REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 66077/2015

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED.

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DATE SIGNATURE

In the matter between:

THE COMMISSIONER OF THE SOUTH AFRICAN REVENUE SERVICE Applicant

and

SUNFLOWER DISTRIBUTORS CC 1st Respondent

SHAN INVESTMENTS14 (PTY) LTD 2nd Respondent

JIN METALS CC 3rd Respondent

J U D G M E N T

Fabricius J,

1.

This is the return date of a provisional order granted on 8 September 2015 in terms of the provisions of s. 163 of the Tax Administration Act 28 of 2011 which commenced on 1 October 2012.

2.

I was presented with very helpful Heads of Argument by both Counsel as well as a detailed chronology of events. The First Respondent was placed under a final winding-up order on 15 September 2015, after the provisional order was granted on 28 July 2015.

3.

The author of the founding affidavit stated that the preservation order was applied for as an interim measure to preserve realisable assets until the final winding-up order is granted and until final liquidators have been appointed by the Master of the High Court, and them taking charge of the assets. At the date of the hearing the last mentioned had not yet occurred, so I was told. The Notice of Motion is dated 19 August 2015. On 15 September the provisional winding-up order of First Respondent was made final. The provisional preservation order has a date stamp of 8 September 2015, and the question was posed: was it really necessary to obtain an order that would be effective for a mere five Court days? Yet, it is effective until the liquidators take up their duty, but I agree that there is no point in confirming the provisional order *vis-a-vis* the First Respondent. In its case, the appointment of a curator bonis was also totally unnecessary, keeping further in mind that the assets sought to be preserved were registered in the name of the Second Respondent and were a motor vehicle and a fixed property (according to the order sought). These brief facts re-enforce the warning sounded by Rogers J in *Commissioner, South African Revenue Service v Tradex (Pty) Ltd and Others* 2015 (3) SA 596 WCC at par. 72, where he stated that the appointment of a curator bonis is often not reasonably required to secure the interim position pending the return date, as it is a considerable intrusion into the rights of a tax payer. Yet, in my experience, this order is sought almost as a matter of course.

4.

Section 163 provides for an ex parte application under certain specified circumstances. I would also interpret the section, in the context of the clear discretion granted to a Court, in the light of the principle that the State is obliged to-and entitled to collect taxes, as its very existence is dependent on it. This must also be done swiftly, but, I must add, at all times lawfully, and in the context of a preservation order sought ex parte, it must be done with a degree of circumspection, keeping in mind that the utmost good faith is required, and the fact that s. 163

allows for a procedure for preserving assets. It is not, and should not be used, as an execution mechanism as Rogers J said in par. 73 of the *Tradex* decision, *supra*.

5.

With these remarks in mind, I need to deal with two aspects raised on behalf of the Second and Third Respondents. I do so with reference to the founding affidavit in these proceedings. The deponent says in the founding affidavit that she has been involved in the particular SARS investigation since January 2014. She then describes the status of the three Respondents, and continues to describe the actions of a Mr K "who is believed to be directly or indirectly involved in each of the Respondents and being the mastermind behind a VAT scheme..." She points out that Mr K was not joined as a Respondent in this application as his estate was finally sequestrated by order of Court, dated 16 March 2015. She stated that an ex parte application was necessary for the preservation of the Respondents realisable assets, as it was required to secure the collection of tax currently due or payable to SARS by First Respondent and/or which the senior SARS Official, on reasonable grounds is satisfied may be due or payable by the Second and Third Respondents. As far as the Second and Third Respondents were concerned, she said that they were joined as Respondents because their assets stood to be directly or indirectly executed against tax debts of the First Respondent. She then deals with the tax debts of the First Respondent and states the following: "During about 2009, SARS commenced with an audit of a taxpayer company that conducted business as a refinery, including the processing and extraction of metals. This refinery was claiming VAT refunds of millions of Rands per month based on input VAT claims. As part of an audit, SARS attempted to verify the validity of supplier invoices based upon which the refinery was claiming refunds and established that Sunflower Distributors was one of the alleged suppliers of second-hand jewellery to the refinery. It was also established that it was only upon the refinery receiving the relevant VAT funds, that it paid Sunflower Distributors for the alleged supplies. It was established that huge payments from the refinery were paid in this way to Sunflower Distributors". A field audit was conducted and it appeared, so she states, that it was confirmed that Sunflower Distributors probably duly declared its output VAT based on its transactions with the refinery in its VAT returns. However, the large notional input VAT claims which Sunflower Distributors made were an entirely different matter. During the audit, SARS was provided with boxes containing documents upon which Sunflower Distributors made these notional claims. She then dealt with certain records that had to be kept in this particular context, and annexed to the founding affidavit two examples of the bundles of documentation that Sunflower Distributors provided to SARS in support of its input VAT claims. These formed part of 17 boxes of documents, provided to SARS during the VAT audit. She then said the following in par. 28 of the founding affidavit, and I deem it convenient to quote this paragraph: "SARS took a random sample of 10 of these sets of documents in order to verify the suppliers of Sunflower Distributors. SARS attempted to make contact with the relevant individuals who

