issue was non-submission of VAT/tax returns by the respondent. Indeed SARS had not established any tax debt in respect of the respondent in Tradex *supra*. In the present matter a fraudulent VAT refund has been paid to one of the respondents, whom then redistributed, at a later stage, the payments at no value at all to other respondents.

[33] Section 190 (5) provides:*" If SARS pays a person by way of a refund any amount which is not properly payable to the person under a tax Act, the amount is regarded as an outstanding tax debt from the date on which it is paid to the person"* It is therefore trite that the said VAT refund is a debt owing to SARS. It follows that all the beneficiaries of the VAT refund paid fraudulently to the third respondent are the debtors of SARS.

[34] Furthermore there is overwhelming evidence that the said beneficiaries partook from the proceeds knowing full well about the fraudulent scheme. In my view whether the payment is paid directly or indirectly to other persons, who may or may not be VAT vendors, the fact that it arises from the debt created by the application of section 190 (5) qualifies it as a tax debt.

[35] The arguments advanced by Ms Dauds pertaining to the misapplication of section 163 were also advanced by Mr Prinsloo on

behalf of the 19th and 20th respondent. As discussed above I am not persuaded otherwise.

[36] It is established law that section 163(1) does not limit the scope to a taxpayer but to any person. See **CSARS v Badenhorst and others**[3].

[37] Having regard to the above the point *in limine* must fail.

Merits regarding the 1st to the 10th respondents

[38] As indicated above the 2nd respondent is the 1st respondent's wife who is the director of the 6th respondent. It is submitted that the 2nd respondent is mentally unstable and that there is a need to appoint a curator for her. It is further submitted that the 2nd respondent was not in charge of the affairs of the 6th respondent. The person who used to manage the second respondent is deceased.

[39] There is no dispute that the 2nd and the 6th respondents were involved in the fraudulent scheme and that there was a flow of funds arising from the said scheme to the 2nd and 6th respondents. Having regard to the above, assets of the said respondents should be subject to a final preservation order. In fact it will also be advantageous to both respondents.

[40] With regards to the 1st, 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 10th respondents the applicant's submission is that funds flowed from the

[3] Case number 51232/2013. Gauteng Division Pretoria

18th and 3rd respondents to the 1st respondent and his entities as well to the 19th respondent. This is supported by the averments in the affidavit of the 17th respondent, Mr Jabosigo the sole director of the 18th respondent. Mr Jabosigo further avers at paragraph 12.14 of his affidavit that about two months after being employed by the 3rd respondent, the 1st respondent informed him that he had connections at SARS and that he had been in the business of VAT refunds for a long period. It appears that the curiosity of the 17th respondent was aroused by the flow of funds to the 5th respondent, a company under the control of the 1st respondent.

[41] Mr Jabosigo further states that on or about the beginning of 2010 the 1st respondent activated a VAT number on behalf of the 18th respondent, 17th respondent's business and further completed the VAT returns personally. Upon enquiry by the Mr Jabosigo of the source of information for the VAT returns, as he knew that his company was dormant, the 1st respondent informed him that he obtained the figures and or the relevant information to complete 18th respondent's VAT returns from the 19th respondent. Subsequent to the payment of VAT refunds to the 18th respondent the 1st respondent would instruct the 17th regarding the distribution of the said funds. It transpired that the funds were later channelled to the 3rd respondent.

[42] Mr Jabosigo's averments clearly link the 1st respondent to the 19th respondent who was working for SARS at the time. When the 19th respondent left SARS he nudged Mr Jabosigo to work with him on the

work he was doing for the 1st respondent. He further links the 33rd respondent to the activities of the 1st respondent. Apparently the 33rd respondent was responsible for construction of financial records and the creation of invoices for the 18th respondent. It has to be remembered that 18th respondent was a dormant company well known by Mr Jabosigo as it was his business. Overall the 33rd respondent was responsible for attending queries arising from fictitious returns and supporting documents.

[43] The 1st respondent's answers as contained in his supplementary affidavit in respect of Mr Jabosigo's allegations are bare denials and few irrelevant try hard point out contradictions on the part of Mr Jabosigo. For example he states that Mr Jabosigo he contradicts himself when he said he chanced upon a cheque of R1m and was told by the 1st respondent that it was for a VAT refund in favour of the 5th respondent. He later said that the year he worked for the 5th respondent he did not see any VAT return or VAT refunds. I see nothing contradictory about these statements. Mr Jabosigo made it clear that he was informed by the 1st respondent that the cheque was in respect of VAT refund. I find no reason for Mr Jabosigo to implicate himself in order to build a case against the 1st respondent and his entities. Mr Jabosigo's averments are supported with evidence. On a balance of probabilities Mr Jabosigo's evidence is overwhelmingly reliable.

