REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2021/48495

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

…… ……..

DATE MOKOSE SNI

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICA

REVENUE SERVICES Applicant

and

ROY MULEYA Respondent

(Identity number [….])

Married out of community of property to:

RUTH DHLIWAYO, Zimbabwean ID No. [….]

Passport No. [….]

JUDGMENT

MOKOSE J

[1] The applicant approaches this court on an urgent basis for an order for the provisional sequestration of the respondent. The application is opposed by the respondent on several grounds.

[2] The facts are briefly that the respondent is a proprietor with businesses in both South Africa and Zimbabwe. In particular, he is the sole director of [….]"). He, together with is wife, managed [….] ("[....]").

[3] The applicant avers that during 2019 it commenced investigations into the importation of tobacco and tobacco refuse by [....]. The documentation submitted to the applicant stated, contrary to the Custom and Excise Act 91 of 1964 ("the Customs Act") that the imports were *"care of"* 8 companies including [….]. Furthermore, [....] facilitated as a clearing agent the importation of 22 112 774 kilograms on behalf of the said entities including [….]. When the applicant failed to obtain information and documentation pertaining to the importation of the tobacco, the applicant concluded that the tobacco had been imported illegally and sought to recover the duties from [….].

[4] Furthermore, the applicant has raised income tax assessments and obtained judgment against the respondent in the sum of R32 million which it avers emanates from issued income tax assessments for the period 2015 to 2019 as assessed as at 16 October 2021.

[5] Accordingly, the applicant contends that the respondent's total debt to it is in excess of R188 million. As such, the respondent is not only factually insolvent but has also committed acts of

insolvency. The applicant contends that the matter is urgent as the respondent continues to dissipate assets and in particular an immovable property he owned during April 2021. It became aware of this transaction at the end of July 2021. The applicant avers that it would suffer prejudice should it have to wait for a hearing in the ordinary course furthermore, it would not be afforded substantial redress at a hearing in due course.

[6] The respondent disputes the income tax debt *inter alia*, on the following grounds*:*

(i) that the debt is the subject matter of Tax Court appeal proceedings in terms of Section 107 of the Tax Administration Act 28 of 2011 and Rule 10 of the rules promulgated under Section 103 of the Act;

(ii) that the respondent had instituted proceedings to review and set aside the applicant's denial of the request for suspension of payment f the tax debt pending the outcome of the decision before the Tax Court in respect of the appeal;

(iii) no court order exists declaring the respondent to be liable in his capacity as director for the alleged tax debt of a third-party company, [….]. The respondent contends that the applicant has failed to establish both [….] and his liability.

[7] The respondent further contends that the matter is not urgent and that on the applicant's own version, avers that it has been aware of the fact that the respondent's immovable property was transferred to a family trust since the end of July 2021 and has failed to launch this application for a period of two months. As such, the urgency is self-created furthermore, no reason why the applicant should not be afforded redress in due course has been given.

Urgency

[8] Rule 6(12)(a) of the Uniform Rules of Court permits an urgent applicant, subject to the court's control, to forge its own rules which must as far as practicably possible, be in accordance with the rules. Where the application lacks the requisite element or degree of urgency, the court can for that reason decline to hear the matter.[1] Rule 6(12)(b) confers a general judicial discretion on a court to hear a matter urgently. It provides that the applicant must:

> *"….set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course."*

[9] The test of urgency in applications of this nature is whether, if this application is brought in the normal course, the applicant will be able to achieve sufficient relief. Tuchten J in the matter of **Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and others**[2] went so far as to note:

> *"It seems to me that when urgency is in issue the primary investigation should be to determine whether the applicant will be afforded substantial redress at a hearing in due course. If the applicant cannot establish prejudice in this sense, the application cannot be urgent."*

[10] The applicant, in the founding affidavit avers that there is an inherent urgency in matters pertaining to insolvency. The sooner a trustee is appointed by the Master of the High Court, he can set the relevant mechanisms into motion to trace and recover assets. Once the respondent has disposed of his assets, the chance of the trustee to find and recover such assets which may also have

[1] Commissioner for the South African Revenue Services v Hawker Aviation Services Partnership 2006 (4) SA 292 (SCA) at para 9
[2] [2014] 4 All SA 67 (GP) at para 64

been hidden becomes more difficult. Counsel for the applicant was of the view that there is no debate about urgency since the advent of the disposition of the respondent's immovable property in view of the fact that the respondent admits that the property was indeed transferred to his family trust. No undertaking to desist from such further dispositions has been received from the respondent.

[11] The respondent denies that the matter is urgent. He alleges that the urgency is in fact self-created due to the delay in instituting the application for a period of 2 months. Furthermore, the respondent contends that the allegations in the founding affidavit in support of the application are merely bare allegations without any detail.

[12] I note that the application could have been launched two months ago. I agree with the respondent's contention that the urgency in the matter is self-created and that the affidavit in support of the application is scant in detail. The applicant has failed to *'set forth explicitly'* the circumstances which he avers render the application urgent. Accordingly, I am not convinced that the applicant has passed the threshold prescribed in rule 6(12)(b). I am of the view that the matter must be struck for lack of urgency.

[13] The general rule pertaining to costs is that the successful party should be awarded costs. This rule should not be departed from unless there are good reasons for doing so. I can think of no reason to deviate from the norm. Accordingly, the following order is granted:

(i) the matter is struck for lack of urgency;

(ii) the applicant shall pay the respondent's including the costs of two counsel.

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MOKOSE J

Judge of the High Court of South Africa

Gauteng Division, Pretoria

For the Applicant:

Adv HGA Snyman SC

Adv N Komar

On instructions of

VDT Attorneys

For the Respondent:

Adv PA Swanepoel SC

Adv CA Boonzaaier

Adv S Maelane

On instructions of

Cliffe Dekker Hofmeyr Inc

Date of Hearing: 27 October 2021

Date of Judgement: 10 November 2021