REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

22/4/16.

CASE NO: 87306/2014

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

21 April 2016 EMAbrahams

DATE SIGNATURE

In the matter between:

COMMISIONER FOR THE SOUTH AFRICAN REVENUE SERVICES	**APPLICANT**
and	
BACHIR, VM	**1ST RESPONDENT**
EXECELLENCE TRADE SEVEN CC	**2ND RESPONDENT**
AZGAR RAIDEN	**3RD RESPONDENT**
FJ AUTO PARTS CC	**4TH RESPONDENT**
CC TRADE 496 CC	**5TH RESPONDENT**
POPAT, RS	**6TH RESPONDENT**
POPAT,SS	**7TH RESPONDENT**
POPAT,S	**8TH RESPONDENT**

JUDGMENT

KUBUSHI, J

INTRODUCTION

[1] This is an application in terms of s 163 of the Tax Administration Act 28 of 2011 ("the Act"). In terms thereof, the applicant seeks an order for seizure, preservation and safeguarding of the respondents' assets in order to prevent any such assets from being disposed of or removed ("the preservation order"), thereby frustrating the collection of the full amount of tax that is either due and payable or that the applicant on reasonable grounds is satisfied may be due or payable. The applicant also seeks certain orders that are ancillary to the preservation order, like for instance, the appointment of a *curator bonis*.

[2] When the application was launched there were eight respondents in this matter. However, when the parties appeared before me only three respondents, that is, second, third and eighth respondents were represented. The other respondents together with the applicant put in place alternative arrangements, the agreement of which was made an order of court. Presently, before me, only the second, third and eighth respondents are opposing the application.

[3] The applicant is represented by Ngcongwane SC and the three respondents by Bhana SC. I shall, in this judgment, refer to the respondents individually as second respondent, third respondent and eighth respondent. I shall refer to them collectively as the respondents.

THE PARTIES

[4] The applicant, in this instance, is the Commissioner for the South African Revenue Services.

[5] The second respondent is a close corporation registered in South Africa and its principal place of business is situated in Komatipoort, Mpumalanga. Komatipoort is situated on the border between South Africa and Mozambique. The second respondent operates as a business that sells and exports goods, mainly in the form of perishable items, to its customers in South Africa, Mozambique and other countries outside South Africa.

[6] The third respondent is the sole member of the second respondent. He is a Mozambican national. He holds a Mozambican passport and a South African passport. He also has a South African identity document. He is registered for tax purposes in South Africa under the Income Tax Act. He lives in Komatipoort, Mpumalanga and is the husband of the eighth respondent.

[7] The eighth respondent is the wife to the third respondent and resides with him in Komatipoort, Mpumalanga. She is a Mozambican national. She holds six Mozambican passports. She is an employee of the second respondent. She is also a director in and holds 25% membership in Flamarall CC a close corporation registered in South Africa. She is registered as a tax payer in South Africa as well. The eighth respondent has two banking accounts with ABSA and FNB, respectively. Her sole source of income during the years of assessment in this regard is a salary she earns from the second respondent. Her only movable asset is a Nissan motor vehicle.

FACTUAL BACKGROUND

[8] On 10 December 2014, the applicant obtained, *ex parte* and in camera, a provisional preservation order ("the Order) in terms of s 163 of the Act.

[9] In terms of paragraph 4 of the said Order, a *rule nisi* was issued calling upon the respondents to show cause why the preservation order should not be made final on the return day of 11 February 2015. After the Order was granted, the applicant's attorneys of record failed to ensure that the Order was served timeously on the respondents. This was occasioned by the fact that the applicant's attorney of record received instructions from the *curator bonis* to proceed with the service of the Order on the respondents only on 10 February 2015. The applicant's attorneys of record received the said instructions only a day before the return day of 11 February 2015. It meant, therefore, that the applicant did not have adequate time within which to serve the Order and to enrol the matter properly. Accordingly, the applicant allowed the Order to lapse by failing to appear in court on the return day. Despite the fact that the Order lapsed on 11 February 2015, the third respondent was served with a copy of that Order on 10 February 2015.

