REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: 13048/13

In the matter between:

THE COMMISSIONER FOR THE **Applicant**

SOUTH AFRICAN REVENUE SERVICE

and

CANDICE-JEAN VAN DER MERWE **2nd Respondent**

In re:

In the ex parte application of:

THE COMMISSIONER FOR THE **Applicant**

SOUTH AFRICAN REVENUE SERVICE

and

GARY WALTER VAN DER MERWE **1st Respondent**

THE INDIVIDUALS, TRUSTS, CLOSE

CORPORATIONS AND COMPANIES LISTED

IN SCHEDULE A HERETO **2nd to 21st Respondents**

Heard: 19 November 2013

JUDGMENT

DELIVERED: 28 FEBRUARY 2014

SAVAGE AJ:

Introduction

[1] On 30 August 2013 a provisional preservation order was granted *ex parte* by Rogers J on application by the Commissioner for the South African Revenue Service ('SARS') under the provisions of s 163 of the Tax Administration Act 28 of 2011 ("the Act") against the 1st, 2nd, 7th, 11th, 14th and 22nd respondents. In terms of the order all respondents were called to show cause why final preservation orders should not be granted, including the 3rd to 6th, 8th, 13th and 21st respondents, against whom no provisional preservation order was made, with. While the 1st, 2nd, 7th, 11th, 14th and 22nd respondents have opposed confirmation of the provisional order, only the second respondent, Candice-Jean van der Merwe, anticipated the return date of the provisional order. It is the application for confirmation of the provisional order made against the second respondent that is currently before this Court for determination.

[2] In terms of the provisional order made against her, the second respondent was -

> *(a) ...interdicted from dealing with, disposing of encumbering or removing from the Republic any of the following assets:*
>
> *(i) Audi A8 Spyder (CA 481415, engine BUJ 008480)*

(ii) Land Rover Evoque

(iii) any monies standing to the credit of any bank accounts in her name or in respect of which she has signing powers to the extent that such monies represent any residue of the sum of US$ 15.3 million (converted into the rand amount of R142 901 673) received by her on or about 16 May 2013, such accounts to include (without derogating from the generality of the foregoing) any amounts held in any of the following bank accounts: FirstRand Bank account 62403543756 (Rosebank branch, Gauteng) in the name of Lucra Movables (Pty) Ltd; Standard Bank third party administration account 271783230 (Kromboom branch); and Standard Bank Marketlink account 374170991 (Milnerton branch);

(iv) any monies held on trust by Perold & Associates and/or Bill Tolken Hendrickse in the name of or for the benefit of Candice van der Merwe or in the name of any other person or entity on whose behalf Candice van der Merwe is accustomed to give instructions in respect of such monies;

(v) any other assets acquired by Candice van der Merwe from the proceeds of the amount of R142 901 673.

[3] The provisional order made against the second respondent preserved assets, in respect of which -

(b) *....there is prima facie evidence indicating:*

(i) that the assets in question in truth belong to Mr Van der Merwe and are thus realisable in respect of his alleged tax debts;

(ii) alternatively, that they will be realisable to satisfy any claim which Mr Van der Merwe may have against Candice van der Merwe in respect of funds made available to her at his instance;

(iii) alternatively, that Candice van der Merwe may, in terms of s182 or s183 of the Act, be held jointly and severally liable for the tax debts of Gary van der Merwe by virtue of her participation in the receipt and further handling of the sum of R142 901 673 previously mentioned.

[4] A similar provisional order was made against the 1st respondent, Gary Walter van der Merwe, who is the father of the second respondent, as well as against the 7th respondent ('Aeronastic'), the 11th respondent ('Pearl Island'), the 14th respondent ('Executive Helicopters') and 22nd respondent ('Zonnekus').

[5] Prior to the anticipated return date, by agreement between SARS and the second respondent, R1 million was released from the operation of the provisional order.

Relevant statutory provisions

[6] Section 163 of the Act provides that:

> (1) *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, authorise 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.*
>
> ...
>
> (3) *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);*
> *(b) the realisable 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 realisable 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 realisable assets.*

[7] The court granting a preservation order may under s 163(7) make ancillary orders regarding how the assets must be dealt with, including authorising the seizure of all movable assets, appointing a *curator bonis* in whom the assets vest, realising the assets in satisfaction of the tax debt and any other order that it considers appropriate for the proper, fair and effective execution of the preservation order.

