IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 7255/2019

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	Applicant
and	
GARY WALTER VAN DER MERWE	First Respondent
GARY WALTER VAN DER MERWE N.O. (in his capacity as a trustee of the Eagles Trust IT 3019/95)	Second Respondent
FERN JEAN CAMERON N.O. (in his capacity as a trustee of the Eagles Trust IT 3019/95)	Third Respondent
DAVE TADEO NKHOMA N.O. (in his capacity as a trustee of the Eagles Trust IT 3019/95)	Fourth Respondent

Date of hearing: 10 August 2021
Date of judgment: 21 September 2021

JUDGMENT

SAVAGE J:

Introduction

[1] The applicant, the Commissioner for the South African Revenue Service, on behalf of the South African Revenue Service ("SARS"),[1] seeks an order in terms of section 2(b) of the Vexatious Proceedings Act, Act 3 of 1956 ("the VPA"), that no legal proceedings may be instituted by the first respondent, Mr Gary Walter van der Merwe ("GVDM"), in his personal capacity, or in his capacity as a director, member or trustee of any company, close corporation or trust, or by the second, third and fourth respondents, in their capacities as trustees of the Eagles Trust, IT 3019/95, against any person in any court without the leave of the court and only if the court is satisfied that the proceedings are not an abuse of the process of the court and that there are *prima facie* grounds for the proceedings.

[2] In the alternative, SARS seeks that an order be made that GVDM, in his personal capacity, or his capacity as a director, member or trustee of any company, close corporation or trust, or the second, third and fourth respondents, in their capacities as trustees of the Eagle Trust, be ordered to set security for any legal proceedings instituted by them against SARS, in an amount to be determined by the Registrar of the High Court, as provided in rule 47 of the Uniform Rules of Court, within ten (10) days of such legal proceedings.

[3] The respondents, GVDM in his personal capacity and the trustees of the Eagles Trust, being GVDM, his mother, Ms Fern Cameron ("FC"), and Mr Dave Nkhoma in their representative capacities, oppose the application. All are represented by GVDM in doing so. Two striking out applications are also before the Court: one brought by SARS in relation to certain allegations contained in the answering affidavit filed by GVDM; and the other brought by GVDM in relation to certain allegations and annexures to CSARS' founding affidavit.

[4] The matter came before Henney J on 6 August 2020 when it was ordered that:

> 'Pending the final determination of the application, no legal proceedings may be instituted by the first respondent ("Mr Van der Merwe"), in his

[1] The applicant is referred to throughout as SARS.

> personal capacity, or his capacity as a director, member or trustee of any company, close corporation or trust, or by the second, third or fourth respondents, in their capacities as trustees of the Eagles Trust, IT 3019/95, against any person in any court or any inferior court, without the leave of the court, or any judge thereof, or that inferior court, as the case may be, and only if that court, judge or inferior court is satisfied that the proceedings are not an abuse of the process of the court and that there are *prima facie* grounds for the proceedings; …'

[5] The matter was postponed *sine die* with the parties to reach agreement with Henney J regarding a virtual hearing. GVDM and the Eagles Trust filed an application for leave to appeal against the order of Henney J. In due course the parties agreed to this application being heard virtually and the matter was allocated for hearing by the Judge President of this division. Costs of the hearing on 6 August 2020 were reserved for determination with the main application.

Background

[6] A long history of litigation exists which is relevant to this matter. GVDM was investigated by the South African Revenue Service ("SARS") and was arrested in 2004, following which he was charged criminally with various fraud and tax-related offences. Litigation related to the validity of search and seizure warrants issued persisted until 2010 when the Constitutional Court found against the Minister of Safety and Security. Following an unsuccessful application for legal aid and an unsuccessful application to this Court in 2012 for an order that the Legal Aid Board fund his representation in the criminal trial, GVDM represented himself at the trial which continued for 15 years. In June 2016 GVDM was convicted of certain charges but acquitted on eight tax-related counts (counts 4 to 11). The appeal in the matter remains ongoing.

[7] In a second criminal trial, GVDM obtained a discharge in terms of section 174 of the Criminal Procedure Act, Act 51 of 1977 on alleged exchange control violations. This followed his arrest after foreign currency was found in his possession and seized on 13 July 2004 as he was attempting to leave the country. In an urgent application in July 2004 GVDM and Zonnekus Mansion (Pty) Ltd ("Zonnekus), of which GVDM was director and which was owned by the Eagles Trust, sought the return of the foreign currency seized. Many years after the seizure

of the currency, despite the dismissal of the urgent application as well as subsequent appeals, the foreign currency was returned.

[8] In 2008 GVDM was unsuccessful in an urgent application for a declaratory order in terms of section 172(1) of the Constitution to the effect that the Directorate of Special Operations, known as the Scorpions, in relation to his alleged exchange control violations had acted outside of its mandate and in a manner which was unlawful, invalid and unconstitutional in investigating him. The refusal of this Court to make such an order was upheld on appeal by the Supreme Court of Appeal ("the SCA").

[9] In May 2013, after attempts by SARS to recover his assessed tax liability for the years 2002 and 2003 had been unsuccessful, it was reported to SARS that US$15 million had been received by GVDM's daughter, Candice van der Merwe ("CVDM"), paid from a foreign source into her local savings account. On 30 August 2013 SARS obtained an *ex parte* preservation order in terms of section 163 of the Tax Administration Act, Act 28 of 2011 ("the TAA"), against the assets of Zonnekus, GVDM, CVDM and other related entities. That order was made final in February 2014 and in May 2015 the SCA confirmed such order, finding that GVDM "*controls Zonnekus Mansions and that he does so through his mother to escape judgment creditors*" and, in addition, appears to control the affairs of CVDM. In September 2015 CVDM's application for leave to appeal to the Constitutional Court failed.

