HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 37351/2020

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 27 JANUARY 2022

SIGNATURE

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	Applicant
and	
LOUIS DANIEL VAN ZYL	First Respondent
HERMAN ENGELBRECHT LUBBE	Second Respondent
CORNEL SUSAN VAN ZYL	Third Respondent
SUNELDA VAN ZYL	Fourth Respondent
EXPRESS MODEL TRADING 123 (PTY) LTD	Fifth Respondent
WILLA SUSANNA SCHONBORN N.O	Sixth Respondent
DORETHEA SOPHEA VISAGIE N. O	Seventh Respondent
VIKING PONY PROPERTIES 135 (PTY) LTD	Eighth Respondent
ENSEMBLE TRADING 428 (PTY) LTD	Ninth Respondent
THE TRUSTEES OF THE MALUBE TRUST	Tenth Respondent

ZELPY 2132 (PTY) LTD Eleventh Respondent

J U D G M E N T

This matter has been heard in open court and disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

At issue in this application was the confirmation of a provisional preservation order granted in terms of section 163 of the Tax Administration Act 28 of 2011 (the TAA). The initial order was granted on 11 August 2020 and extended from time to time. In the meantime, a curator had been appointed. The curator has performed the necessary investigations and has filed two reports. The confirmation of the provisional preservation order was opposed by various respondents.

[2] The role players

2.1 The applicant is the Commissioner of the South African Revenue Service (SARS). SARS was represented in the matter by a "senior SARS official" as provided for in section 163 of the TAA who in turn, acted on investigations performed by SARS' Illicit Economy Unit (the IEU).

2.2 The first respondent is one Louis Daniel van Zyl (Van Zyl). He and the second respondent, one Hermanus Engelbrecht Lubbe (Lubbe) were the controlling minds and directors of a number of companies which had submitted fraudulent Value Added Tax (VAT) returns. Based on these

fraudulent returns, vast VAT refunds were claimed and obtained from SARS.

2.3 The remainder of the respondents fall into two groups. They were all, according to SARS, recipients or beneficiaries of proceeds of the illegally obtained VAT refunds.

2.4 The first group of the remaining respondents are Van Zyl's previous wife, their daughter and a company called Viking Pony Properties 135 (Pty) Ltd (Viking Pony). These respondents featured as the third, fourth and eighth respondents respectively. They were represented by Adv Goodman SC together with Adv Acker. These respondents counter-applied for the discharge of the provisional preservation order. For convenience's sake this group of respondents shall be referred to as the "Van Zyl group".

2.5 The second group of respondents consist of another company, Express Model Trading 123 (Pty) Ltd (Express Model) and a trust, the Malube Trust, represented by its trustees. Adv. Bester appeared for Lubbe and these respondents, being the fifth and tenth respondents. I shall refer to this group of respondents as the "Lubbe group".

2.6 The first respondent had been sequestrated and, due to a heart condition, was unable to attend the proceedings.

2.7 The trustees of the Sulalla Trust feature as the sixth and seventh respondents and two other companies, Ensemble Trading 428 (Pty) Ltd (Ensemble Trading) and Zelpy 2132 (Pty) Ltd (Zelpy 2132) feature as the ninth and eleventh respondents. The roles of these respondents shall be described hereinlater.

[3] The fraudulent scheme

3.1 As set out in an extensive affidavit by an operations specialist of the IEU, Van Zyl operated a scheme whereby fraudulent VAT returns were submitted by companies under his control between 2006 to 2014. When SARS became suspicious about the validity of the VAT refunds claimed based on these returns, third party verification of the underlying invoices were conducted. This established that fictitious invoices were generated for purposes of claiming undue VAT refunds. This was principally done by Van Zyl through two companies, Greenbridge Future Contracts (Pty) Ltd and RZP Zelpy 5427 (Pty) Ltd.

3.2 Based on the above, the refunds were reversed and the amounts demanded back from the companies. In addition, SARS authorised audits of all the taxpayers who either participated in or benefitted from the scheme.