[8] In terms of s 163(8) –

> '(8) *The court making a preservation order may also make such further order in respect of the discovery of any facts including facts relating to any asset over which the taxpayer or other person may have effective control and the location of the assets as the court may consider necessary or expedient with a view to achieving the objects of the preservation order'.* Section 163(10) provides that a preservation order remains in force in terms of) pending any appeal against it and '*until the assets subject to the preservation order are no longer required for purposes of the satisfaction of the tax debt'.*

The applicant's case

[9] The first respondent has been engaged in numerous disputes over a number of years with SARS. In summary, SARS contends that he has been linked to several companies that SARS states have fraudulently claimed VAT refunds, resulting in substantial amounts being incorrectly paid out with the result that the first respondent and various other entities are currently liable to SARS for payment of the total sum of R291,000,000 in respect of tax, additional tax, penalties and interest. In addition, criminal charges have been instituted against him.

[10] SARS details in the founding papers the *modus operandi* followed by the first respondent, with the assistance of other parties, involving the

intentional manipulation and inflation of certain assets in non-VAT entities, the selling of second hand goods (particularly aircraft, vessels and spare-parts) by non-vendors to vendors, all in order to enable the vendors to claim notional input tax in terms of s 16(3)(a)(ii) of the VAT Act. In the process, the selling non-vendors have not been liable for the payment of any output tax as they have not been registered for VAT purposes, whilst the purchasing vendors claimed input taxes from SARS. Payment in terms of the agreements has largely been made by transferring shares, the values of which have been manipulated according to SARS. Income tax returns have been withheld in order to avoid income tax and capital gains tax liabilities based on the inflated sale value of the assets, or when submitted have been manipulated artificially to create losses. The selling has ostensibly occurred between arm's length parties, but SARS states that in reality the parties have been linked to each other and controlled by the first respondent and the transactions have primarily, if not exclusively, been entered into for the purpose of creating VAT refunds. These transactions have been regarded by SARS as falling within the meaning of a scheme as envisaged by s 73 of the Value Added Tax Act 89 of 1991.

[11] By way of example of such a scheme, SARS details transactions during 2005 involving the first respondent and the companies Executive Helicopters, SA Administration Services, Two Oceans Aviation and Helibase. SARS states that the first respondent was a director of SA Administration Services, the general manager of Two Oceans Aviation, a director (with his mother), as well as general manager and public officer of Helibase. He acquired 50% of Executive Helicopters and subsequently represented the company in interactions with SARS. SARS raised assessments against Executive

Helicopters in respect of the VAT period 09/2005 to the value of R44.1 million in terms of s 190(5) of the Act, which provides that if SARS pays to a person by way of refund of any amount which is not properly payable to the person under a tax act, the amount is regarded as tax payable by the person to SARS from the date on which it is paid to the person. The company did not appear at the tax appeal raised by it, as a result of which the sum of R72,608,119.66 is currently due and payable to SARS.

[12] SARS also provides in its founding papers by way of background the history of the arrest of the first respondent on 13 July 2004 at Cape Town International Airport with foreign currency in the approximate rand value of R1.2 million. The currency was seized and ultimately, following litigation, returned to the first respondent on the basis that is constituted the total allowance permissible for a group of eight adults and four children who, apart from himself, had already left for Las Palmas two days earlier. The monies were stated to have been sourced from the sale of immovable property owned by Zonnekus, gambling winnings, redemption at a casino, his children's savings account and the available amount on his credit card, with the US dollars belonging to a friend. Lengthy litigation ensued regarding the return of the funds.

[13] SARS contends that the second respondent, either in her own right owes SARS taxes or holds assets on behalf of her father, or some of the other respondents, against which assets SARS may execute in the collection of taxes. During May 2013 the Financial Intelligence Centre ('FIC') made SARS aware of certain transactions relating to the first and second respondents. On 16 May 2013 Standard Bank of South Africa received the amount of

US$15,300,000.00 for the benefit of the second respondent. The remitter of the funds was identified as Muhamad Muhamad Nazih Rawas ('Rawas') and the funds were transferred from the Bank Med Sal in Lebanon. The second respondent, in her application to sell this foreign currency, gave her contact details as those of her father and stated that the funds were a gift from Rawas. The SWIFT transaction recorded the transfer to be for 'South Africa Purchase of Property in Cape Town'. On 21 May 2013 the amount of R142,901,673.10, less bank charges, was transferred to a Marketlink account number 374170991 held by the second respondent, on which account she has signing powers.