[10] In December 2013, SARS obtained an order appointing a presiding officer for purposes of an inquiry to be held in terms of section 50 of the TAA into the tax affairs of GVDM, CVDM, Zonnekus and various related entities. In February 2014 GVDM, CVDM and twelve other applicants failed in an application to interdict the tax inquiry, alternatively to have certain provisions of the TAA declared unconstitutional and invalid; and were refused an order allowing them access to the court file. Leave to appeal was refused with costs, including those of two counsel. In March 2014 the SCA dismissed an application for special leave to appeal and in June 2014 the Constitutional Court dismissed an application for leave to appeal. The tax inquiry proceeded and resulted in letters of audit findings being issued in respect of *inter alia* GVDM, CVDM and Zonnekus, culminating in assessments being raised against them by SARS.

[11] In May 2014, in accordance with the terms of the preservation order, SARS instituted an action under case number 8569/2014 *inter alia* against GVDM, CVDM, Zonnekus and Pearl Island Trading 712 (Pty) Ltd ("Pearl Island"). SARS filed its discovery and supplementary discovery affidavits in March 2015. In March 2016 SARS withdrew its claims against CVDM in this action and CVDM withdrew her counterclaim instituted. This followed the resolution reached by SARS and CVDM of the disputes between them. SARS nevertheless persisted with its claims *inter alia* against GVDM and Zonnekus and seeks an order that GVDM be held personally liable for the tax debts of certain of the defendants cited in the matter. In April 2016 SARS launched an application in terms of rule 35(2) to compel GVDM and other defendants to make discovery. The application was opposed by GVDM in his personal capacity and on behalf of the other defendants. In August 2016 SARS succeed in its application to strike out a number of allegations made in GVDM's opposing affidavit and discovery was ordered. In striking out certain of the material contained in GVDM's affidavit Dolamo J noted that GVDM in his affidavit "*went overboard and vented his perceived frustrations with* [SARS]. *In doing so he strayed into the realm of scandalous, vexatious and irrelevant matter, which are prejudicial to SARS*…". In March 2017 application was made by the Eagles Trust to obtain further and better particulars in respect of its request for further particulars, with a similar application brought in April 2017 by GVDM. On 2 June 2017 SARS amended its particulars of claim to reflect the withdrawal of its claims against CVDM and claim F against GVDM. On 8 June 2017 SARS was ordered to provide certain better and further particulars, which were thereafter provided, and in September 2017 SARS filed its expert summary in terms of rule 36(9)(b) of the rules.

[12] In January 2018 GVDM and other of the defendants, in a rule 7(1) application, challenged the authority of attorneys MacRobert Inc. ("MacRobert") to act on behalf of SARS. After a detailed response was filed by SARS, no replying papers were filed by GVDM. A rule 30A application was served in June 2018, which was withdrawn in October 2019. Prior to answering papers being filed, an affidavit from the Acting Commissioner was provided confirming authority had been granted, with GVDM invited to withdraw the application. GVDM persisted with the application which was opposed by SARS and MacRobert. SARS opposed the application on the basis that it had complied with the notice in terms of rule 7(1) and rule 30A was not

applicable, the application was out of time, vexatious, without merit and constituted an abuse of process and that there was no basis on which to allege that SARS could not engage the services of a private firm of attorneys. GVDM was granted until August 2018 to file his replying affidavit. In August 2018 GVDM brought an application in terms of rule 35(13) and (14) for the rules of discovery to apply to the rule 30A application to allow a handwriting expert to determine the validity of the signature on the document. The rule 30A application was postponed *sine die*, with GVDM having taken no further steps to ensure the enrolment of the application. In October 2018 the rule 35 application was dismissed with costs, including those of two counsel, with the application found by Papier J to be an abuse of process, "*doomed*, "*frivolous and spurious*" and an attempt to delay the hearing of the rule 30A application. An application for leave to appeal was filed one day prior to the main application being heard. It was dismissed in October 2018 with costs, including two counsel, with it noted by the court that this was "*yet another example of the applicant's dilatory approach designed to frustrate the hearing of the matter*". Leave to appeal was sought by GVDM from the Constitutional Court and the application remains pending.

[13] In June 2014 Standard Bank instituted proceedings for the winding up of Zonnekus on the basis that it was commercially insolvent. The application was opposed but no answering affidavit was filed. After an application to postpone the hearing was unsuccessful, Zonnekus was placed into provisional liquidation in September 2014, with the provisional order made final in October 2014. Following their appointment, the liquidators applied for an extension of their powers under section 386(5) of the Companies Act, Act 61 of 1973 ("the 1973 Act") on an urgent *ex parte* basis. In March 2015 the liquidators applied to convene an inquiry in terms of section 417 of the 1973 Act into the affairs and business dealing of Zonnekus. Shortly before the section 417 inquiry was due to commence, in April 2015, GVDM and other applicants launched a first business rescue application ("BR1") in relation to Zonnekus, with Zonnekus, Standard Bank and SARS cited as respondents. Standard Bank and SARS raised a preliminary point which was unsuccessful and after an earlier agreed postponement of the matter, BR1 was heard in February 2016. Condonation for the late filing of a replying affidavit two days before the hearing was refused by Koen AJ as "*an entirely improper attempt to*

defer the hearing" and BR1 was dismissed with costs, including the costs of two counsel. Application for leave to appeal was dismissed in March 2016 and in July 2016 the SCA refused leave to appeal.

[14] In May 2015 SARS issued a letter of audit findings in respect of Zonnekus in which it advised that it intended to raise assessments which would result in additional normal tax liability in the amount of R12 million, excluding interest on the underpayment of provisional tax. Various extensions were granted by SARS to GVDM and the liquidators of Zonnekus to respond to the audit findings pending determination of the BR1. In November 2015 SARS raised the assessments against Zonnekus and thereafter refused an extension to the period within which to file an objection. Reasons for the assessment were requested but refused by SARS on the basis that the period within which to file an objection had expired.

[15] In November 2017 the liquidators of Zonnekus requested information from GVDM to consider the quantum and validity of the assessments. GVDM obtained an extension of the period within which to respond to the liquidators but no response was received. The assessments therefore became final and conclusive in terms of section 100 of the TAA, with the total tax indebtedness of Zonnekus exceeding R42 million.