3.3 Van Zyl has, in an affidavit furnished to the South African Police Services, admitted to the manufacturing of false invoices, having been assisted therein by Lubbe. Notably, Van Zyl has been described by his daughter (the fourth respondent) as "an accountant and tax practitioner".

3.4 The investigation by SARS indicated that the VAT refunds paid by SARS prior to the discovery of the scheme had resulted in an unusual flow of funds between various companies and individuals. In order to analyse the flow of funds, bank statements of all the persons and entities who ultimately became respondents in this application, were obtained, analyzed and reconciled with each other by way of cross-referencing.

3.5 An extensive table listing the amounts respectively received and transferred back by the various respondents between each other revealed that some R 228 million had flowed into their accounts, while some R150

million had again flowed out of their accounts. In some instances, one bank account was shared by six different companies. This appeared to have been purposely done in order to distribute the fraudulently obtained VAT refunds, as most of the companies involved did not even trade.

3.6 In addition to the ebb and flow of funds, the investigations revealed that the following amounts, constituting VAT refunds, were paid directly to each of the respondents in this matter:

L D van Zyl	R21 288 371, 08
Expense account Van Zyl	R 1 868 507, 44
H E Lubbe	R 809 806, 00
C S Van Zyl	R 423 477, 98
S Van Zyl	R 958 501, 00
Express Model Trading 135	R 9 213 382, 44
Ensemble Trading 428	R 234 000, 00
Sulalla Trust	R 211 890, 20
Viking Pony Properties 135	R 68 197, 37
Total:	R 35 076 133, 57

3.7 The audit finding further indicated that, apart from the tax liability of the companies which had claimed the illicit VAT refunds, those other individuals and companies who had received funds had either failed to declare these funds or have under-declared their income. They each had outstanding or estimated tax liabilities.

[4] The tax liabilities

4.1 In the instance of Express Model and Zelpy 2132 tax assessments have already been issued and the tax due on date of the launch of the application by these two companies were already R 40 509 707, 54 and R 887 771, 69 respectively.

4.2 In addition, based on the flow of funds and receipt of illicit VAT refunds, the respondents were otherwise estimated to be liable for tax debt as follows:

Taxpayer	Income declared	Under declaration	Estimated tax debt that may be due
L D van Zyl	7 548 983, 00	21 288 371, 08	8 515 348, 43
CS van Zyl	3 941 174, 00	10 806 173, 31	4 322 469, 32
S van Zyl	2 383 065, 00	7 069 938, 63	2 827 975, 45
H E Lubbe	2 319 399, 00	6 764 516, 54	2 705 806, 62
Express Model	-	9 213 382, 44	2 579 747, 08
Sulalla Trust	-	7 363 609, 38	2 945 443, 75
Viking Pony	13 792 197, 00	3 291 260, 31	1 391 552, 89
Ensemble Trading	-	-	683 520, 00
Malube Trust	-	2 333 509, 00	933 403, 60
Zelpy 2123	-	10 246 550, 11	2 989 864, 25
			Total: R 29 895 131, 40

4.3 Based on the tax liability of Greenbridge Future Trading (Pty) Ltd and RZP Zelpy 5427 (Pty), SARS has issued certified statements of tax due in terms

of section 172 of the TAA against Van Zyl, with reliance on section 180 of the TAA for his personal liability for some these taxes in the amounts of R 12 167 016, 63 and R 18 436 584, 06 respectively. These certificates had been endorsed in the Western Cape High Court in cases 19 327/2019 and 19 328/ 2019 respectively. When the liquidators of the Greenbridge Group sought to sequestrate Van Zyl, SARS successfully intervened, based on these claims. As a result of this intervention Van Zyl was, despite vehement opposition, provisionally sequestrated on 2 July 2020, also in the Western Cape Division of this Court.

4.4 In similar fashion as with Van Zyl, SARS has also obtained judgments against Lubbe in respect of his personal liability for some of the tax debts of another two companies, Express Model Trading 723 (Pty) Ltd and RZP Zelpy 4996 (Pty) Ltd. The certificates issued in terms of section 172 of the TAA against Lubbe in respect of these companies are in the amounts of R 9 759 903, 23 and R 10 920 909, 94, endorsed in cases 2014/2019 and 2013/2014 respectively in the Western Cape Division of this Court.