[14] From the papers is it apparent that thereafter R15 million was transferred to the First National Bank savings account of Lucra Movables with account number 62403543756 as an investment for the second respondent. R110 million was transferred to the trust account of Perold & Associates Attorneys on 27 May 2013 and R7.9 million to the Standard Bank account of Zonnekus Mansions. On 27 May 2013, R100 million was transferred to a 'third party fund administration account' held at Kromboom with account number 271783230 under the name of Ms Candice van der Merwe and R10 million on 28 May 2013 to Ocean View Trust.

[15] On 29 May 2013 R10 million was received into the attorney's trust account from the Kromboom account and the next day payment of R10 million was paid to Lucra Movables. Most of the funds were transferred back to the attorney's trust account when a transfer of R87.5 million was received on 4 June 2013 and on the same date the same amount was transferred to Tolken Hendriksen, a firm of attorneys.

[16] From December 2012 to May 2013 amounts in excess of R2 million were received by Zonnekus Mansions from 'Perolds' and/or 'Perold and Associates'. Nedbank had enrolled an application for the winding-up of Zonnekus in this Court on 7 August 2013, which application was withdrawn following Zonnekus settling its indebtedness to Nedbank. SARS contends that the funds transferred from the second respondent's account to Zonnekus Mansions' account 'in all probabilities' were used to settle such indebtedness to Nedbank, strengthening SARS' belief that the funds received by the second respondent may not be her own but received on behalf of her father or some of the other respondents, alternatively that she allows her accounts to be used by them. SARS considers these transactions to have tax implications and require investigation. Furthermore, the account of Lipsotex (Pty) Ltd, held at First National Bank under account number 62379325337 shows references to Zonnekus and Van der Merwe. SARS contends that all of these transfers support its reasonable belief that the first respondent uses the respondents, other persons and entities to hide his assets.

[17] The second respondent is currently working as a model. She declared taxable income in 2009 of R20,023.00, in 2010 of R20,912.00, in 2011 of R24,995.00 and in 2012 of R45,366.00.

[18] In May 2013 she acquired an Audi R8 and during June 2013 a Land Rover SD4 Coupe Auto. Both vehicles were not financed.

[19] SARS believes that the US$15.3 million received by the second respondent was received by her on behalf of any one or more of the respondents, alternatively that she allows her accounts to be used by them. A

final preservation order is sought against her to secure assets that may be executed against in respect of existing indebtedness to SARS, as well as indebtedness still to be established. SARS contends that the second respondent may be held personally liable for the indebtedness of her father or the other respondents owing taxes to SARS in accordance with chapter 11, part D of the Act, alternatively s 424 of the Companies Act 61 of 1973 and the corresponding provisions of the new Companies Act. SARS seeks that the order remain in force for as long as it is required to secure the collection of tax and until the tax debts of Van der Merwe and the respondents owing or found to be owing taxes have been settled in full, and pending finalisation of steps to be instituted to declare the assets of the other respondents executable for the tax debts or hold them personally liable.

[20] To this end, a *curator bonis* as envisaged in s163(7)(b) of the Act, was appointed by terms of the provisional preservation order to take charge of the assets of respondents and to identify assets which can be executed against for the collection of taxes due to SARS. SARS persists that it is undesirable for the first respondent to be left in control of the respondents, as it is reasonable to believe that if allowed to do so, the assets of the respondents will be dissipated or their value diminished and the effective realisation of the assets to the benefit of both the respondents and SARS may be 'extremely difficult and even impossible'. This is given that the SARS believes that the corporate entities are used to hide assets to the detriment of SARS and the realisation of shareholding, members' interest and loan accounts cannot effectively be dealt with in terms of the normal execution steps prescribed by the Rules of Court. In addition, SARS persists that the appointment of a mediator is required, with the

costs of both the *curator bonis* and the mediator to be borne by the respondents jointly and severally insofar as such costs are incurred in the effective execution of the order.

Basis of opposition

[21] The second respondent seeks that the provisional order made against her be set aside and takes issue with the fact that SARS, without notice to her, interdicted her from dealing with her assets and now seeks a 'most draconian' final order against her on the basis of a bald allegation that the funds 'may' not be her own but with no facts to support this.