[16] In June 2016 a second business rescue application ("BR2") was launched by employees of Zonnekus days prior to the refusal of leave to appeal by the SCA in BR1 and despite the fact that GVDM had stated on oath in BR1 that Zonnekus had no employees. BR2 relied on the same allegations as those contained in the BR1, yet both SARS and Standard Bank were not cited as respondents. In August 2016 GVDM's application for leave to intervene in BR2 on behalf of the Eagles Trust was refused and the employees were unsuccessful in an attempt to set aside that order. SARS and Standard Bank were granted leave to intervene as an affected persons in terms of section 128(1)(a) of the Companies Act, Act 71 of 2008 ("the 2008 Act) in the application. They obtained orders striking out large portions of the founding affidavit and allowing the liquidation to proceed pending the finalisation of BR2. In September 2016 BR2 was dismissed with certain ancillary orders made. Weinkove AJ found that the application was an abuse of process and brought in bad faith. An application for leave to appeal was dismissed in November 2016 with costs, including the costs of two counsel. In March 2017, in an application opposed by

SARS and Standard Bank, the SCA granted leave to appeal to a full bench of this Court against the ancillary orders made. The full bench set aside a *de bonis propriis* costs order made against the applicants' attorney but dismissed remainder of the appeal.

[17] A third business rescue application ("BR3") was instituted by GVDM in his capacity as trustee of the Eagles Trust on 2 September 2016, prior to BR2 being heard on 5 September 2016, but served after the dismissal of BR2. Although the application was served on SARS, neither SARS nor Standard Bank were cited as respondents to the application. In BR3 *inter alia* confirmation of GVDM as a director of Zonnekus and the ratification of decisions taken by him from 13 April 2015 was sought. SARS launched an urgent application to intervene in BR3 and the court dismissed BR3 with costs, including those of two counsel, on the basis that BR3 was launched while BR2 was pending. An application for leave to appeal was filed but not pursued. It was dismissed in May 2018, with costs including those of two counsel, after SARS and Standard Bank enrolled the application for hearing. In September 2018 the SCA dismissed an application for special leave to appeal and in November 2018 the Constitutional Court dismissed an application for leave to appeal.

[18] A fourth business rescue application ("BR4") was launched in September 2016 in which relief identical to that sought in BR3 was sought. SARS brought an application for leave to intervene and with Standard Bank opposed the application. In December 2016 BR4 was dismissed by Gamble J, with it found that GVDM was an experienced litigator "*on a mission to discredit SARS*" and that his explanation as to why he had delayed nine months in launching BR1 indicated that the application had been launched "*to frustrate the liquidators from discharging their obligations*". GVDM's conduct was found to have "*precluded the liquidators from taking any steps in relation to the company for more than two years*", with it stated that "(m)*anifestly, procrastination and foot dragging was the preferred approach of the van der Merwe interests*" and that a "*clearer example of abuse of process…could not be found…*". It was ordered that pending any application for leave to appeal the liquidation proceedings of Zonnekus where not suspended and that GVDM in his personal capacity and representative capacity as trustee of the Eagles Trust were interdicted from launching further applications to place Zonnekus under supervision and commence business rescue proceedings without the prior leave of the duty

judge. In February 2017 leave to appeal was dismissed, with special leave to appeal dismissed by the SCA in March 2017 and leave to appeal dismissed by the Constitutional Court in August 2017.

[19] In August 2017 the Eagles Trust, represented by GVDM, launched an urgent application that Edward Nathan Sonnenbergs Inc. ("ENS") as attorneys for the liquidators, the liquidators and SARS be declared in contempt of the preservation order granted in March 2014. The application was struck from the roll for lack of urgency in August 2017 and a notice of withdrawal was filed, with no tender of costs. A second contempt application was launched in September 2017 in which MacRobert was included as a respondent. SARS launched an application for security for costs and in July 2018 both the application for security and the contempt application were dismissed, the latter with costs. Slingers AJ found that the application was "brought without sufficient ground" and was "*vexatious and an abuse of the court process*". In October 2018 leave to appeal was refused, with special leave refused by the SCA in February 2019. The application for leave to appeal is pending before the Constitutional Court.

[20] In March 2018 the liquidators of Zonnekus brought an application for the eviction of GVDM and the other occupiers from the Woodbridge Island property, being the sole remaining immovable property of Zonnekus. SARS was not a party to the application. In February 2019, after various postponements, an eviction order was granted by this Court. Applications made for leave to appeal were dismissed.

[21] In November 2018 GVDM in his personal capacity and as a trustee of the Eagles Trust, with FC and Mr Nkhoma as trustees of the trust, applied for the removal of the liquidators of Zonnekus and that liquidation proceedings be stayed. This was on the basis that the liquidators had failed to disclose the existence of the preservation order in respect of Zonnekus in their *ex parte* application for the extension of their powers in terms of section 386(5) of the Companies Act; that the application had been brought immediately after the appointment of the liquidators, which indicated it had been prepared before their appointment, which was an abuse of process; and that in acting on behalf of both Standard Bank and the liquidators the actions of ENS constituted a "*gross conflict of interest*" and allowed excessive legal costs to be incurred by the liquidators. In March 2019 an interlocutory application under Rule 30A(2) was launched in the removal application seeking that the

liquidators comply with an earlier notice in terms of rule 7(1) which attacked the authority of ENS to represent the liquidators.

[22] In January 2019 GVDM in his personal capacity and as a trustee of the Eagles Trust, with FC and Mr Nkhoma as trustees, applied *inter alia* for the re-opening and setting aside of the first confirmed liquidation and distribution account and the institution of an enquiry into the conduct of the liquidators under section 381 of the 1973 Act. GVDM contended that the reason that Zonnekus ceased trading was that the preservation order had been imposed against it and that it was as a result that it became unable to pay its debts. In addition, application was made for the repayment of legal costs earned by ENS with an order sought that the conduct of ENS be referred to the Director of Public Prosecutions.