[44] The 1st respondent launched the same unfounded attack against Mr Mahlangu. Mr Mahlangu's evidence conjures up well with Mr Jabosigo's. Mr Jabosigo stated that the trading activities of the 3rd respondent involved bill boards, Mr Mahlangu is adamant that he was sent to China by the 1st respondent a few times to buy him metal sign boards, aluminium signs and the like. The same *modus operandi* was followed, wherein the 1st respondent ran the business account of Mr Mahlangu, the 13th respondent through issuing instructions regarding the distribution of funds. It is not surprising now that the said funds which were pre known by the 1st respondent but being paid to the 13th respondent would land up with the 3rd respondent as it happened with Mr Jabosigo's transactions.

[45] I hold the same view as above that the 1st respondent's answers are bare denials and fabrications of cash advance and or loans without any supporting evidence. Again I find no reason on the part of Mr Mahlangu to implicate himself to this extent.

[46] The 1st respondent although professing that the 3rd respondent received legitimate payments in respect of VAT refunds however promises to repay SARS. There is therefore no basis for doing so in the event that the VAT refunds paid to the 3rd respondents were legitimate. It also transpired during argument that the 1st respondent never requested funds from the curator to attend to the audit of his accounts to prove that VAT refund were legitimately claimed in order

to disprove SARS case. The 1st respondent only requested a sum of R1, 2 million for the maintenance of his family.

[47] The 1st respondent does not dispute that there was a flow of funds from 13th, 15th and 18th respondents to the 3rd and 4th respondents. However his defence is that he was not aware that the said respondents were involved in VAT irregularities. According to the 1st respondent funds advanced by the respondents to his entities were loans, this is despite the 1st respondent omitting to give the details of the alleged loans.

[48] The forensic report filed by the curator bonis, shows that the funds received by the 1st respondent and his entities did not amount to loans, as no repayment of same is evident from the banks statements and no interest charged for such loans. Furthermore the report states that the business of the 3rd respondent was not profitable and relied on transfers from other entities for its operations.

[49] It was argued on behalf of the 1st to 10th respondents that averments in the forensic report was inadmissible. The forensic report was not discovered and neither was it attached to the founding affidavit. I ruled in favour of the 1st to 10th respondents in this regard.

[50] Be that as it may the applicant's case regarding the flow of funds is founded on Nosipho Mkhoma's (*"Nosipho"*) affidavit one of the applicant's employees. According to Nosipho an analysis of the bank

account records of the 3rd respondent revealed that the VAT refunds were paid to the 13th respondent by SARS and were later diverted to the 3rd respondent.

[51] The argument raised on behalf of the 1st respondent is that the VAT refund claims submitted by him on behalf of the 3rd respondent were proper refunds, therefore neither himself nor the 3rd respondent are indebted to the applicant for any tax liability. It is further submitted that 4th and 5th respondents as well as the 7th, 8th, 9th and 10th respondents trusts connected to the 1st respondent are not liable to the applicant for any tax debt. This is despite the overwhelming proof by the applicant that the above entities received funds from the fraudulent VAT refunds paid to the 3rd respondent. This has been widely dealt with in point *in limine* above.

[52] Having regard to the above I am satisfied that the applicant has established a case for tax debt on the part of the 1st to 10th respondents.

[53] I now turn to enquire whether the preservation order if granted would confer a substantial advantage in the collection of tax. This entails whether the applicant, SARS has shown that there is a material risk that assets which would otherwise be available for satisfaction of tax would, in the absence of a preservation order, no longer be available.

[54] SARS has successfully shown that there is a material risk of further dissipation of assets in the absence of the final preservation order. The latest report by the Curator more than establishes this fact. Paragraph 10 of the order granted on 29 July 2014 reads as follows:

"The curator bonis shall be entitled, in order to give effect to this order, to interview the Respondents, the Directors, members of the Respondents, who are obliged to furnish the curator bonis with full particulars within three days of service of the provisional order on the Respondents, of all their assets and how assets were acquired".

[55] At page 235 of the paginated bundle paragraph 4.1. of the report dated 2nd June 2016 the curator reports as follows:

"AD 1st to 10th respondents:

4.1.3 Unfortunately Mr, Tloubatla was, from the outset, not co-operative and it was struggle to identify and locate any assets belonging to 1st to 10th respondents.