[22] She states that SARS knew in May 2013 that the funds were received by her on 21 May 2013 as a gift remitted by Rawas from an account in Lebanon for the purchase of property in Cape Town and no facts have been uncovered since transfer to show that the transactions were not genuine '*or that the funds paid by Rawas were anyone else's, let alone [her father's]*'. The vast majority of the funds has been invested in immovable property which 'plainly is not going anywhere' and SARS is not entitled to divest her of her assets.

[23] When she was 15 years old the second respondent met Ryan Hignett ('Hignett') who books models to travel to the Seychelles to attend at resorts. Given that she was too young to travel and work abroad on her own when she was first contacted by Hignett, he contacted her again when she was 19 years old Hignett and asked her if she was interested in travelling to the Seychelles. She was contracted through Ice Model Management ('Ice Models') to travel to the Plantation Club on Mahé Island, in the Seychelles, a private resort she

states is owned and frequented by some of the richest private individuals in the world '*for whom money is no object*' and to whom privacy and security are paramount with '*(m)odels from only the trusted agencies ... routinely flown in from all over the world to lend a sense of glamour and exclusivity*' to events at the resort. On arrival she states that their passports are taken from them, only returned on their departure and they are prohibited from taking photographs or disclosing the identity of any person met at the resort, failing which their contract may be terminated.

[24] On her first trip to the resort from 13 to 17 October 2012, the second respondent states that she '*got on very well*' with the people she met there. Although she indicates that she is not certain as to the reasons for this, she suspects it was the result of her healthy lifestyle, strict exercise regime and what she has been told is her '*very engaging personality*'. She was booked through Ice Models (Ice Genetics section) to return to the Seychelles resort, which she did from 26 to 28 January 2013, 9 to 17 March 2013, 15 to 19 May 2013 and 20 to 22 May 2013. It was during her visit from 9 to 23 March 2013 that '*one of the topics of conversation which came up*' was cars that she liked. She indicated that her dream car was an Audi R8. Shortly after her return to South Africa her car was written off in an accident and her cellphone damaged. She discussed the incident with numerous people '*including persons with whom I have become friendly while I have been in the Seychelles*'. A few days later, she received two new cellphones by courier and was contacted by the V&A Waterfront Audi dealership and presented with an Audi R8 Spyder which she was informed by the dealership was registered in her name and had been purchased for her. Documents put up indicate that the amount of R2,090,000.00

was paid in cash for the vehicle. In June 2013 a Land Rover Evoque was presented to her in similar circumstances having been purchased in cash for R660,683.09 and registered in her name. Jacques Taljaard, a sales executive at Audi Waterfront stated on oath that he had received an enquiry for an Audi R8 Spyder from one Georges Moussalli ('Moussalli') with whom he was in email contact thereafter and from whom he asked a R500 000 deposit, although the full purchase price of the vehicle was then paid to the dealership. Niel Burger of Land Rover in Cape Town deposed to a similar affidavit in which he confirmed that he too had been in email contact with Moussalli relating to payment and thereafter transfer of the Land Rover to the second respondent.

[25] The second respondent states that in 2013 a number of the friends she had met in the Seychelles came on a trip to Cape Town. They spoke about different areas in Cape Town and it was suggested to her that she look for a house in one of the areas that she liked as she '*would receive funds to pay for it*'. She viewed 50 Ave St Bartholomew in Fresnaye and states that she loved the property which comprises of erf 1990 Fresnaye, erf 1991 Fresnaye and erf 1917 Fresnaye. The asking price was R110 million which she communicated to her friends. Subsequently, the amount of US$15.3 million was remitted to her by Rawas.

[26] Candice requested her father, who is an experienced businessman, to assist and represent her in dealing with the funds and the negotiations for the purchase of the property. The shareholding in K2013087647 (South Africa) (Pty) Ltd, the company which purchased erf 1991 Fresnaye from Ocean View Trust for R4 million, is held and owned by her and she is sole director of the

company. The shareholding in K2013087073 (South Africa) (Pty) Ltd, the company which purchased erf 1990 Fresnaye from Ocean View Trust for R7 million, is held and owned by the Moondance Trust. The second respondent is the sole director of K2013087073. The trustees of the Moondance Trust are Candice, her sister (Christin Monique Ahrens) and her father. The second respondent and her descendants are the sole income and capital beneficiaries of the Moondance Trust.