4.5 The extent of the estimated probable tax liabilities of the remainder of the respondents, as listed in paragraph 4.2 above, are without the inclusion of understatement penalties of up to 200% and without interest, both of which should still be added.

[5] <u>The preservation order and its consequences</u>

5.1 On 11 August 2020 SARS obtained a provisional preservation order against the respondents as contemplated in section 163 of the TAA. The provisional order also made provision for the appointment of a curator bonis.

5.2 After his appointment, the curator ensured that service of the order took place on the respondents. Hereafter, as already mentioned, Mrs Van Zyl (the third respondent) launched a counter-application for the discharge of the provisional order. She did so in her personal capacity and as a director of Viking Pony. A similar counter-application was launched by her daughter (the fourth respondent). At the end of October 2020, SARS responded to these applications.

5.3 Only in April 2021 did Lubbe, is his personal capacity, and on behalf of the fifth and tenth respondents, oppose confirmation of the provisional order.

5.4 The curator bonis has filed two reports. He has, in the performance of his obligations and the discharge of his duties, been in regular contact with those respondents who are natural persons. This has, inter alia, resulted in the release of funds to Mrs Van Zyl and her opening a new Capitec bank account into which she could make deposits and withdraw funds.

5.5 The curator has discovered that Mrs Van Zyl was the director of various companies and a trustee of various trusts. She however, declined to provide particularity hereof to either the curator or via her opposing affidavit, to this court. The curator could establish that Mrs Van Zyl has loaned and advanced an amount of R 2,2 million to a company Propergreen (Pty) Ltd (Propergreen) from which she receives interest payments. No contract underpinning this loan nor any financials were however produced in respect of this company, nor was any detail furnished about Propergreen's income or the source of the interest payments. Mrs Van Zyl also had investments of R 2 million which had, on maturity it seems, been reinvested. She was also found to be the owner of more vehicles than disclosed in her opposing affidavit. With the curator's consent, an

immovable property belonging to Viking Pony was sold and the proceeds kept in trust by Mrs Van Zyls' attorney (this sale had been at an advanced stage by the time the curator had been appointed).

5.6 Ms Van Zyl (the fourth respondent) is a director of a dormant company, Outpost Holding 12 (Pty) Ltd, which she failed to disclose in her opposing affidavit. She apparently also trades in Crypto-currency, but both the extent thereof and the profits appear to now be inaccessible.

5.7 In similar fashion as with Ms Van Zyl, Lubbe failed to disclose in his opposing affidavit that he is a member of a close corporation Brainwave Projects 2403 CC (now apparently dormant). His affidavit also does not disclose that he has loaned some R 2,6 million to this close corporation as start-up capital. To date, no documentation has been produced regarding either this loan or the close corporation's activities. At some stage it was alleged that the business of the close corporation had been sold for R 970 000, 00 but the flow of the proceeds of this sale is as absent as any documentation confirming this, save for an unsigned sale agreement. In respect of the companies of which Lubbe was still a director, namely Southern Star (Pty) Ltd and RZP Zelpy 4996 (Pty) Ltd, he has produced unaudited financial statements reflecting zero assets and liabilities. In respect of the Malube Trust, Lubbe could not provide the curator with any bank or financial statements. He did, however, confirm that Express Model has paid certain "profit shares" to the Malube Trust. In addition, it has been established that the same company paid rentals to the trust in respect of a property or properties rented by Van Zyl and Lubbe, but ownership or further particularity of these properties could not yet be established.

5.8 In similar fashion as with Mrs Van Zyl, the curator has released access to Lubbe's current account to him to enable him to pay his monthly expenses of which he has provided the curator with a breakdown.

[6] The Van Zyl Group's position

6.1 As already indicated, Van Zyl has been sequestrated (at least provisionally) and the control of his estate vested as a result thereof, in the hands of the Master or a provisional trustee. SARS therefore no longer seeks confirmation of the preservation order as the hand of the insolvency law has taken care of control of his estate.

