

IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)



Case number: 51232/2013

56971/2013

Date: 1 April 2016

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHERS JUDGES: YES/NO

(3) REVISED

1/4/2016 *[Signature]*  
DATE SIGNATURE

In the matter between:

THE COMMISSIONER OF THE SOUTH AFRICA  
REVENUE SERVICE

APPLICANT

And

PETRUS JOHANNES UYS BADENHORST t/a SA GLOBAL  
TRADING and/or GLOBAL TRADING

FIRST RESPONDENT

JACQUES SASSIN

SECOND RESPONDENT

TROJIN FEEDS (PTY) LTD

THIRD RESPONDENT

MINISTER OF FINANCE

**FOURTH RESPONDENT**

**AND**

**THE COMMISSIONER OF THE SOUTH AFRICAN  
REVENUE SERVICES**

**APPLICANT**

**And**

**HERMANUS JOACHIM BOTHA VERMAAK**

**FIRST RESPONDENT**

**HANLIE JANSE VAN RENSBURG**

**SECOND RESPONDENT**

**PIERRE CILLIERS**

**THIRD RESPONDENT**

**THE TRUSTEES OF THE TIME BEING OF THE  
PJU BADENHORST TRUST (IT2247/13), being  
MR PJU BADENHORST Senior  
MR PJU BADENHORST Junior**

**FOURTH RESPONDENT**

**THE TRUSTEES FOR THE TIME BEING OF THE SJ  
TRANSPORT TRUST (IT2248/13), being  
MR PJU BADENHORST Senior  
MR PJU BADENHORST Junior  
MR S JANSE VAN RENSBURG  
HANLIE JANSE VAN RENSBURG**

**FIFTH RESPONDENT**

**THE TRUSTEES FOR THE TIME BEING OF THE  
GLOBAL TRUST (IT1049/2012), being  
MR J SASSIN  
MR JA DELGADO as nominee of Iprotect Trustees  
(Pty) Ltd**

**SIXTH RESPONDENT**

**THE TRUSTEES FOR THE TIME BEING OF THE**

**FIRST TRUST (IT2761/2009)**

**SEVENTH RESPONDENT**

**THE TRUSTEES FOR THE TIME BEING OF THE  
THIRD TRUST (IT2180/2008), being  
FRANCOISE JANE SASSIN; JACQUES SASSIN  
AND JOSE ALBERTO DELGADO**

**EIGHTH RESPONDENT**

**THE TRUSTEES FOR THE TIME BEING OF THE  
HOME TRUST, being FJ SASSIN; J SASSIN and  
GE SASSIN**

**NINTH RESPONDENT**

**THE TRUSTEES FOR THE TIME BEING OF THE  
DUAL TRUST**

**TENTH RESPONDENT**

**THE TRUSTEES FOR THE TIME BEING OF THE  
SECOND TRUST**

**ELEVENTH RESPONDENT**

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**JUDGMENT (APPLICATION FOR LEAVE TO APPEAL)**

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**PRETORIUS J.**

- (1) This is an application for leave to appeal to the Supreme Court of Appeal against the whole judgment and order of this court delivered on 13 October 2015. The second and third respondents in the application under case number 51232/2013 and the sixth to eleventh respondents in the second application are cited as applicants in the application for leave to appeal.
- (2) The application for leave to appeal is only heard now, five months after

the order had been granted due to the court and counsel's unavailability. The parties will be referred to as in the original application for the sake of convenience.

- (3) The respondents are relying on section 17(1) of the **Superior Courts Act, 10 of 2013** on both grounds as set out in section 17(1)(a):

*"(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-*

*(a) (i) the appeal would have a reasonable prospect of success; or*

*(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;"*

- (4) The fourth respondent's counsel argued that the respondents' application for leave to appeal fails to meet the threshold as set out in **Himunchol v Moharom 1947 (4) SA 778 (N)** at 780 where the court held:

*"What the rule contemplates is that, in framing his grounds of appeal, an appellant shall specify the findings of fact he appeals against, and the rulings of law, and the object is that his opponent shall be made aware of points taken by the appellant and the court of appeal shall be apprised of the issues which it is asked to decide...it is essential that the grounds of appeal*

***should be framed in such a way that the issues to be decided by the court of appeal are clear.***" (Court's emphasis)

- (5) The main reason for the application for leave to appeal is that, according to the respondents, there are conflicting judgments on the legal issues arising in this matter. The court was referred to the judgment of Seegobin J in the KwaZulu Natal Division of the High Court. It is clear from the reading of the judgment of Seegobin J that the court was not dealing with a preservation application in that matter as is the case in the present matter. Seegobin J referred the application to trial.
- (6) The respondents rely on the admissibility of the section 50 enquiry in the leave to appeal application, although it had not been argued before this court. The KwaZulu Natal application by SARS was against Trojin Feeds (Pty) Ltd and Mr Sassin for judgment in an amount of R41 253 533.50 as well as a larger claim based on fraud, not for a preservation order.
- (7) I was referred to and I have read paragraph 69 of Seegobin J's judgment carefully and cannot agree that it is a finding in respect of section 50. In any event, as stated above, the section 50 enquiry's admissibility was never argued before this court and was not an issue at any stage.
- (8) Section 56(4) of the **Tax Administration Act, 28 of 2011** ("the TA

Act”) provides:

*“(4) Subject to section 57 (2), SARS may use evidence given by a person under oath or solemn declaration at an inquiry in a subsequent proceeding involving the person or another person.”*

(9) In the Seegobin J judgment Mr Sassin stated:

*“My evidence (if found to be admissible in these proceedings) is before this Court. It is contained at “SARS1”/108 – 213 and “SARS2”/214 – 250. That evidence is true. It is, moreover, uncontradicted. I did not know that Badenhorst did not intend to pay VAT to SARS (see for example “SARS1”/197 – 199; 206 and 208 – 212; “SARS3”/249).”*

(10) Therefor it is clear that Mr Sassin had relied on the evidence he had given at the enquiry in the KwaZulu Natal case. Had the issue been argued in this court, the applicant and the court would have dealt with it, but it was never part of the respondents’ case.