[10] It is alleged that on receipt of the Order, and in a letter dated 20 February 2015, the third respondent, through his attorneys of record, made enquiries from the applicant's attorneys of record about the status of the matter. In the said letter the applicant's attorneys of record were informed that they should not proceed by *ex parte* application in the light of the fact that the respondents were not dissipating their assets and have no intention to flee South Africa. The attorneys of record of the respondent further requested that copies of any further proceedings against the respondents be served on their offices.

[11] The applicant launched another *ex parte* application to revive the lapsed interim order without serving the application on the respondents. The revival order was granted on 18 March 2015. Once the interim order was revived, it was served on the respondents again, placing all the respondents' respective estates under preservation and in the control of the *curator bonis*, Mitesh Patel.

[12] Pursuant to the preservation order the second respondent's assets (the assets include trading stock which primarily consisted of consignment stock) were attached and placed under preservation. In order to enable the second respondent to continue trading, an agreement was reached between the respondents and the *curator bonis* that the second respondent should continue to trade and the proceeds of the sale of the trading stock be deposited in the trust account of the respondents' attorneys of record.

ABUSE OF PROCESS

[13] The respondents in opposing the application are raising a number of criticisms on the merits of the application and also raise a point *in limine*. I shall deal first with the point *in limine* as it might be dispositive of the matter.

[14] The contention by the respondents is that the preservation order should not be confirmed on the basis that the applicant in its revival application breached its duty of good faith, which is an essential requirement of *ex parte* applications. It is alleged in the respondents' papers that the applicant failed to disclose material facts to the court hearing the revival application. The material not so disclosed is alleged to include, but not limited to, the fact that despite the Order having been served on

the respondents on 10 February 2015, the respondents did not flee South Africa as the applicant alluded in its founding affidavit; neither did the respondents attempt to dissipate any of their assets in order to frustrate the purpose of the Order; and further that the respondents' attorneys of record addressed a letter to the applicant's attorneys of record enquiring about the status of the matter and also informing them about the respondents' situation.

[15] The crux of the submission, as argued before me, is that the appellant failed to disclose the letter of 20 February 2015 written by the respondents' attorneys of record to the appellant's attorneys of record, to the court during the hearing of the revival application.

[16] The applicant in its replying affidavit responded by denying that there were any grounds on which the respondents could lend credence to the suggestion that the applicant did not act in good faith when it obtained the order reviving the interim Order. According to the applicant, there is no requirement that any further information on the facts should be placed before court at the time of bringing the revival application. In any event, it is contended, the content of the letter of 20 February 2015 from the respondents is the subject of a dispute, relevant for the hearing whether or not the final preservation order is required against the respondents. At the time of the *ex parte* application, so it is argued, in any event, the applicant was able to show that the provisional preservation order was required to secure the collection of tax.

ANALYSIS OF EVIDENCE

[17] In this instance, I have to deal with a revival application that was obtained on *ex parte* and *in camera*. I am not aware of any considered judgment where such an application was the subject matter. Neither did counsel provide me with any authority in that respect. It is my view that the fact that it was actually a revival application that served before the court should not detract from the fact that the application was an *ex parte* application and ought to be treated as such.

[18] Uniform rule 27 (4) provides, thus:

> '(4) After a *rule nisi* has been discharged by default of appearance by the applicant, the court or judge may revive the rule and direct that the rule so revived need not be served again.'