6.2 Mrs and Ms Van Zyl initially contemplated anticipating the return day of the preservation order as applicants in an application for the discharge thereof. The release of funds by the curator as referred to above has somewhat ameliorated their position and, after case management, the matter proceeded as a third court application, inserted into my roll by arrangement with the Judge President and Deputy Judge President of this Division.

6.3 The grounds of opposition to the confirmation of the preservation order initially raised by Mrs Van Zyl in her affidavit (with which Ms Van Zyl largely made common cause), have been distilled in subsequent Heads of Argument to the following:

6.3.1 The preservation order sought is an abuse of the provisions of section 163 of the TAA;

6.3.2 The order and appointment of a curator was unnecessary and "*grossly invasive*";

6.3.3 The order constitutes an overreach in relation to the tax debt;

6.3.4 SARS failed to disclose all material facts when the initial order was sought.

[7] The Lubbe group's position

7.1 Lubbe denied any knowledge of VAT fraud perpetrated by Van Zyl inter alia via the companies of which Lubbe was a director and/or the financial manager.

7.2 The remainder of the "topics" that featured in the Lubbe group of respondents' opposition to the preservation order were listed by their counsel as being:

7.2.1 No realizable assets;

7.2.2 No risk of dissipation;

7.2.3 Should the order be confirmed, it would have no practical utility;

7.2.4 The application amounts to an abuse of section 163 of the TAA.

[8] The Law

8.1 Section 163(1) of the TAA provides as follows: "*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, authorize 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*".

8.2 Section 163(3) extends the ambit of the order in relation to assets as follows: "*A preservation order may be made if required to secure the collection of the tax referred to in subsection (1) and in respect of –*

(a) realisable assets seized by SARS under subsection (2) [providing for seizure, safeguarding and the appointment of a curator bonis in whom attached assets shall vest];

(b) the realizable assets as may be specified in the order and which are held by the person against whom the preservation order is being made;

(c) all realizable assets held by the person, whether it is specified in the order or not; or

(d) *all assets which, if transferred to the person after the making of the preservation order, would be realizable assets*".

8.3 Regarding the status of a tax debt certified by SARS, section 172(1) of the TAA provides as follows: "*If a person has an outstanding tax debt, SARS may, after giving the person at least 10 business days' notice, file with the clerk or registrar of a competent court a certified statement setting out the amount of tax payable and certified by SARS as correct*".

8.4 Section 174 of the TAA then further provides that a certified statement filed in terms of section 172 "*must be treated as a civil judgment lawfully given in the relevant court in favour of SARS*".

8.5 In terms of section 180 of the TAA, in the event of a senior SARS official being satisfied that a person who controls or is regularly involved in the management of the overall financial affairs of a taxpayer is or was

negligent or fraudulent in respect of the tax debt of such a taxpayer, such a person can be held personally liable for any such outstanding tax debt.

8.6 Rogers J, in the matter of *Commissioner, South African Revenue Services v Tradex (Pty) Ltd and Others* 2015 (3) SA 596 (WCC) at 606 B-D, held as follows in explaining the approach to the suspicion of a respondent's dissipation of assets with the intention of frustrating an SARS' claim against it:

> "*I do not think that 'required' in s 163(3) entails proof of such an intention of the part of the taxpayer. However, SARS is required to show, I think, that there is a material risk that assets which would otherwise be available in satisfaction of tax will, 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 realizable assets will not be available when it comes to ordinary execution. An obvious case is that of a company which, believing it owes no tax, proposes to make a distribution to its shareholders*".

8.7 In the matter of *Metcash Trading Ltd v Commissioner, South African Revenue Services & Another* 2001(1) SA 1109 (CC) at para 60 it was held by Kriegler J:

> "*First, the public interest in obtaining full and speedy settlement of tax debts in the overall context of the Act is significant. In their affidavits the Commissioner and the Minister mentioned a number of public policy considerations in favour of a general system whereby taxpayers are granted no leeway to defer payment of their taxes. These are in any event well-known and self-event. Ensuring prompt payment*

by vendors of amounts assessed to be due by them is clearly an important public purpose".