4.1.5 Initially, when I and/or A-Forensic did manage to make contact with Mr. Tloubatla he continuously postponed scheduled meetings with will-nilly excuses. Later on any attempt to contact Mr Tloubatla failed. Even attempts to contact Mr Tloubatla through his attorneys of record were fruitless.....

4.1.12 The lack of co-operation by Mr. Tloubatla suggests he is concealing assets in all likelihood.

4.1.14 I have, accordingly, come to the conclusion that the 1st to 10th respondents should own substantial further assets, which are being concealed.

[56] At page 249 of the paginated bundle the curator remarks as follows:

" 4.8 AD 28TH AND 29 RESPONDENTS:

4.8.1 Mr. Owen Perry is the registered owner of the immovable property known as 8 Genzo Road, Naturena , Gauteng. The property consists of an old dwelling, which seems to be in the process of being renovated.

4.8.2 An initial meeting with the 28th respondent revealed that he was formally a pastor, but is now involved in the construction industry through the 29th respondent.

4.8.3 Mr. Perry undertook to provide me with full details of his other assets, which have not been received to date. I have, however, ascertained that he is the owner of the following vehicle: Volkswagen Polo , BK 09 FF GP"

[57] At page 250 of the paginated bundle the curator remarks as follows:

"4.10 AD 32ND RESPONDENT:

4.10.1 All my attempts to make contact with Mr. Frank Abt, the 33st (sic) respondent, have to date , have failed.

4.10.2 I intend to appoint tracing agents to assist me in locating Mr. Avt.

4.11 AD 33RD RESPONDENT:

4.11.1 The 33rd Respondent, Mr Ahmend Bryon (sic), is the registered owner of the immovable property known as No.3, Barrydale Street, Elodarado Park, Gauteng, from which he carries on his tax and accounting practice.

4.11.2 There are two vehicles registered in the name of Mr. Bryon, being 1. Volkswagen Golf BV 37 NP GP , 2. Volkswagen Golf CZ 85 SZ GP.

4.11.3 Mr. Bryon declared his willingness to co-operate with this investigation and undertook to supply me with a comprehensive list of all his assets and financial details. To date I have not received this information."

[58] As indicated above the respondents who sought the supplementary report did not challenge the curator's report. There is therefore no case made that the lesser the assets found from the respondents the

greater are the chances to discharge the preservation order or allowing the preservation order to lapse. It is clear that respondents are deliberately frustrating the "big find" in order to raise the flawed argument above. It is apparent from the behaviour of the said respondents that there is a material risk that the respondents will dissipate the assets. I take note of the waste of time by the said respondents who had requested a further report by the curator. They did not even bother to comment on the curator's findings. In fact the delays arising from the request of the latest curator's report are chronicled in the introduction above.

Merits regarding the 28th, 29th, 32nd and 33rd respondents

[59] Counsel for the applicant Ms Phehane submitted that the averments by Mr Jabosigo overwhelmingly link the 33rd respondent to the dealings of the 1st respondent. By his own admission he introduced Mr Jabosigo to the 28th respondent and he, 28th and 32nd respondent conducted work for the 18th respondent, the 17th respondent 's company.

[60] The 33rd respondent was introduced by the 19th respondent to the 1st respondent. On this chain there is an amount of R12 million arising from fraudulent VAT refunds clearly traced back to the 1st respondent and his entities in particular the 3rd respondent. It is reasonable probably true that the amounts that were disbursed were higher than the amount of R300 000 they received. In respect of 28th, 32nd and

33rd respondent there is overwhelming evidence that they knew they were assisting a fraudulent cause. The fact that they even admit to defrauding their client in the process is more telling. The 33rd respondent is desirous of challenging the email exchange correspondence with the 17th respondent in the heads of argument. Regrettably he never took issue with the email in his opposing affidavit. The rule is trite that the deponent rises and falls by the averments on his or her affidavit.

[61] It is trite that all who participated and benefited in the scheme whether it is through payments for "accounting and or auditing work" owe tax debt to SARS and that gives rise to the confirmation of preservation order.

Merits regarding the 19th and 20th respondents

[62] The case against the 19th and the 20th respondents follows the same pattern of the flow of funds as depicted above. It was submitted that the evidence linking the said respondents to the tax fraud was hearsay as the bank statements of the 20th respondent from the Standard Bank account were converted. Mr Jabosigo's undisputed direct evidence counters this argument.