[19] It has been held that whilst the sub rule does permit the court or a judge to revive a *rule nisi* that has been discharged by default of appearance by the applicant, the subrule does not override or detract from the rights of the opposing party in the litigation or of third party, nor does it diminish the need to care for such interests.[1]

[20] At the time the revival application was launched the applicant was aware that the respondents were represented and had indicated by a letter through their attorneys of record that they be served copies of any further proceedings that the applicant may institute against the respondents. The applicant failed to serve the revival application on the respondents and failed to disclose the letter to the court, whilst it already knew, having been informed in the said letter of 20 February 2015,

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[1] See S & U TV Services (Pty) Ltd: In re S & U TV Services (Pty) Ltd) (in provisional liquidation) 1990 (4) SA 88 (W) at 90H – J.

that the respondents were not dissipating their assets and had no intention to flee South Africa.

[21] Consequently, I do not agree with the argument by the applicant's counsel that the applicant failed to attach the letter, and as such failed to disclose it to the court, because there is no requirement that any further information on the facts should be placed before court at the time of bringing the revival application. The applicant seems to have lost sight of the fact that this was not an ordinary revival application, but, an *ex parte* application to revive the interim order that had lapsed. The application should as such not be handled normally, but, must comply with all the requirements of an *ex parte* application. One such requirement is full disclosure.

[22] As it has been held, an *ex parte* application is a serious departure from the ordinary principles applicable to civil proceedings to seek an order in the absence of notice to the respondent party. As *per* normal court practice an *ex parte* procedure should be invoked only where there is good cause or reason for the procedure such as when the giving of notice would defeat the very object for which the order is sought. It is, therefore, our law that an applicant in an *ex parte* application bears a duty of utmost good faith in placing before the court all the relevant material facts that might influence a court in coming to a decision. Only facts that are material and which are within the applicant's knowledge should be disclosed.[2]

[23] I am in alignment with what was said by Fabricius J in the unreported judgment of this court in *Commissioner for the South African Revenue Service v Sunflower Distributors* CC 2015 JDR 2546 GP, when dealing with the issue of good faith in *ex parte* applications:

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[2]See Powell and others v Van der Merwe and Others 2005 (5) SA 62 (SCA) para [42].

'Section 163 provides for an *ex parte* application under certain specific circumstances. I would also interpret the section, in the context of the clear discretion granted to a Court, in the light of the principle that the State is obliged to – and entitled to collect taxes, as its very existence is dependent on it. This must also be done swiftly, but, I must add, at all times lawfully, and in the context of a preservation order sought *ex parte*, it must be done with circumspection, keeping in mind that the utmost good faith required, and the fact that s 163 allows a procedure for preserving assets. It is not, and should not be used, as an execution mechanism as Rogers J said in par. 73 of the Tradex decision, *supra* [*Commissioner, South African Revenue Service v Tradex (Pty) Ltd and Others 2015 (3) SA 596 WCC para 72].*'

He states further at para 11 of the same judgment that:

'Good faith is a *sine qua non* in *ex parte* applications. If any material facts are not disclosed, whether they be fully suppressed or negligently omitted, the Court may on that ground alone dismiss an *ex parte* application. The court will also not hold itself bound by an order obtained under the misapprehension of the true position. Among the factors which the Court will take into account in the exercise of its discretion to grant or deny relief to a litigant who has been remiss in his duty to disclose are at least:

1. The extent to which the rule has been breached;
2. The reasons for the non-disclosure;
3. The extent to which the first Court might have been influenced by proper disclosure;

4. The consequences from the point of doing justice between the parties.

See: Superior Court Practice, Erasmus, Vol. 2 at D1-61 to D1-62.'

[24] Ordinarily, the effect of uniform rule 27 (4) would be the same as if the *rule nisi* had not been discharged. This of course would be were matters are still *res integra*. However, it is said that where there is adequate room for a probability that matters are no longer *res integra*, the *rule nisi* should not be revived without notice to the respondent.[3]

[25] In *Ex Parte S & U TV Services (Pty) Ltd: In re S & U TV Services (Pty) Ltd (in provisional liquidation)* above, the court refused an application for the revival of a provisional order of winding up of a company where it was brought three weeks after the discharge of the provisional order by reason of there being no appearance on the return day on behalf of the applicant. The court took into account the probability that, because of the lapse of three weeks, matters were no longer *res integra* in that it was possible that respondents in the application may have heard of the discharge and acted accordingly.