[27] The Moondance Trust purchased from the Hyde Park Trust the shareholding in and all claims on loan account of this Trust against Promotrade for R86.5 million. The shareholding in Promotrade is held and owned by the Moondance Trust. The second respondent is the sole director of Promotrade and the Moondance Trust is Promotrade's sole shareholder. Bill Tolken Hendrikse are the conveyancers to whom SARS wrote on 3 September 2013 and who indicated to SARS that no funds were held in trust by the firm on behalf of any of the respondents.

[28] The second respondent put up a letter signed by Rawas in which he stated that –

> '*...the funds remitted to Miss. Candice Jean Van der Merwe was a gift and that she may deal with them in her discretion as they are hers, she may purchase a property or what ever she wishes to do with the funds.*'

[29] The rand amount paid to her was R142 901 028.10, after costs, of which R98 578 030,82 was used to purchase the three immovable properties, R25 million was loaned in terms of an acknowledgment of debt and loan agreement signed with Bret Lang to Lucra Movables (Pty) Ltd, now known as

Bank On Assets Holdings (Pty) Ltd, a company which buys distressed assets and on-sells them, being an investment with an annual return of 10% per year over 36 months with the option of purchasing shares in Lucra Movables.

[30] In addition, the debts of Zonnekus, the shareholding of which is held by the Eagles Trust of which she and her two siblings are sole beneficiaries, were paid in order to discharge an order of placing the company in provisional liquidation. Given her good relationship with her siblings, the second respondent states that she was 'happy to assist' and by agreement, Lucra purchased Zonnekus Mansion, one of five properties held by Zonnekus, for R10 million of which R6,187,260.00 was used to settle debts outstanding and cancel the bond with Nedbank, with the result that the order of provisional liquidation against the company was discharged.

[31] A total amount of R12.9 million was paid to Zonnekus in various deposits on 27 May 2013 and 19 August 2013. Zonnekus carries out building projects and will be used to improve the properties bought by her and the second respondent states that she uses its account for other expenditure in relation to the properties as she does not have a current account. In addition, Zonnekus has paid transfer costs for the properties and bought R2.3 million in gym equipment. The approximate balance of R5 million of the funds remitted by Rawas remains in her account.

[32] She states that all of these transactions were concluded openly and have been investigated by the authorities, with no further investigation required. The effect of the provisional order is that building work at the properties '*is about to grind to a halt*' and expenses must be paid.

[33] Candice states that she has no interest in any of the business affairs of her father, not ever has; her father has no interest in her assets or funds; and that she knows nothing of the 7th to 21st respondents. It is wrong, she says, to suggest that the funds received '*may not*' be her own, a speculation without foundation.

[34] The first defendant confirmed that he is a trustee of the Eagles Trust and general manager of Zonnekus. He denies that he was involved in providing his daughter with US$15.3 million, or any portion thereof, nor the expensive vehicles she received given that he has no assets and has judgments against him in excess of R100 million.

Reply

[35] In reply SARS claims that the second respondent's opposition to the preservation order lacks merit and persuasion, that she has not raised any *bona fide* dispute of fact, that piecemeal adjudication of the application should be avoided and the her '*vague and unsubstantiated version*' is not capable of being resolved on affidavit. She has not explained '*who or what Mr Rawas is*', has failed to detail who her friends are, as well as when, where and how they indicated that they would forward funds to her or how the precise amount of $15.3 million was transferred. Furthermore, there has been no explanation as to why she stated in an affidavit on 24 May 2013 that the funds '*were received as a gift from my companion*' or why no details of her employment at the Plantation Club has been provided. Issue is taken with the fact that on 3 June 2013 at a meeting held with members of the Financial Surveillance Department of the employees of the South African Reserve Bank ('SARB'), the second respondent

stated that upon receipt of the funds she had '*not identified a specified property to purchase*'. Following the interview, which was also attended by her father, he confirmed that the contents of a letter dated 8 July 2013 to the second respondent were correct. This letter recorded that –

> '...2. *you were requested to provide us with further details in respect of the foreign currency amount of USD 15 299 965-00, converted to Rand 142 901 673-10, at The Standard Bank of South Africa on 2013-05-17. 3.*
>
> *You informed us that:*
>
> *3.1 The said foreign currency in question was gifted to you for your personal use by a Mr [redacted] after having advised him of your intention to purchase a house. The funds in question were, however, remitted to you without prior notice of the amount authority was to be applied;*
>
> *3.2 at the date of receipt of the funds you had not identified a specific property to purchase;*
>
> *3.3 you met Mr [redacted] six-month prior to the receipt of funds in question during a trip to the Seychelles; and*
>
> *3.4 Mr Muhamad Rawas reflected on the relevant declaration to The Standard Bank of South Africa Limited is in fact an assistant to Mr [redacted] and not the donor of the funds in question.*