[63] It was submitted on behalf of the applicant that the fact that the 19th respondent worked for SARS for many years and was involved in authorising VAT pay-outs. He was therefore in a position to

understand the VAT system and galvanise the network of other corruptible officials to assist him. Furthermore the evidence of the 33rd respondent connects the 19th respondent with the 1st, 17th respondent and himself as he states that it was the 19th respondent that approached him to establish the 20th respondent on his behalf. It is common cause that he was the sole member of the 20th respondent.

[64] It was further submitted that it is common cause that the 20th respondent never submitted any tax returns to SARS despite receiving huge amounts of money in its Standard Bank account. It was submitted on behalf of the 19th and 20th respondent that the 19th respondent had no access to the Standard bank account. This is because of the strange and rather illegal agreement that the seller of the 20th respondent to the 19th respondent would continue to keep the standard bank account under his control.

[65] The arrangement set out above directly support the case of fraud as pleaded by the applicant. It is probably true that the Standard Bank account was intended to receive part of the proceeds of VAT fraud. As alluded above 20th respondent through 19th respondent owes the VAT amount which is part of the R154 million to SARS.

[66] The argument submitted on behalf of the 19th respondent that the Standard Bank account of the 20th respondent should be ring fenced for preservation order does not hold water. According to Counsel, Mr Prinsloo the final preservation order should not be granted against the

personal accounts of the 19th respondent held at Nedbank and First National Bank respectively.

[67] I cannot accept the above argument, a huge amount of taxpayer's funds is missing amongst various role players including the 19th and 20th respondent. It is highly probable that 19th respondent's account has been and or will be used to channel the amount due to the applicant. In the event that the 19th respondent needs to utilise the accounts in question he has remedies through the curator. Furthermore the submission that since less assets have been found and preserved against the respondents, that should equal to no requirement for the final preservation order is flawed. As alluded above there is more than compelling evidence that more than R154 million fraudulent VAT refund has been distributed amongst more than 30 entities and individuals.

[68] It was also submitted on behalf of the respondents that a case of final relief in terms of common law has not been established, as the applicant has not established a clear right. This matter has been brought in terms of section 163 of the TAA. The test as shown above differs from the requirements of common law.

[69] Having regard to the above the case of final preservation order has been established against the 19th and the 20th respondents.

[70] The following order is made:

70.1 That the provisional order granted against 1st to 10th respondents on 29 July 2014 be and is hereby confirmed.

70.2 That the 1st to 10th respondents are to pay the costs of this application jointly and severally the one paying the other to be absolved, costs to include the cost of two counsel.

70.3 That the provisional order granted against 19th and 20th respondents on 29 July 2014 be and is hereby confirmed.

70.4 That the nineteenth and twentieth respondents are to pay the costs of this application jointly and severally the one paying the other to be absolved, costs to include the cost of two counsel.

70.5 That the provisional order granted against 28th, 29th, 32nd and 33rd respondents on 29 July 2014 be and is hereby confirmed.

70.6 That the 28th, 29th, 32nd and 33rd respondents are to pay the cost of this application jointly and severally the one paying the other to be absolved, costs to include the cost of two counsel.

70.7 That the provisional order granted against the 11th, 12th, 14th, 16th to the 22nd, 24th, 25th, 26th and 27th respondents on 29 July 2014 be and is hereby confirmed

70.8 That the 11th, 12th, 14th, 16th to the 22nd, 24th, 25th, 26th and 27th respondents are to pay the cost of this application jointly and severally the one paying the other to be absolved, costs to include the cost of two counsel.

70.9 That the *curator bonis*, Mr Cloeter Murray shall take over the control of the assets of all the above mentioned respondents and that he should investigate the existence of further assets.

N.P. MALI
JUDGE OF THE HIGH COURT

Counsel for the Applicants:	Advocates van Der Merwe (SC) and Phehane-Rametse
Instructed by:	Poswa Incorporated
Counsel for the 1st to 10th Respondents:	Advocate Dauds
Instructed by:	Ramushu Mashile Twala Inc
Counsel for 19th and 20th Respondents:	Advocate Prinsloo
Instructed by:	Strauss de Waal Attorneys

Counsel for 28th, 29th, 32nd and 33rd Respondents:	Advocate Strydom
Instructed by:	Strydom Attorneys
Dates of hearing for the 19th and 20th Respondents:	1 March 2017
& dates of hearing for the 1st to 10th, 28th, 29th, 32nd and 33rd Respondents:	16, 17 & 18 May 2016
Date of Judgment:	31 March 2017