were reflected in the documents as the alleged suppliers of second-hand jewellery to Sunflower Distributors. It transpired that certain of these individuals were deceased at the date of the alleged supplies. The remainder of the ten alleged suppliers that SARS was able to contact, denied ever being suppliers of second-hand jewellery to Sunflower Distributors. It therefore emerged that these were probably invalid claims based on forged and/or fraudulent documents, probably involving what is referred to as "identity theft"." No explanation was tendered as to why this clear hearsay evidence was introduced or why it should be admitted.

6.

Mr J. J. Lubbe made an opposing affidavit on behalf of the Second Respondent. On behalf of Applicant a number criticisms were aimed at this affidavit which I do not intend dealing with at this stage. Mr Lubbe was a director of the Second Respondent and said that he was duly authorised to depose to this affidavit. In the context of the paragraph that I quoted from the founding affidavit, he said that the affidavit was replete with allegations of a hearsay nature. These allegations were furthermore far-reaching. He said that the deponent to the founding affidavit had no knowledge of any of the events of 2011 and 2012. No case was made out why this Court should accept the clear hearsay allegations in the founding affidavit, and more particularly those that I have just related. There was no reason indicated why a Mr Swanepoel, who dealt with the matter at all relevant times could not make a supporting affidavit describing what he actually knew. In the present context, I need to refer also to an affidavit by Mr I. D. van der Linde who was a duly registered Public Accountant and Auditor, and practiced as such. He was also registered as a Chartered Accountant and as a tax practitioner as contemplated in terms of the Tax Administration Act. He said that his firm was appointed as accountants for the First Respondent and that he acquired knowledge of the business practices of First Respondent through discussions with the then member Mr K. He also assisted it in a value-tax audit. He accordingly requested Mr K to deliver all the relevant documents relating to Sunflower Distributers VAT returns to his firm. Some 17 boxes containing approximately 19 000 pages were delivered to his offices. Mr Swanepoel, who, as I have said, did not make an affidavit at all, together with an assistant attended at his offices, and they had a general discussion about the business of Sunflower Distributers and how this impacted on its VAT obligations and rights. He explained to him that Sunflower Distributers inter alia conducted business as a purchaser of gold jewellery, for cash, which it then sold to refineries in terms of a certificate under the Second-Hand Goods Act 23 of 1995, which was repealed by the Second-Hand Goods Act 6 of 2009 with effect from 30 April 2012. He also was aware that the Act that applied required Sunflower Distributers to keep records which were from time-to-time inspected by police. Mr Swanepoel told him that he would randomly choose 10 examples of transactions which were conducted during the tax period in issue, namely July 2011. I will continue with his explanation of events inasmuch as they are also particularly relevant, having regard to the Second and Third Respondents' further material

objection to Applicant's ex parte application. He said that the normal procedure at the time would have been that after such audit, a letter of findings would be issued inviting a response from the tax payer. Such a letter was indeed sent. He then pointed out certain acts contained in this letter of findings, namely that the relevant tax period was July 2011, that a response was invited, that it did not constitute an assessment, that the letter did not allege any fraud, but merely alleged that there were shortcomings in the administrative recording of input VAT and that certain other documents required by the VAT Act were not properly kept. He prepared a response to the letter of findings, dated 22 November 2011, addressed to Mr Swanepoel. This letter was not annexed to the founding affidavit, but it was obviously received by the Applicant inasmuch as SARS acknowledged its receipt in its "assessment letter", dated 24 May 2012. This response dealt extensively with the alleged administrative failures identified in the letter of findings of 8 November 2011. He also explained the reasons for the high frequency of cash transactions. The thrust of his detailed letter was that First Respondent was perfectly entitled to deduct the input tax that it paid to its suppliers from the output tax which the client that it supplied paid to it.

7.

Keeping this in mind, I now turn to par. 30 of the founding affidavit which deals with this letter (or rather its absence in the founding papers): "As it appears from the letter of findings SARS had afforded Sunflower Distributers an opportunity to make representations in respect of the findings. No satisfactory response was received and SARS proceeded to raise VAT assessments, on or approximately 25 and 26 April 2012, in terms of s. 31(1) of the VAT Act, disallowing its input VAT claims".