8.8 The court in the matter of *Commissioner for the South African Revenue Service v Van Der Merwe*: *In Re: Ex parte Commissioner for the South African Revenue Service* 2014 JOL 31647 (WCC) held that:

> "*The basis on which a preservation order, in terms of Section 163(3), may be made is "if required to secure the collection of tax*".

The court went on to state as follows:

> "*Whilst the grant of a preservation order may be considered harsh, there are compelling reasons within the context of your constitutional democracy why steps which assist the fiscus securing the collection of tax are required, which include court orders to preserve assets so as to secure the collection of tax*".

The court further stated that:

> "*It follows therefore that for a court to determine whether a preservation order is required to secure the collection of tax in terms of section 163(3), it does not need to be shown that the grant of the order is required as a matter of necessity, or to prevent dissipation of the assets. Rather, in making the assessment as to whether to grant the order or not, the Court must be appraised of the available facts in order to arrive at a conclusion, reasonably formed on the material for it, as to whether a preservation order is required or not to secure the collection of tax. These facts must not amount to a statement*

of the applicant's opinion, but must illustrate an appropriate connection between the evidence available and the nature of the order sought".

8.9 This court has in *CSARS v Badenhorst t/a S.A Global Trading* (5123/2013, 56971/2013) [2015] ZAGPPHC 1085 (13 October 2015) confirmed, with reference to section 190(5) of the TAA at paras 57 and 58: "*If SARS pays to 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 tax that is payable by the person to SARS from the date on which it is paid to the person. Even if VAT had been paid out incorrectly by SARS, it still remains the collection of tax. The only manner SARS can recover some of its owned by the insolvent ... is t claim it from the persons and entities to which it has been paid ... and the relevant respondents to which it has been dissipated*".

8.10 Regarding the exercise of a court's discretion pertaining to the granting of a preservation order, the case of *Commissioner, South Africa Revenue Service v Tradex (Pty) Ltd and Others* (above) is particularly apposite for purposes of the current application. In that case the court explained the approach to section 163 preservation orders, to be the following:

> "*[37] The question whether a preservation order is 'required' and whether the court should exercise its discretion to grant one, calls for a consideration of the specific terms of the order sought by SARS. The question whether a preservation order is required cannot be answered in the abstract. The practical utility of the actual terms must be assessed*".

[9] Evaluation

9.1 In order not to the adjudicate the issue of the preservation of assets sought in this case "in the abstract", it is convenient to start with the person who had, by his own admission, fraudulently orchestrated the VAT refunds. That is Van Zyl. Until 17 December 2017 he was married to Mrs Van Zyl. She was not an employee of the company in which Van Zyl had orchestrated the illicit refunds, yet she received R 2 041 514.29 from that company over a two year period. In the affidavit by the IEU operations specialist, SARS claims that the transfers to Mrs Van Zyl simply do not make commercial sense and that "*the only plausible explanation of these unusual financial transactions was [that they] were intended to disguise money laundering and tax evasion*".

9.2 In a long-winded answer to these allegations, winding its way through accusations of confirmation figures and detail supplied by SARS and through a partial history of Mrs Van Zyl's investments, maturity thereof, re-investment, sales of immovable properties leading up to her current residence in Hartenbosh, there was no actual denial of these allegations. A further significant aspect is that the direct payment or transfer of unlawfully obtained funds to her own account as referred to in paragraph 3.6 above was never directly addressed by her.

9.3 Furthermore, the undocumented loans to Propergreen (discovered by the curator) and to Viking Pony (as admitted by Mrs Van Zyl in her affidavit), lend credence to the fact that, absent a preservation order, millions of Rands were (and may still be) transferred to entities without SARS' knowledge and in respect of which disclosure is or may be withheld. Such transfers and non-disclosures would surely frustrate the recovery of tax as contemplated in section 163 and the concern of the senior SARS official seems entirely justified.

9.4 However, there appears to be merit in Mrs Van Zyl's argument that the extent of the preservation order amounts to overreaching. The preservation of assets in excess of R20 million in respect of an estimated tax debt which, from all indications received from SARS's counsel, amount to some R12 million, appears excessive.