[26] In this instance, the *rule nisi* was discharged on 11 February 2015 and revived on 18 March 2015. Approximately four weeks had lapsed at the time the order to revive the *rule nisi* was granted. I would opine, therefore, that probabilities are that should the letter have been disclosed to the court that heard the revival application, that court would most probably have been influenced not to grant the order and directed service upon the respondents.

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[3] See Ex Parte S & U TV Services (Pty) Ltd: In re S & U TV Services (Pty) Ltd (in provisional liquidation) above at 91 B-C.

[27] Besides, the letter itself would have informed the court that matters are no longer *res integra*. Some of the reasons why the applicant is seeking a preservation order is, as alleged by the applicant in its papers, that the respondents are disseminating their assets; and that, the respondents may flee to Mozambique. If the court had sight of the letter it would have known that it might not be so. This would be so because, the respondents informed the appellants in that letter that they are not disposing their assets, nor do they intend to flee South Africa. Most probably, the court would have revived the discharged *rule nisi*.

[28] Failure by the applicant to disclose this letter is to me a material non-disclosure and the applicant's contention that it found it not necessary to attach the letter to its founding affidavit does not hold water. As it was said in the *Sunrise*-judgment above at para 11, 'the deponent cannot act as judge in her own case and decide which facts to include and which not to include,' that should be left to the court to decide.

[29] In court the applicant's counsel submitted that the letter could not be disclosed because of the confidentiality of the matter. The explanation is not satisfactory as well. The confidentiality of the matter, in my opinion, was done away with when the Order was served on the third respondent. At the time the revival application served before court, the respondents' attorneys of record were already in possession of the Order served on the third respondent. The attorneys of record of the respondents in the letter of 20 February 2015 advised the applicant's attorneys of record to serve a copy of any further proceedings against the respondents at their offices. This must have been on instruction of their clients, the respondents.

[30] If material facts are not disclosed in an *ex parte* application or the facts are deliberately misrepresented to the court the order will be erroneously granted.[4]

COSTS

[31] The respondents' counsel requests an order for costs on an attorney and client scale in the event the judgment favours the respondents. The submission by the respondent's counsel is that the application instituted against them is vexatious in that the applicant purposefully misinterpreted the provisions of s 163 of the Act.

[32] I do not think that the circumstances of this matter warrant costs on an attorney and client scale. As it is the matter has been decided in favour of the respondents on a technical issue.

[33] Counsel also asks for costs of postponement occasioned by the applicant on the first day of trial. According to counsel half a day was wasted awaiting the applicant to finalise the negotiations with the other respondents. I am not inclined to accede to this request as in my understanding the matter was postponed *per* agreement between the parties.

ORDER

[34] In the premises I would make the following order:

1. The application before me is dismissed with costs, including the costs of two counsel.

2. The provisional preservation order is not confirmed.

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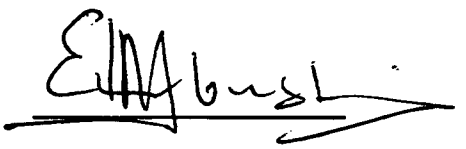
[4] See Naidoo v Matlala NO 2012 (1) SA 143 (GNP) at 153C – E.



E.M. KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCES:

HEARD ON THE	**: 22 March 2016**
DATE OF JUDGMENT	**: 21 APRIL 2016**
APPLICANT'S COUNSEL	**: ADV. NGCONGWANE SC**
APPLICANT'S ATTORNEYS	**: MAPONYA INCORPORATED**
2ND, 3RD, & 8TH RESPONDENTS' COUNSEL	**: ADV. BHANA SC**
2ND, 3RD, & 8TH RESPONDENTS' ATTORNEY	**: GATTOO ATTORNEYS**