[23] In April 2019 an application was instituted under rule 6(12)(c) for the reconsideration of the order granted more than 4 years earlier extending the powers of the liquidators under s386(5) of the 1973 Act. In September 2019 this application, and in November 2019 the application to reopen the first liquidation and distribution account and the application to remove the liquidators, were dismissed with costs on an attorney and client scale. In addition, the rule 30A application was dismissed with costs on an attorney and client scale. The removal application, the application to reopen the liquidation and distribution account, the rule 30A application were all heard by Gamble J who dismissed all applications with punitive costs orders. Gamble J took issue with the "*excessive claims*" made by GVDM when he suggested that as part of the "*feeding frenzy*" the liquidators and ENS were "*co-conspirators liable to be charged under the Prevention of Organised Crime Act*". GVDM was cautioned by Gamble J in his judgment to "*exercise restraint lest he go beyond the reasonable bounds of litigation privilege*", with the applications found to be an abuse of process "*carefully planned and designed to interrupt the winding-up process and to cause as much collateral damage to the liquidators and creditors as possible*".

[24] In 2019 GVDM instituted an action against the Minister of Finance and SARS seeking R1 billion in constitutional damages on the basis *inter alia* that SARS obtained the preservation order after misrepresenting the facts to the Court and that he had been the subject of malicious prosecution. CVDM instituted a similar application also seeking R1 billion in damages. In addition, GVDM instituted a R5.6 billion claim for damages against SARS in June 2019 consequent to investigations

instituted by SARS between April 2002 and September 2003 against a number of companies in which GVDM was a majority shareholder as a result of which the companies were irreparably prejudiced and ceased business operations.

[25] On 30 April 2019 the current application was the instituted by SARS.

Striking out applications

[26] Both SARS and the respondents seek orders striking out certain material contained in the founding and answering affidavits filed in this matter.

Respondents' strike out application

[27] In the respondents' application to strike out, GVDM, on behalf of the respondents, sought that paragraphs 30 - 46, 101, 275 – 301 of SARS' founding affidavit be struck out, together with Annexures ML10 - ML14, ML32, ML46 - ML48 and ML51 – ML 67, on the basis that the contents are inadmissible in that their disclosure is unlawful as it constitutes a breach of the provisions of section 69(1), read with sections 67, 68 and 236 of the TAA, alternatively that they are irrelevant, vexatious, scandalous and defamatory. He claimed that he will be prejudiced if the averments in these paragraphs and annexures are allowed to remain in the founding affidavit as this will allow SARS to use illegally obtained information in the presentation of its case against him and unfairly paint him as a tax defaulter and tax evader when such tax claims are the subject of other proceedings. Since the TAA requires taxpayer information to be protected as confidential, the information in paragraph 30 – 46 and annexures ML10 - ML14, he submitted, should be struck out in that it details his tax number, the amounts claimed from him by SARS, the steps taken by him to challenge these amounts and correspondence relating to his tax affairs. Paragraph 101 and Annexure ML32 contain similar confidential tax information relating to Zonnekus; and paragraphs 276-301 and Annexures ML46 - ML48 and ML51 - ML67 contain confidential taxpayer information relating to CVDM and her tax affairs. All of this information is irrelevant to the main application and beaches GVDM's constitutional right in section 14 of the Constitution to privacy.

[28] SARS opposed GVDM's strike out application on the basis that he lacks *locus standi* in relation to the objections raised in respect of Zonnekus or CVDM. Furthermore, it contended that the evidence contained in the founding papers is not inadmissible, nor irrelevant or in breach of the confidentiality provisions

of the TAA. This is so in that in terms of section 5 of the South African Revenue Service Act, Act 34 of 1997 ("the SARS Act"), SARS is to do all that is necessary or expedient to perform its functions properly, including instituting legal action. In terms of section 68(3) of the TAA, a SARS official may disclose confidential SARS information where the information is public or the disclosure is authorised by the Commissioner; and section 69(2) of the TAA allows a SARS official to disclose taxpayer information when it is in the course of the performance of duties under a tax act or the information is public. Since the information was disclosed in the execution of the duties of a SARS official in terms of tax acts, it is admissible evidence. The strike out application, it was argued, therefore constitutes an abuse of the court process and a continuance of strategy to delay and frustrate SARS' attempts to recover the taxes due, when most of the matter sought to be struck out already forms part of papers filed in previously pending litigation between the parties which was or is being conducted in open court. GVDM's tax debts were detailed in the preservation application, as well as in the action instituted by SARS and the various business rescue proceedings concerning Zonnekus, which has been finally wound up. Furthermore the circumstances and events concerning the assessments raised by CVDM are the subject matter of the actions by GVDM and CVDM against SARS.

SARS' strike out application

[29] In its application, SARS seeks that paragraphs 12 to 15, 62, 64, 67, 69, 115, 117, 157 to 159, 222-227 and Annexure GVDM1 to GVDM's answering affidavit be struck out on the basis that such material is irrelevant, vexatious, scandalous or inadmissible and to the prejudice of SARS.

[30] Annexure GVDM1 sets out portions of GVDM's testimony regarding his life's history, including raids directed at him conducted by SARS and the South African Police Service ("SAPS"). It is contended for SARS that this document should be struck out in that it is inadmissible and irrelevant to the issues arising in the litigation between the parties, with the only mention of raids being from pages 6436 to 6438; and references made to documents put up in the criminal trial, to which SARS did not have access. It is stated that prejudice will arise if the document is not struck out and GVDM were to rely on it since SARS would not have had the opportunity to respond to it.