9.5 In similar fashion as her mother, Ms S Van Zyl only gave partial explanations for the funds received. One glaring example is the R 900 000,00 single payment received from RZP Zelpy 5427 (Pty) Ltd (trading as Greenbridge Grain), one of the major role-players in the illicit VAT refund scheme. There was, upon a scrutiny of Ms Van Zyl's affidavit, no actual denial of the channeling of funds to her accounts, nor of her estimated tax debt. The findings by the curator relating to the estimated value of her assets in the region of R 5, 5 million were also left intact. Contrary to the position of her mother, the total estimated tax debt and interest of R8, 4 million, exceed the amount of her preserved assets and the question of overreach does not apply to her.

9.6 The position of Viking Pony is even simpler: its sole immovable asset has been sold with the consent of the curator and the net proceeds of R 2,15 million is being held in trust by the attorneys involved. As this amount is still short of the estimated tax debt which, together with interest, amount to R 2, 67 million, the preservation of the proceeds will ensure that no frustration of recovery occurs until the final assessment and payment of this company's tax debt.

9.7 Once it has been determined, as indicated above, that persons (or entities) who have received proceeds of illicitly obtained VAT refunds and who could not or would not disclose either particularity or cogent reasons for these receipts and who thereafter transferred large portions of these funds,

in some cases amounting to huge sums of money, to other entities in circumstances which are either clandestine (in the instances of non-disclosure) or, again, without detail or substantiating documentation, then the inferences of money laundering or tax evasion, drawn by SARS, appear to be justified. Against this background, complaints of abuse of the statutory mechanisms and the alleged invasiveness thereof, pale into insignificance. The conduct of the curator to release funds and accounts to allow for daily expenses and allowing the sale of Viking Pony's immovable property to proceed, further militates against findings of abuse or unnecessary invasion.

9.8 Much was also made by counsel for these respondents that no actual dissipation has been proven which would justify the granting of a preservation of assets to prevent such dissipation. He argued that not all funds received were ill-gotten gains and that it cannot be said that all onward payments amounted to dissipation. Reliance was also placed on the following extract from the judgment of *Commissioner: South African Revenue Service v Tradex (Pty) Ltd and Others* (supra) wherein the Court indicated that there must be a material risk that assets will be dissipated in order to justify the granting of a final preservation order. Rogers J stated:

> "*... However, SARS is required to show, I think, that there is a material risk that asses which would otherwise be available in satisfaction of tax will, in the absence of a preservation order, no longer be available*".

9.9 However, the facts in respect of which the statement in the above portion of judgment has been made, are to be distinguished from the present facts. In the present matter SARS was confronted by a massive fraudulent scheme, perpetrated by Van Zyl, though entities controlled by Lubbe,

followed by dissipation (at that stage at least) of the proceeds of the illicit refunds through various entities, all controlled or managed by Van Zyl, his family and Lubbe. It took detailed and meticulous investigation from SARS to distill the facts of which only the most pertinent have been summed up above. Had the money-laundering, once detected and traced, stopped there, there might have been more force to this leg of the Van Zyl respondents' argument, but when disclosure of details of money-laundering (for that is what it is once the inferences referred to earlier have not been dispelled) remain absent to a court-appointed curator (and to the court itself) then, in my view, preservation of what is needed to secure a tax debt is "required", in the words of section 163, to avoid frustration of recovery from whatever else may have been left undisclosed. A further example of conduct which confirm that SARS cannot put much stock on the exculpatory versions of these respondents, is Ms Van Zyl's contention that some R 2, 3 million of the funds which she had been accused of having received was a graduation gift. The graduation gift on which she relies, was made in 2016, which post-dates the flow of funds on which SARS initially relied. The dissipation by way of distribution of funds combined with the selective manner of furnishing purported explanations or of not making disclosures when called for, constitute, in my view, sufficient "compelling reasons" as contemplated in *CSARS v Van der Merwe* (at para 8.8 above) as to why "*steps which assist the fiscus in securing the collection of tax are required*". (my emphasis)

9.10 The Lubbe-group of respondents' position is slightly different: whilst they also contend that a preservation order is not "required" as there is no fear of dissipation and that SARS' resort to section 163 constitutes an abuse, the principal contention is that there are no realizable assets and a confirmation of the order would therefore have no practical effect. In heads

of argument, the reference to realizable assets was occasionally replaced with an alleged absence of "any material assets".