Evaluation

Relevant statutory provisions

[36] The Tax Administration Act, which came into operation on 1 October 2012, replaced the common law preservation interdict which required that an applicant prove on a balance of probabilities that the assets sought to be preserved would be diminished with the specific objective of frustrating the

claimant's claim if the interdict were not granted. *Knox D'Arcy Ltd v Jamieson and others* 1996 (4) SA 348 (A) at 372F-G and approved of in *Janse van Rensburg NO and another v Minister of Trade and Industry and another* 2001 (1) SA 29 (CC) at para 33.

[37] A preservation order may be made in terms of s 163(3) of the Act *'if required to secure the collection of tax'*, with its purpose in s 163(1) being *'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'.*

[38] A preservation order obtained remains in force in accordance with section 163(10) pending any appeal against the order or *'until the assets subject to the preservation order are no longer required for purposes of the satisfaction of the tax debt'*, with a tax debt defined in s 1 as *'an amount of tax due by a person in terms of a tax Act'*. In preserving the assets of a person, the order neither divests a person of such assets, nor grants an order of forfeiture against the assets and the person against whom the order is made is not obliged by its terms to settle any tax debt.

[39] There is no requirement contained in s 163 that the applicant prove that the assets sought to be preserved would be diminished if the order were not made. The basis on which a preservation order, in terms of s 163(3), may be made is *'if required to secure the collection of tax'*. Mr *MacWilliam* SC argued for the second respondent that the words *'if required'* make the provision 'vastly intrusive and draconian'. He contended that the provision must be interpreted to require an objective standard of necessity to prevent dissipation. In support of

this contention he argued that a statute must be construed in such a manner that it will alter the common law no more than is necessary (*Reek N.O v Registrateur van Aktes, Transvaal* 1969(1) SA 589 (T) at 594H to 595A) and in cases of uncertainty or ambiguity, a fiscal statute is to be interpreted *contra fiscum* (*Estate Reynolds v CIR* 1937 AD 57 at 70).

[40] In *National Director of Public Prosecutions v van Staden and Others* 2013 (1) SACR 531 (SCA) at para 12, in the context of an application for a restraint order under the provisions of s 26 of the Prevention of Organised Crime Act 121 of 1998 ('POCA'), Lewis JA took issue with the finding of the court *a quo* that the effect of that provision was draconian. The judge stated that although it '*may be harsh, it is not generally accepted to be draconian. The defendant is not deprived of his property arbitrarily. He is simply restrained from dissipating what are alleged to be the proceeds of unlawful activities until such time as he has been convicted and a court is persuaded that such proceeds should be confiscated.*'

[41] Similar reasoning applies to a preservation order under s 163. Whilst the grant of a preservation order may be considered harsh, there are compelling reasons within the context of our 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. Had it been intended by the legislature that the court infuse the requirement of necessity to prevent dissipation into a determination as to whether a preservation order should be granted in terms of s163(3), as much would have apparent from the statute. This is given that there exists a clear distinction between the word

'required' and the requirement of necessity. As much is event from the Concise Oxford English dictionary definition of 'required' as 'need or depend on, wished to have', as opposed to 'necessity' which is defined as 'an indispensible thing'.

[42] Necessity to prevent dissipation is also not capable of being read into the statute by implication or otherwise. Corbett JA in *Rennie NO v Gordon and another NNO* 1988 (1) SA 1 (A) at 22E-G stated that –

'Over the years our Courts have consistently adopted the view that words cannot be read into statute by implication unless the implication is a necessary one in the sense that with out it effect cannot be given to the statute as it stands (see e.g. *Germiston Municipality v Rand Cold Storage Co* Ltd 1913 TPD 530 at 539; *Taj Properties (Pty) Ltd v Bobat* 1952 (1) SA 723 (N) at 729 E-H; *S v Van Rensburg* 1967 (2) SA 291 (C) at 294C-D; *The Firs investments (Pty) Ltd v Johannesburg City Council* 1967 (3) SA 549 (W) at 557B-C; *DEP Investments (Pty) Ltd v City Council, Pietermaritzburg* 1975 (2) SA 261 (N) at 265G-H; *Hamman en 'n ander v Algemene Komitee, Johannesburgse Effektebeurs en 'n ander* 1984 92) SA 383 (W) at 391 H...'