[31] Issue was taken with paragraphs 12 to 15 of the answering affidavit in which GVDM states that SARS has "*relentlessly pursued*" those he has done business with or been associated with to the point that his once stellar reputation has been besmirched, with he and his family "*tarred and feathered as criminals and tax delinquents, pilloried to pariah status, now classed as individuals with whom people would not even consider doing business. This is entirely due to SARS, not only harassing me through the courts, both civilly and criminally, leaving me with no option but either to bring applications of my own or defend myself, but also using the media to sensationalise that obviously false allegations against Candice and I*". He states that it is a "*great rarity*" for targeted taxpayers like him to fight SARS and to go on the attack to vindicate themselves and claim substantial damages "*caused by this egregious conduct by an organ of state*". He states that his "*resolute defence*" and "*quest for justice*" is motivated by his "*desire to expose what I can only class as criminality by a small number of SARS officials, their attorneys and advocates*" when he has done nothing wrong and has been treated in "*the most reprehensible and unconscionable manner by people that think nothing of abusing the process of the courts in order to victimise a citizen and taxpayer for nothing more than their own gain*". He states that he therefore seeks to "*demonstrate the naked criminality and wanton greed*" of which he has been a victim for two decades. It was submitted for SARS that in stating as much GVDM makes vague and spurious allegations against SARS, its officials and its legal representatives, without providing factual support for the vexatious and defamatory conclusions reached by him which are inadmissible in evidence and prejudicial to SARS.

[32] In relation to paragraphs 62 and 64 to 67, SARS submitted that unsubstantiated personal attacks are made on SARS' legal representatives which are vexatious, scandalous and prejudicial to SARS. GVDM states that it "*became abundantly clear that the vendetta pursued*" against him "*was not about tax, it was an economic hit and an exercise to create fees for lawyers, MacRobert attorneys and their professional consultants who act both for and against SARS, and to destroy me and my family in circumstances where we are not people of power or influence and nor are we people that pose a threat of violence or danger to anyone*."

[33] GVDM states in paragraph 64 that the case against him has been ongoing since 2013, with discovery consisting of 75 000 pages of no relevance and

much of it unlawful. This has cost CVDM "*at least half her wealth and an estimated R50 million to the taxpayer for the benefit of MacRobert attorneys, in circumstances where there was no case to begin with, about a gift to my daughter which was not taxable income*". He states in paragraph 65 that he has placed into a class of well-known and notorious figures in the criminal underworld and organised crime, despite the fact that he has links to neither. Instead, in paragraph 66, he states that he is "*a victim of organised crime and state capture by a firm of attorneys and I am resolute in my belief that the campaign that has been waged against me is criminal in nature*". In paragraph 67 he records his past successful business career and the "*generous gift*" received by CVDM from one of the wealthiest men in the world, made them "*prime targets from whom money could be extracted by unscrupulous attorney seeking to benefit themselves*".

[34] SARS contended that the innuendo that its officials or legal representatives can be bought, when GVDM states in paragraph 69 *inter alia* that he has "*refused to fall prey to extortion*", is unsubstantiated, vexatious, scandalous and to its detriment. It is contended that the claim in paragraph 115 that SARS' plea is "*based on lies and deceit*" is equally unsubstantiated, vexatious, scandalous and prejudicial to SARS. GVDM records further, in paragraph 117, that SARS and its officials rely on "*major nondisclosures, deceit and lies*" in litigating against him, with the preservation application "*brought in stealth*" and that SARS should be sanctioned for its "*egregious contact*". This, it is submitted by SARS, is unsubstantiated, vexatious, scandalous and prejudicial to SARS.

[35] SARS took further issue with paragraphs 157 to 159 with the suggestion that it was content to have GVDM's friend and business partner's farm worth R89 million sold in liquidation for R4 million; that it acted "*illogically*" in opposing the business rescue application for Zonnekus which would have seen it receiving its full claim; and that it seeks "*to execute and economic hit against persons identified as enemies of SARS and not actually retrieve revenue as they are mandated to do*". SARS submits that these allegations are reprehensible, unsubstantiated, vexatious and prejudicial to SARS.

[36] In relation to paragraphs 222 to 227, SARS objects to what it claims are unsubstantiated allegations made against its attorneys and are scandalous, vexatious, unacceptable and prejudicial. In paragraphs 222-223 GVDM states that it

is not coincidental that the attorney for Standard Bank is married to the attorney for SARS and that both senior attorneys were previously partners at MacRobert, before Mr Andre Symington moved to ENS. He states that this "*obvious conflict of interest*" emerged later when the liquidators, represented by ENS, worked closely with Standard Bank and SARS to prevent Zonnekus going into business rescue. This was despite the fact that Standard Bank was offered all money owing to it and that "*ENS Africa have run up at least R10 million in legal fees over the past few years of dealing with this matter, estimated to be double what was owed to the bank by Zonnekus Mansion in the first place*". In paragraph 224 GVDM states that "*it is quite remarkable, and indeed vexatious, that a bank took the…reckless approach"* when it had been offered what was due to it. In paragraph 225 GVDM contends that Standard Bank engineered a shortfall, with the properties sold for less than their value after the liquidators agreed to a R1.5 million reduction on a R9 million offered to purchase the bonded properties. He states that this reduction appears to have emanated from the liquidators, to avoid further attempts to put Zonnekus into business rescue when the SARS claims "*would be the only alleged debt remaining*". In paragraph 226, GVDM states that given the history and regular correspondence between MacRobert and the liquidators and the relationships between the parties "*the hand of SARS is never far from the actions of the liquidators and the bank…*". In paragraph 227 he posits that *"SARS have used Standard Bank to get the company into liquidation and then maintained the status quo in order to avoid the bogus tax assessments being challenged*", with the attitude of Standard Bank to the matter changing after a meeting involving SARS.

Evaluation: strike out applications

[37] Rule 6(15) of the Uniform Rules of Courts provides that:

> 'The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs including costs as between attorney and client. The court will not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it be not granted.'