9.11 The lastmentioned contention is not entirely correct: there is at least the one immovable property, an erf in Worcester. Taking this into account, as well as certain motor vehicles, and deducting Lubbe's total liabilities (excluding his tax liabilities), the curator has determined a net asset position of R 1, 210 616, 21.

9.12 In similar fashion as with the Van Zyl's, the curator had requested Lubbe to disclose his income and expenditure and his assets and liabilities. He was also requested to provide all books and records under his control relating to his affairs and that of the respondents. His current bank account was released from the preservation order to allow for the deposit of his salary and processing of his debit orders.

9.13 Lubbe has two vehicles and one trailer and the curator was furnished with the purchase prices and financing thereof. However, Lubbe stated that the one vehicle he gifted to a female friend and the other, a Hilux "bakkie" and a trailer, belongs to his mother "as he owed her money that he borrowed from her a few years ago". The same apparently applies to his household items. This debt arose subsequent to the sale of a family farm which had, by way of a bond, financed a bottle store previously operated by Lubbe.

9.14 Lubbe declared a loan account in his favour against Brainwave Projects 2403 CC in an amount of R 2 656 789, 20 but declared that the close corporation, was dormant since September 2017. No particularity or documentation in confirmation of any of this has been furnished to the curator.

9.15 Apparently relying on *CSARS v Tradex (Pty) Ltd* (above), Lubbe tendered the registration of an interim caveat against his immovable property "until the dispute has been finalised". SARS argued that, absent a cession of the proceeds of any sale of the property, the caveat will only serve to prevent further encumbrance or transfer of the property should Lubbe sell it.

9.16 Lubbe is a bookkeeper and despite this and his directorship of the companies involved in the VAT fraud scheme, he pleads being agnostic about Van Zyl's doings. Nonetheless, even such negligent abdication of his fiduciary duties as a director, render him liable to SARS in respect of the tax liability of the companies. This liability has been confirmed by court orders in respect of which none of the TAA internal procedures have been initiated and which have become undisputed and final.

9.17 Lubbe's explanation of his role in Van Zyl's scheme is at the same time both unconvincing and facilitative. Either way, it amounts, at best, to a gross abdication of the duties and responsibilities as a director of companies. He put it thus in his opposing affidavit: "*My role was that of a "passive partner" and I was only requested by the First Respondent to provide a company within which the trading could take place. Being the sole director and shareholder of the Fifth Respondent, we decided to use the Fifth Respondent as the corporate vehicle for the proposed trading*". The rest, as they say, is history. Lubbe's reliance on delegation authorities provided for in the Companies Act 71 of 2008 and on Van Zyl does not justify his total abdication of control and responsibility. Whatever ignorance Lubbe may now plead, has therefore been overtaken by events, resulting in an outstanding tax liability.

9.18 What little Lubbe actually does disclose, is how he acquired the presently owned immovable property. It was financed from the proceeds of the sale

of his previous residence, the proceeds of a disability benefit and the current bond. The acquisition of an asset need not, however, to have been by way of illicit refunds to make it subject to a preservation order.

9.19 Another point which Lubbe tried to make is that neither Express Model nor the Malube Trust have any assets and neither could the curator (to date) locate any such assets.

9.20 Both groups of respondents allege that the application and the reliance on section of 163 of the TAA constitute an abuse of process. SARS is accused as having launched the application solely to put Van Zyl under pressure and "to bring matters to a head". The fact that Van Zyl had been sequestrated in separate proceedings refutes the first premise of this allegation. I further find, on a conspectus of all the evidence and voluminous documentation, but in particular, with reliance on the vast sums of money which have been channelled back and forth between various entities and respondents, that SARS had been justified in being concerned about further such manipulation of funds and transfers, amounting to dissipation of assets from one taxpayer to another or to an undisclosed third party, all of which might frustrate the recovery of tax debts. Resorting to the mechanism created by section 163 of the TAA can, in these circumstances, not amount to an abuse of process.