8.

It is the Respondents' case that the letter of 22 November ought to have been annexed for the benefit of the Court and that the deponent to the founding affidavit ought then to have dealt with whatever criticism was justified. She could not play Judge in her own cause in this context, and if this letter had been considered by the Court that granted the provisional preservation order, it might not have granted it, or might have granted it on different or other terms. The effect of this failure to annex this letter or deal with it in the founding affidavit meant that the duty to act with the utmost faith had not been complied with, and that I was entitled, on this basis alone, but no doubt coupled to the significant hearsay evidence, not to confirm the provisional order.

9.

In the replying affidavit, the author of the founding affidavit criticised Mr van der Linde and pointed out that he was clearly not authorised to speak either on behalf of the First Respondent nor Mr K, who had in any event not made an affidavit denying any participation in fraud. He

also pointed out that Mr van der Linde did not address the allegations of fraud made in the founding affidavit, either demonstrably or at all. I may just say in this context that the deponent to the founding affidavit used the word “suspicious” on a number of occasions and also referred to “an elaborate VAT scheme”. The word ‘fraud’ appears in one occasion. In any event, it is my view that the letter of 22 November ought to have been annexed and ought to have been dealt with. In reply she said that the fact that she did not expressly refer to this letter of Mr van der Linde cannot be described as a material omission. She stated that there was no satisfactory response and upon analysis, reference to the letter was indeed made, which is correct, but not sufficiently so. She contended that, for present purposes, express reference to the Van der Linde letter was not required, and certainly not as a ground to discharge the preservation order insofar as Shan Investments and Jin Metals were concerned. At best, it could be relied upon by Sunflower Distributers, which it did not. I do not agree with this contention. If the founding affidavit is read in its totality, and considered as such, on its own wording, it refers to a “scheme” utilised by all three Respondents via Mr K. Having dealt with Mr van der Linde’s letter, she then annexed further some documentation in reply. Further criticisms were then levelled against the Second and Third Respondents’ IA case, for instance that no opposing affidavit was filed on behalf of the Third Respondent, and that Mr K’s belated affidavit said nothing about any denial of a “scheme” or fraud.

10.

It is my view that the letter of 22 November 2011 is highly significant, that it explains the dealing between the Respondents, and on the face of it, and seen contextually, it explains any alleged “scheme”. It is a material letter and its omission from the founding papers is a material omission in my opinion. Furthermore, there is no acceptable explanation of any sort why the mentioned hearsay evidence was tendered and why no supporting affidavit from the persons involved was obtained.

11.

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

11.1 The extent to which the rule has been breached;

11.2 The reasons for the non-disclosure;

11.3 The extent to which the first Court might have been influenced by proper disclosure;

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

See: *Superior Court Practice, Erasmus, Vol. 2 at D1-61 to D1-62*. In my view, the absence of the relevant letter has not been properly explained. As I have said, the deponent could not act as Judge in her own cause in this context and it seems to me that the explanation in the replying affidavit was one that emerged when she was confronted with the allegation that a material document had been omitted. I am also of the view that if this letter had been considered by the learned Judge who issued the provisional order, it might have had an effect on his ruling, and the probabilities are that it would have had such an effect. I have also considered the fact that although the events relevant hereto commenced in 2009, that there was no proper explanation tendered why the preservation order suddenly became so urgent during 2015. As happened in the *Tradex* case supra, I have the distinct impression that the application was brought not so much because a preservation of the Respondents' assets was required, but in order to bring matters to a head by placing legal pressure on the tax payers. In any event, what I deem material to this application and its outcome, is the significant omission to annexe the letter of 22 November 2011 and to deal with it, coupled with the unexplained hearsay evidence that forms the basis of much of what the deponent relies on in her founding affidavit read as a whole.

12.

In the light of all of the above, the following order is made.

The provisional preservation order is not confirmed, and the application before me is dismissed with costs, including the cost of Senior Counsel.

JUDGE H.J FABRICIUS
JUDGE OF THE GAUTENG HIGH COURT, PRETORIA DIVISION

Case number: 66077/2015

Counsel for the Applicant:	Adv H. G. A. Snyman SC Adv M. T. M. Phehane-Rametse
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Counsel for the Respondents:	Adv P. F. Louw SC Instructed by: Pierre Retief Attorneys
Date of Hearing:	22 October 2015
Date of Judgment:	17 November 2015 at 10:00