[43] No necessary implication exists which warrants reading a requirement of the requirement of necessity into the statute. It follows therefore that for a court to determine whether a preservation order is required to secure the collection of tax in terms of s 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 apprised of the available facts in order to arrive at conclusion, reasonably formed on the material before 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 and purpose of the order sought. It is not required of the court to determine whether the tax is, as a matter of fact, due and payable by a taxpayer or other person contemplated in s163(1) which will be determined by later enquiry. Rather, at the preservation stage sufficient information is to be placed before the court to enable the court to determine whether such an order is required against the persons against whom it is sought.

[44] Once it has been shown that the order is required to secure the collection of tax, the court is properly seized of its discretion and of the view I take of the matter, as with the granting of a restraint order under the provisions of POCA, it is not open to the court to then frustrate the statutory provision when it purports to exercise its discretion *(cf Kyriacou, footnote 1, paras 9 and 10 referred to in NDPP v Rautenbach and another* [2005] 1 All SA 412 (SCA) at para 27*)*.

Does confirmation of the order amount to final relief?

[45] It is trite that in order to obtain interim interdictory relief an applicant must establish a *prima facie* right to such relief, show there to exist an apprehension of harm which may be irreparable, that the the balance of convenience favours it and indicate the absence of a satisfactory alternative remedy. *Howard Farrar, Robinson & Co v East London Municipality* (1907) 24 SC 685 687; *Ferreira v Grant* 1941 WLD 186 192; *SA Motor Racing Co Ltd v Peri-Urban Areas Health Board* 1955 1 SA 334 (T) 338–339; *Van den Berg v*

OVS Landbou Ingenieurs (Edms) Bpk 1956 4 SA 391 (O) 400; *Windhoek Municipality v Lurie & Co (SWA) (Pty) Ltd* 1957 1 SA 164 (SWA) 170. Where a clear right is shown to exist a final interdict may be granted. *Prinsloo v Shaw* 1938 AD 570.

[46] Mr *Gauntlett* SC for the applicant argued that confirmation of the rule *nisi* granted did not have the effect of a final interdict in that the terms of the order are in effect interlocutory, capable of variation or discharge if circumstances change. Furthermore, the order has no final effect on the category of assets preserved and simply confirms the interim arrangement pertaining to the assets.

[47] In determining whether an order is final '*not merely the form of the order must be considered but also, and predominantly its effect*' (*South African Motor Industry Employers' Association v South African Bank of Athens Ltd* 1980 (3) SA 91 (A) at 96H, and *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532I). An order which is purely interlocutory in effect is one which if reversed on appeal would remain purely interlocutory in its effect. *Priday t/a Pride Paving v Rubin* 1992 (3) SA 542 (C) at 547H. This is given that a court in interlocutory proceedings is not called upon to determine disputes of fact and is only required to determine if a *prima facie* case has been made out. *Fourie v Oliver and another* 1971 (3) SA 274 (T) at 285.

[48] Where the decision of the court is determinative of a self-standing issue which has been finalised and in respect of which the trial court is bound, it may be appealable. *Caroluskraal Farms (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk; Red Head Boer Goat (Edms) Bpk v Eerste Nasionale Bank*

van Suider-Afrika Bpk; Sleutelfontein (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk 1994 (3) SA 407 (A). To be appealable, a decision of the High Court must be a judgment or order that is final in effect, definitive of the rights of the parties in that it grants definitive and distinct relief and dispositive of at least a substantial portion of the relief claimed in the main proceedings. *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A).

[49] If the issues raised by the interim order are not to be reconsidered in the main proceedings, the order may be final in effect and thus appealable. *Metlika Trading Ltd and others v Commissioner for SARS* 2005 (3) SA 1 (SCA) at para 23.

[50] A restraint order under the provisions of POCA was found in *Phillips and Others v National Director of Public Prosecutions* [2003] 4 All SA 16 (SCA) at paras 12 and 21 to have only temporary duration, operative pending the outcome of later events and is rescindable. Howie JA in *Phillips* at para 22 nevertheless found that the effect of such an order was to strip the defendant of the restrained assets and any control or use of them as result of which he '*is remediless*' pending the conclusion of the trial. This '*unalterable situation*' he concluded was final '*in the sense required by the case law for appealability*' and that in spite of the order lacking certain characteristics of a final order, the legislature clearly contemplated it to be appealable.