[10] Conclusions

10.1 SARS no longer seeks confirmation of the order against the 9th Respondent and neither against Van Zyl, subsequent to his sequestration, and therefore no preservation order need be confirmed against these respondents.

10.2 The sixth, seventh and eleventh respondents have not opposed the confirmation of the preservation order.

10.3 In the circumstances as set out above, I find that the preservation order should be confirmed against the Van Zyl group of respondents, except that, in respect of Mrs Van Zyl (the third respondent) the extent of the order should be limited to R 12 million. As to which assets should comprise this preserved amount, I find it prudent to defer to the curator. He has, by his conduct, proven himself capable of exercising a reasonable approach to dealing with the preserved assets to date. The result is that the counter-application for the total upliftment of the provisional preservation order, must fail.

10.4 As far as the Lubbe group of respondents is concerned, I am of the view that the preservation order should be confirmed in respect of the corporate entities. Despite Lubbe's assertions, there might reasonably still be assets recoverable in these entities, such as his loan account. Insofar as Lubbe himself is concerned, should a caveat as tendered by him, containing terms that satisfy SARS be registered, then I find that he is correct that there would be no further practical use for any preservation order on the facts as they currently stand. The tender for a caveat was made in Lubbe's papers and repeated in open court and the court is therefore entitled to rely on such a tender in respect of any appropriate order regarding the confirmation of the provisional order. This would constitute a "condition" of the preservation order as contemplated in section 163(1) of the TAA.

[11] Costs

The customary rule is that costs should follow the event and I find no cogent reason to depart therefrom, save in respect of Lubbe. The replacement of the preservation order by a caveat might appear to be a notional victory, but, if this self-imposed obligation had really been Lubbe's intent, it could have been put in place long ago. There is also no reason why no attempt had been made by him to pay his tax debt once it

had become final. The need to recover the tax debt and Lubbe's own liability arose from his own conduct and the facilitation of Van Zyl's tax fraud by way of corporate entities under Lubbe's control. In the exercise of my discretion, I find that this notional "victory" should not be rewarded with costs. No costs have been claimed against the unrelated nominal trustees of the trust involved.

[12] Order

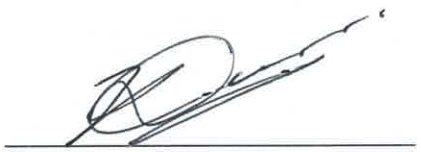
1. The provisional preservation order granted on 11 August 2020 is discharged as against the first and ninth respondents.

2. The provisional preservation order granted on 11 August 2020 is confirmed and made final as against the third to eighth, tenth and eleventh respondents, save that in the case of the third respondent, its extent shall be limited to assets amounting to R 12 million.

3. The provisional preservation order granted on 11 August 2020 against the second respondent is discharged on condition that the second respondent, within 60 days from date of this order or such longer period as may be granted in writing by the South African Revenue Service (SARS), lodge with the relevant Registrar of Deeds, a caveat to be registered in favour of SARS on such terms as SARS may prescribe, over the immovable property situated at 76 Sutherland Street, Worcester, Western Cape Province, failing which the provisional preservation order shall become confirmed.

4. The third, fourth and eighth respondents' counter-application is dismissed.

5. The third to fifth, eighth and eleventh respondents are, jointly and severally, ordered to pay the applicant's costs, including the costs of two counsel.



N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 22 September 2021

Judgment delivered: 27 January 2022

APPEARANCES:

For the Applicant:	Adv BH Swart SC together with Adv K Kollapen
Attorney for the Applicant:	VDT Attoneys, Pretoria
For the 3rd, 4th & 8th Respondents:	Adv R Goodman SC together with Adv L Acker
Attorneys for the Respondents:	Rauch Gertenbach Attorney, Pretoria
For the 2nd, 5th & 10th Respondents:	Adv BC Bester
Attorneys for the Respondents:	Van der Merwe Inc, Pretoria