[38] An order striking out any matter from an affidavit will succeed where an applicant has shown that the matter to be struck out is scandalous, vexatious or

irrelevant and that he or she will be prejudiced if the matter is not struck out.[2] In *Vaatz v Law Society of Namibia*[3] it was stated that scandalous matter consists of "*allegations which may or may not be relevant but which are so worded as to be abusive or defamatory*", vexatious matter of "*allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy*" and irrelevant matter of "*allegations which do not apply to the matter in hand and do not contribute one way or the other to a decision of such matter*".[4] In relation to prejudice it was said that this "*does not mean that, if the offending allegations remain, the innocent party's chances of success will be reduced. It is substantially less than that. How much less depends on all the circumstances*…".[5]

[39] The taxpayer information relating to GVDM is set out in paragraphs 30 - 44 and annexures ML10 - ML14 to the founding affidavit, concerns the origins of and amount of the tax debt which SARS claims GVDM owes it, to which SARS notes no objection or appeal has been raised by GVDM. The debt is therefore considered to be final and conclusive. Such information is relevant for purposes of the current matter insofar as it sets out the basis on which SARS proceeded against GVDM. The inclusion of this information remains directly relevant to the current application, with any potential prejudice which could arise from for example of the disclosure of GVDM's tax number or other personal details, countered by the fact that the court file remains sealed and confidential. The same applies to paragraph 42, which is relevant to the extent that it details that portion of the debt which arose in respect of 2016 - 2018 years, which forms part of the total tax debt claimed; and paragraphs 44 - 46 which set out the history of the write-off of GVDM's tax debt by SARS in 2011, which debt was reinstated in 2013, and the dispute between the parties as to whether the write-off was temporary in nature or not. Paragraph 101 and ML32 set out the detailed basis upon which the tax debt of Zonnekus was determined by SARS, which for purposes of this application is relevant to the litigation which arose related to the liquidation of Zonnekus and has not been shown to cause any prejudice. Paragraphs 275 - 301, together, with annexures ML46 - ML48 and ML51 - ML 67, relate to tax liability determined in 2016 and the objection raised by CVDM in

[2] *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 733A-B.
[3] 1991 (3) SA 563 (NM).
[4] At 566A – 567A.
[5] At 566J.

2018 to the settlement amount paid by her to SARS in respect of her tax liabilities in March 2016. This material is relevant to the current application insofar as it relates to the preservation application, the withdrawal of SARS' action against CVDM and CVDM's action instituted against SARS, and its inclusion has not been shown to cause prejudice to the respondents.

[40] There is nothing before this Court to suggest that the material sought to be struck out is inadmissible, nor that it has been put up in breach of the confidentiality provisions of the TAA when the tax affairs of GVDM, Zonnekus and CVDM are directly relevant to the issues raised in the main application. Section 5 of SARS Act expressly permits SARS to institute legal action such as the current. Section 68(3) of the TAA permits a SARS official to disclose confidential SARS information where the information is public or the disclosure is authorised by the Commissioner; and section 69(2) allows a SARS official to disclose taxpayer information when it is in the course of the performance of duties under a tax act or the information is public. There is no basis on which to find that the information disclosed in the founding affidavit was not disclosed in the execution of the duties of a SARS official in terms of prevailing tax laws, or that by putting up such information GVDM's privacy rights have been breached when much of such information has been the subject of previous litigation between the parties. For these reasons the respondents' application to strike out cannot succeed and the application is dismissed.

[41] Turning to SARS's application to strike out, there can be little doubt from a plain reading of paragraphs 12 - 15, 62, 64, 67, 69, 115, 117, 157 to 159 and 222-227 of the answering affidavit that each of these paragraphs contain allegations which are worded in a matter which is abusive or defamatory and vexatious in the sense they are intended to harass or annoy. As much is evident from the serious and repeated allegations of fraud, corruption and harassment raised against SARS and its attorneys, without evidence put up to support such serious allegations, as well as the unwarranted and unduly emotive language used repeatedly throughout such paragraphs. This is when the facts advanced by SARS, and not refuted by the respondents, indicate that objections had not been raised within the prescribed time limits, or at all by the respondents, against tax liabilities assessed by SARS in relation to GVDM, CVDM and Zonnekus and that appeals against such assessments

were not instituted or pursued. It is patently clear that were such scandalous, vexatious and irrelevant material not to be struck out, SARS would suffer prejudice in its case.

[42] Similarly, I can find no reason why Annexure GVDM1 should not be struck out given the extensive details it contains relating to matter which is irrelevant to the current application. That reference is made in two pages to raids undertaken by authorities against GVDM and others does not alter this fact. To allow material concerned with documents put up in the criminal trial, to which SARS has not had access, would cause prejudice were it not to be struck out. It follows that given the irrelevant matter contained in this annexure and the allegations raised in it, which are largely unrelated to the current application, if they apply at all, SARS would be prejudiced in the current matter were this document not to be struck out.

[43] It follows that SARS' application to strike out paragraphs 12 - 15, 62, 64, 67, 69, 115, 117, 157 to 159 and 222-227 and annexure GVDM1 to the respondents' answering affidavit succeeds and the offending paragraphs and annexure are struck out. There is no reason why costs should not follow the result, with such costs to include the costs incurred in respect of the postponement of the respondents' strike out application. The respondents must therefore pay SARS' costs in respect of its application to strike out, jointly and severally, the one paying the other to be absolved, including the costs of two counsel.

Evaluation: application for declaration as vexatious litigants

[44] Section 2(b) of the Vexatious Proceedings Act, Act 3 of 1956 ('the VPA') provides:

> *'(b)* If, on an application made by any person against whom legal proceedings have been instituted by any other person or who has reason to believe that the institution of legal proceedings against him is contemplated by any other person, the court is satisfied that the said person has persistently and without any reasonable ground instituted legal proceedings in any court or in any inferior court, whether against the same person or against different persons, the court may, after hearing that person or giving him an opportunity of being heard, order that no legal proceedings shall be instituted by him against any person in any court or any inferior court without the leave of the court, or any judge thereof, or that inferior court, as the case may be, and such leave shall not be granted unless the court or judge or the inferior court, as the case may be, is satisfied that the proceedings are not an abuse of

> the process of the court and that there is *prima facie* ground for the proceedings.'