(11) In the present case Mr Sassin and the other respondents admitted the facts alleged by SARS in the founding affidavit to such an extent that a strong *prima facie* case was made, which resulted in Ledwaba DJP granting a provisional preservation order. The case was strengthened by the evidence Mr Sassin had given at the enquiry. The enquiry only took place after the founding affidavits in the present matter was attested to.

(12) The fourth respondent opposed the application for leave to appeal as

well, dealing with the counter application. The respondents state in paragraph 5 of the application for leave to appeal that the court *"fail[ed] to properly deal with the argument relating to the fact that Section 163 of the Tax Administration Act must be read in conjunction with Section 179 to 183 of the Tax Administration Act."* There is no indication by the respondents as to how and where and in what way the court was incorrect in its finding. This contention by the respondents is defective due to the lack of particularity in setting out the reason for this submission as a ground of appeal.

- (13) I have dealt with the interpretation of section 163 in detail in the judgment and am not going to regurgitate my findings in that respect.
- (14) Counsel for the respondents' argument that my interpretation of "any other person" will lead to absurd results cannot be entertained as a preservation order is granted under judicial supervision. A court of law will deal with applications and will not allow an absurd end result.
- (15) In **Mpumalanga Department of Education v Hoërskool Ermelo 2010(2) SA 415 CC** at paragraph 72 the Constitutional Court held:

***"The possibility that a statutory power may be abused - which is an ever-attendant risk - cannot determine the construction of the ambit of the power, especially since the law affords adequate remedies for official abuse of power. Moreover, in this instance, the statute requires the exercise of the power to be reasonable. The remedy is thus to correct***

***the abuse, and not to attenuate the power through strained construction.***" (Court's emphasis)

- (16) I have carefully considered the grounds set out in the application for leave to appeal. The fact that the section refers to "the assets of the taxpayer or other person" makes it clear that it is applicable on other parties as well and not only on the taxpayer.
- (17) This court did not rely on section 190(5) of the TA Act when holding Sassin responsible for payment. The respondents once again fail to properly set out in what way the court was incorrect and setting out how the court's reliance on section 190(5) came about, as the court's conclusion was not based on the provisions of section 190(5)..
- (18) The same can be said, as set out by the fourth respondent, that the respondents failed to state how, why or in what way section 163 of the TA Act is ambiguous, what the impact in law may be and the nature and extent of the ambiguity. Having regard to the **Himunchol case** (*supra*) the respondents once more fail to meet the required threshold to set out the reason for declaring the finding to be wrong.
- (19) The further contention that the provisions of section 163 violates section 25 of the Constitution is set out as follows:

*"In finding that a broad interpretation of Section 163 does not lead to an arbitrary and unjustifiable infringement of the fundamental property rights of the affected respondents and is*

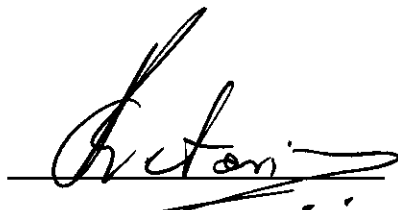


*by implication not an infringement of the Constitution."*

There is no indication as to why it is alleged that section 163(1) of the Tax Act falls outside of the provisions of the Constitution. No reasons are set out as to the manner in which section 163(1) of the Tax Act violates section 25 of the Constitution. This ground of appeal has to be dismissed.

- (20) There can be no procedural unfairness as the court grants a preservation order after considering all the facts placed before it.
- (21) Once more it must be emphasised that at no stage was there any indication by Mr Sassin as to why the payment of R65 million was justified and why R24 million was repaid to Mr Badenhorst to pay tax.
- (22) I have considered all the oral and written arguments, carefully to decide whether leave to appeal should be granted. I have also considered the authorities to which counsel had referred me in relation to the facts in the present matter.
- (23) I find that in the present matter there is no prospect that another court may come to a different conclusion having regard to the facts and circumstances of the present matter. I have dealt with the reasons fully in my judgment and do not intend repeating the reasons, but it must be incorporated into this judgment.
- (24) Accordingly I make the following order:

1. The application for leave to appeal is dismissed including the leave to appeal against the counterclaim.
2. The respondents to pay the costs of the applicant, including the cost of two counsel.
3. The respondents to pay the costs of the fourth respondent in the application for leave to appeal against the counterclaim, including the costs of two counsel.



Judge C Pretorius

Case number : 51232/2013 & 56971/2013

Matter heard on : 30 March 2016

For the Applicant : Adv JL Van der Merwe SC  
Adv LG Kilmartin

Instructed by : Ledwaba Mazwai Attorneys

For the Second and Third

Respondents : Adv MM Rip SC

Instructed by : Cuzen Randeree Attorneys

For the Fourth Respondent : Adv G Marcus SC

Adv M Stubbs

Instructed by : State Attorney

Date of Judgment : 1 April 2016