REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 34975/2019

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

Date: **WHG VAN DER LINDE**

In the matter between

Kenneth Siphayi	Applicant
Kenny Bricks CC	Second Applicant
and	
Commisioner for SARS	1st Respondent
South African Revenue Service	2nd Respondent
Pearl Moodley	3rd Respondent

Draft Judgment

Van der Linde, J:

[1] The first applicant is the sole member of the second applicant which is a close Corporation. The second applicant is a taxpayer who is indebted to the first and second respondents, respectively the Commissioner for the South African revenue services, and the revenue services itself. The two applicants bring an urgent application for various forms of relief but primarily it is aimed at declaring that the deducting of funds from the bank account of the first applicant in respect of a tax debt of the second applicant is unlawful and invalid. The applicants also seek an order directing that SARS be ordered and directed to resend notices of intention to hold the first applicant liable for the tax debts of the second applicant.

[2] The application is brought by way of urgency and urgency is disputed. The application was launched on 4 October 2019 and it gave SARS opportunity till 10 October 2019 to file its answering affidavit. The answering affidavit was filed although after that date. The case of the applicant is that in terms of section 184 of the tax administration act to recover tax from a person held personally liable under section 155 or 157 of that act, as it has against the taxpayer itself. But that section obliges SARS 1st to give notice to the person intended to be held personally liable. It is the case of the applicants that the first applicant was not given such notice.

[3] The attached urgency lies in the fact that if the tax liability of the second applicant is deducted from the account of the first applicant, then the first respondent will be haplessly affected in his ability to conduct his business and to serve as his creditors. He has employees who are required to be paid and creditors as well. He also needs to pay water, electricity, rates and taxes. These are obviously in matters of a commercial nature but it does not make the relief sought less urgent and I have decided to share the matter on the basis of urgency.

[4] It was argued on behalf of the respondent that the first applicant is not sought to be held liable as a representative taxpayer for the purposes of section 184 of the act. But this cannot be correct because the very notices upon which SARS relies for holding the first applicant

liable for the tax liability of the second applicant expressly provides that the first applicant is the representative taxpayer of the second applicant as provided for in terms of section 153 (one) of the tax administration act. That being so, the personal liability provisions set out in section 155, 157, 180 and 184 of the tax administration act expressly apply.

[5] The liability of the second applicant to SARS is in excess of 26 million wrong. According to this AR this appropriate notices in terms of section 184 of the act were sent to the first applicant 23 email addresses and they were also posted to a physical address. The letters that were sent to the physical address were by registered post but the tracking notes reflect that they were returned because the registered letters were not collected at the post office. The emails were sent respectively on 7 June 2019 and 6 August 2019. Nothing is said as to whether these emails were bumped back.

[6] In consequence, SARS appointed Nedbank as a third-party in terms of section 179 of the tax administration act to withhold and immediately pay over to SARS all available funds, not exceeding for time million wrong. It is not clear whether the bank account at Nedbank is an account of the second applicant close Corporation, order whether it is an account of the first applicant natural person. According to the papers by the applicant's the monies were deducted from the first applicant's personal bank account head held at Nedbank on 17 September 2019.

[7] The case of the applicant's is that the second applicant does not oh SARS the monies because the second applicant was in fact defrauded by its accountant. Criminal charges were laid against the accountant but the public prosecutor disinclined to prosecute.

[8] More importantly for present purposes is that the first applicant says that he did not receive the notices of 7 June 2019 and 5 August 2019 on which SARS in turn relies. He says that had he received them he would have acted and it would have made representations as requested in the notices. In his replying affidavit the applicant again stresses that he never received the notices.

[9] The applicant argues that Section 253 (1) provides that a notice, document or other communication issued, given, sent or served in the manner referred to in section 251 or 252, is regarded as received by the person to whom it was delivered or left, or if posted it is regarded as having been received by the person to whom it was addressed at the time when it would, in the ordinary course of post, have arrived at the a addressed place. Subsection (1) does not apply if— (a) SARS is satisfied that the notice, document or other communication was not received or was received at some other time; or - (b) a court decides that the notice, document or other communication was not received or was received at some other time.

[10] The applicant submits further that if SARS is satisfied that a notice, document or other communication (other than a notice of assessment) issued, given, sent or served in a manner referred to in section 251 or 252 (excluding paragraphs (a) and (b) thereof)— (i) has not been received by the addressee; or - (ii) has been received by that person considerably later than it should have been received; and the person has in consequence been placed at a material disadvantage, the notice, document or other communication must be withdrawn and be issued, given, sent or served anew.

[11] It remains a mystery as to what happened to the emails that were sent to the email addresses referred to at paragraphs 23 and 24 of the answering affidavit. But since only interim order is sought at this stage, I must assume that the version that the applicants put up, unless the version of the SARS costs serious doubt on the applicant's version. I do not believe that it can be said that it does. In the result I make the following order:

(a) Pending the re-enrolment of this application by either party, the first and second respondents are interdicted from deducting monies from the first applicant's bank account in terms of section 184 of the tax administration act 28 of 2011.

(b) The first and second respondents are directed to resend notices of intention to hold the first applicant liable for the tax debts of the second applicant at the following email addresses: (to be supplied).

(c) The remainder of the relief sought in this application is postpone sine die.

(d) Costs are reserved.

WHG van der Linde

Judge, High Court

Johannesburg

Date heard: 25 October 2019

Date judgment: 25 October 2019

Counsel for the Applicant
Adv.
Instructed by
VM Mashele
C/O Denga Attorneys
85 Main Street
7th Floor, Nedbank Building
Johannesburg
Tel: 011 9805651
Fax: 011 980 7971
Email: info@vmasheleattorneys.co.za

Counsel for the first and second respondents
Adv
Instructed by Majang Inc Attorneys.
Fancourt Office Park, Building 12,First Floor
Cnr Northumberland & Feistead Avenue
Northriding
Johannesburg
Tel: 011 7041348
Email:majang@majanginc.co.za