[45] The Constitutional Court in *Beinash and Another v Ernst & Young and Others*[6] found that while section 2(b) of the VPA limits the right of access to courts, such limitation is reasonable and justifiable having regard to section 36 of the Constitution.[7] The purpose of the section is to impose a procedural barrier to litigation on persons who are found to be vexatious litigants so as to restrict their access to courts to stop *"persistent and ungrounded institution of legal proceedings*" and *"the making of unjustified claims against another or others, to be judged or decided by the Courts*".[8] Such an order is not an immutable bar to litigation, but aimed at regulating access to courts to protect the interests of those at the receiving end of the vexatious litigant who have repeatedly been subjected "*to the costs, harassment and embarrassment of unmeritorious litigation as well as the public interest that the functioning of the Courts and the administration of justice*.[9] The VPA does not afford protection against vexatious proceedings, or an abuse of process in respect of legal proceedings, which have already been instituted.[10]

[46] The jurisdictional requirements for an order in terms of section 2(1)(b) are that legal proceedings must in the past have been instituted, or there is reason to believe that proceedings will in the future be instituted, against the applicant; and that the court is satisfied that the respondent has persistently instituted legal proceedings without any reasonable ground in a court, or inferior court, whether against the same person or against different persons.[11]

[47] There is no dispute that legal proceedings have in the past been instituted both by GVDM in his personal capacity, and by GVDM and the other trustees of the Eagles Trust, directly against SARS and against a range of other parties. The thread that runs through all of this litigation is that its relationship to the tax affairs or determined tax liabilities of GVDM, CVDM, the trustees of the Eagles Trust or other entities to which GVDM is related. From this litigation it is apparent

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[6] *Beinash and Another v Ernst & Young and Others (Beinash)* 1999 (2) SA 116 (CC).
[7] *Beinash (supra)* at para 18.
[8] *Beinash* (supra) at paras 15 -16.
[9] *Absa Bank Ltd v Dlamini* (*Absa)* 2008 (2) SA 262 (TPD) at para 23 also quoted in *Searll NO and Others v Hough and Others* [2016] ZAWCHC 197 at para 95.
[10] *Absa (supra)* at para 24.
[11] See *MEC for Co-operative Governance and Traditional Affairs, Mpumalanga v Maphanga* 2018 (3) SA 246 (KZN) at paras 15 and 18.

that GVDM has acted both on his own behalf and on behalf of the trustees of the Eagles Trust, in whom ownership in Zonnekus was vested, or other entities in which GVDM holds an interest. He has been the driving force behind much of the litigation which has increasingly been litigated personally by him without the assistance of any legal representative. From the manner in which he has conducted this litigation it is apparent that he has gained significant knowledge regarding the law, legal process and the workings of the courts. What is however equally apparent are the dangers incumbent in holding a limited knowledge in areas of the law, which has allowed a patently ill-conceived and unreasonable approach to be taken by GVDM and the other respondents to much of the litigation embarked upon.

[48] What is in issue for purposes of the current application is whether the respondents have been shown to have "*persistently and without any reasonable ground instituted legal proceedings in any court or in any inferior court, whether against the same person or against different persons*" in a manner which warrants an order to be made against them in terms of section 2(1)(b). This requires a careful consideration of the legal proceedings which has been instituted by the respondents.

[49] In relation to the preservation application, to the extent that the application to anticipate the return date of the order granted *ex parte* against them constituted the institution of legal proceedings, the respondents were clearly within their rights to do so. In relation to the tax enquiry, GVDM and others instituted an unsuccessful application to interdict the enquiry, secure access to documentation in the court file and contest the constitutionality of provisions of the TAA, with various applications for leave to appeal thereafter refused. The court took issue with the approach taken by the respondents to that application, including the language, tone and content of the founding papers. Yet, despite these objections it is difficult to conclude that the application was instituted without any reasonable ground, particularly when it would have been difficult for the respondents to have identified the documents in the court file to which they sought access when they were not given access to such file and would therefore have been unaware of the documents contained in such file.

[50] GVDM's stance to that application, reflected equally in his approach to other of the applications referenced in this matter, indicates his strongly held belief that he and the businesses in which he has been involved have been unfairly treated

by SARS. However, what appears to be absent throughout the litigation is a recognition on his part that avenues have been available to him, or individuals and entities with which he is associated, including to object and appeal timeously against assessments raised by SARS, of which use has not been made and there has been a resounding failure to explain why this is so.

[51] In respect of the action instituted in 2014 by SARS, although a number of interlocutory skirmishes have arisen between the parties, it is pertinent to note that SARS has not to date driven the matter to finality, with the action not set down for hearing. In addition, while GVDM was unsuccessful in interlocutory applications brought under rules 7(1) and 30A, SARS has equally been the ordered to comply with interlocutory orders related to the matter. Furthermore, while issue may be taken with the reasonableness of GVDM's decision to pursue the rule 7(1) and rule 30A applications after SARS had put up the relevant material was, it appears, patently unreasonable, it is relevant to note that the reliance placed by SARS on the contents of GVDM's affidavit opposing discovery, which were found to have "*strayed into the realm of scandalous, vexatious and irrelevant matter, which are prejudicial to SARS*", relate to proceedings not instituted by GVDM or the other respondents.

[52] The persistent and vexatious approach taken by GVDM and the other respondents in the unreasonable institution of legal proceedings is most clearly apparent in relation to the liquidation of Zonnekus and applications ancillary to it. The liquidation application against Zonnekus was instituted by Standard Bank, with the liquidators instituting applications to extend their powers, commence a section 417 enquiry and secure an eviction order against the occupants of the immovable property owned by Zonnekus. The numerous other applications brought in the matter were instituted by GVDM, the trustees of the Eagles Trust or both. These included four separate unsuccessful business rescue applications, one of which was launched by the purported employees of Zonnekus but appeared to have been directed by GVDM. These applications followed consecutively upon the other, relying on the same set of facts, and on one occasion before the previous application had been finalised. Underlying these applications was GVDM's objection to the extent of the tax liabilities raised by SARS against Zonnekus despite the fact that the evidence put up indicated that none of the respondents had made use of the SARS' objection and appeal mechanisms available to challenge such liabilities; and when no assistance,

as had been sought, was provided to the liquidators by GVDM or others to do so. In such circumstances, given such unchallenged and extensive tax liabilities, the business rescue applications were patently unwarranted, instituted without any commercial justification, were doomed to failure and set out to achieve an extraneous objective, namely to frustrate and delay the liquidation. The single-minded persistence with which these applications were pursued was unreasonable, patently vexatious and constituted an abuse of court process. This course of action was aimed at, and for an extended period succeeded in, halting the liquidation of the company. The manner in which the applications were pursued, with SARS not always cited as a respondent despite the respondents being aware of its large tax claim against Zonnekus, was equally litigious since it led to SARS having to seek leave to intervene in such matters given its interest in them.

[53] The further applications concerned with Zonnekus and pursued by GVDM and the trustees of the Eagles Trust included an application for the removal of the liquidators, two applications to hold the liquidators and SARS' attorneys (in the second application) in contempt of the preservation order in the winding up of Zonnekus, an application for the removal of the liquidators, an application to re-open the liquidation and distribution account, an application that ENS repay legal costs paid to it by the liquidators and a numerous applications for leave to appeal in various courts. Each of these applications, instituted in the persistent and relentless manner in which they were, were equally unmeritorious and unreasonable, patently vexatious and constituted an abuse of court process.

[54] What constitutes an abuse of court process is a matter to be determined from the circumstances of each case. In general, such abuse arises where procedures permitted by the rules of court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective.[12] The difficulty that arises with the approach of many a lay litigant is that the legal knowledge held is short of what is required for the purpose to which it is applied, with critical gaps in what is required to succeed in the litigation. As much is apparent from much of the litigation instituted by GVDM and the respondents. While it may be that elements of the complaints raised suggest that they may hold some kernel of truth or merit, the persistent manner in

[12] *Standard Credit Corporation Ltd v Bester and Others* 1987 (1) SA 812 (W) at 820A B; Taitz The Inherent Jurisdiction of the Supreme Court (1985) at 16.

which the applications have been instituted, together with their content, has been unreasonable and the litigation has been pursued in so vexatious a manner as to point squarely to its intent to harass and delay in circumstances in which this is plainly unwarranted. As such, there can be little doubt that all such litigation has been vexatious, unreasonable and an abuse of court process.

[55] It was argued by GVDM that much of the litigation that could be instituted by the respondents has already been instituted and that there is little purpose served in declaring the respondents to be vexatious litigants under the VPA. I am not persuaded that this is so given the respondents' past conduct. It seems to me that it remains entirely within the realm of possibility that a similar approach to that adopted to date in litigation could well continue into the future without regard to the prospects of success, the legal costs incumbent in opposing such litigation, the abuse of court process or the serious objection raised by numerous judges in this division as to the vexatious manner and conduct of the respondents in relation to past litigation.

[56] The respondents have been shown to have persistently and without any reasonable ground repeatedly instituted legal proceedings, whether against SARS, its attorneys or others, in so unreasonable and persistent a manner as to warrant an order being made to restrict such litigation into the future. As was recognised in *Beinash,* this is not a total bar on litigation but permits a litigant, once a *prima facie* case is made out in circumstances in which the judge is satisfied that the proceedings to be instituted will not constitute an abuse of the process of the court, to proceed with such litigation.[13] There is no reason why such evidentiary burden should not be placed on GVDM in his personal capacity, as well as on each of the respondents as trustees of the Eagles Trust, given the manner and approach they have adopted to the institution of legal proceedings to date. Since such litigation poses the very real risk of not only negatively impacting on the court system and the administration of justice, but has in the past patently amounted to an abuse of court process, it follows that in exercise by this Court of its discretion, an order in terms of section 2(1)(b) should, for the reasons stated, be made against the GVDM in his personal capacity, as well as each of the respondents as trustees of the Eagles Trust. The order made does not apply to those proceedings already instituted in any

[13] *Beinash (supra)* at para 19.

court by any of the respondents and, in argument, counsel for SARS accepted as much.

[57] Given its success in this application it is not necessary to have regard to the alternative relief sought by SARS. There is no reason that costs should not follow the result, with such costs to include those of two counsel.

Order

[58] In the result, the following order is made:

1. The applicant's application to strike out succeeds and paragraphs 12 - 15, 62, 64, 67, 69, 115, 117, 157 to 159 and 222-227 and annexure GVDM1 to the respondents' answering affidavit are struck out, with the respondents to pay the costs of such application, jointly and severally, the one paying the other to be absolved, including the costs of two counsel.
2. The respondents' application to strike out is dismissed, with the respondents to pay the costs of the applicant's opposition to such application, including the costs of the postponement of such application, jointly and severally, the one paying the other to be absolved, including the costs of two counsel.
3. The first respondent, Gary Walter van der Merwe, in his personal capacity, or his capacity as a director, member or trustee of any company, close corporation or trust, and the second, third and fourth respondents, being Gary Walter van der Merwe N.O., Fern Jean Cameron N.O. and Dave Tadeo Nkhoma N.O., in their capacities as trustees of the Eagles Trust, IT 3019/95, may not, in terms of section 2(1)(b) of the Vexatious Proceedings Act 3 of 1956, institute any legal proceedings against any person in any court in the Republic of South Africa without the leave of the court to be granted only if the court is satisfied that the proceedings are not an abuse of the process of the court and that there are *prima facie* grounds for such proceedings.
4. The respondents are to bear the costs of this application, including the costs occasioned by the previous postponement of the matter, jointly and

severally, the one paying the other to be absolved, inclusive of the costs of two counsel.

SAVAGE J

Appearances:

Applicant:	N G D Maritz SC and C Naude Instructed by MacRobert Inc.
Respondents:	G W van der Merwe (in person)