[51] Section 163(10) provides that a preservation order remains in force pending the setting aside of such order on appeal, if any, or until the assets subject to the preservation order are no longer required for purposes of the satisfaction of the tax debt. The legislature clearly contemplated therefore that

such an order is capable of being appealed. Thus, while the order may, as with a restraint order under POCA, be of temporary duration and rescindable, where it is neither rescinded nor set aside on appeal its effect is to create an otherwise unalterable situation which removes control, and in certain instances, use of such assets from a person.

[52] It therefore displays elements of final relief insofar as it its purpose and effect is concerned. Final interdictory relief requires proof of a clear right, an actual or threatened invasion of such right and no other suitable remedy permit the grant of final relief. *Setlogolo v Setlogolo (1914) AD 221 at 227; Hall & Another v Heyns & Others (1991) (1) SA 381 at 395 E - F).* In my mind given the distinct species of relief sought in a preservation order, it is not appropriate that the test for final interdictory relief apply to the grant of such order, not only given that the order is not in all respects final given that its terms may be varied but also given the unique nature of such order. If I am correct in this regard, it follows as a necessary consequence that disputed evidence in applications of this nature would not be subject to the well-known rule enunciated by Corbett JA in *Plascon-Evans Paint Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) but that the court be entitled to arrived at a conclusion reasonably formed on a consideration of the material before it that such an order '*is required to secure the collection of tax*'.

[53] Support for this conclusion is to be found in the judgment of Mlambo AJA (as he then was) on behalf of the majority of the court in *NDPP v Kyriacou* 2004 (1) SA 379 (SCA) in which he rejected the notion that disputed evidence in a preservation application under POCA must be dealt with in accordance with

the principles applicable to motion proceedings set out in *Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) and *Plascon Evans Paint Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

Referral to oral evidence

[54] In the event that this Court is not inclined to grant a final preservation order, SARS seeks an order in terms of Rule 6(5)(g) of the Uniform Rules of Court referring the matter to oral evidence and that the second respondent be ordered to appear in person to be cross examined on a number of issues. The second respondent opposes a referral to oral evidence on the basis that such the application for a final order is to be determined on the papers and only where a matter cannot properly be decided on affidavit in terms of Rule 6 that issues may be referred to oral evidence.

[55] Rule 6 (5)(g) of the Uniform Rules of Court provides that -

'Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the aforegoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examine and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.'

[56] A party who is obliged by law to bring proceedings by way of notice of motion, such as in the current instances, and who seeks to discharge an onus of proof which rests upon him or her by asking for an opportunity to adduce oral evidence or to cross-examine deponents to answering affidavits, should not be lightly deprived of that opportunity. *AECI Limited v Strand Municipality* 1991 (4) SA 688 (C) at 698J-699A; *Freedom Under law v Acting Chairperson: Judicial Service Commission* 2011 (3) SA 549)SCA) at 564F-H. However, in *Hopf v Pretoria City Council* 1947 (2) SA 752 (T) at 768 the court cautioned that the Rule is *'intended to provide an expeditious method of settling disputed questions of fact'* and that its function is not to engage in a fishing excursion in relation to one's case.

[57] In *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1164 it was stated that -

'...entirely different considerations apply where purely interim relief is sought in interlocutory matters such as interdicts pendente lite. Where however permanent relief is sought, it does not follow that the only way of deciding the dispute of fact is by trial action. The Court has a discretion in the matter. The presiding Judge may find it convenient, in cases where the issues are clearly defined, the dispute of fact comparatively simple even though material, and a speedy determination of the dispute desirable, to act under Rule 9 (the predecessor of Rule 6(5)(g)). The employment of this Rule is at the Court's option, exercisable whether or not either party requests him to invoke it – and even if the party who has raised the dispute by denials or counter-allegations refuses oral evidence. In other circumstances the Court's discretion may well be

exercised in the direction of either dismissing the application, or of sending the parties to trial, with such direction as to costs and of filing pleadings as it deems fit. What particular course should be taken depends upon the circumstances of each case, and it is undesirable to lay down any rule regarding the exercise of the Court's discretion.'

[58] A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who raises the dispute has unambiguously addressed the fact in his or her affidavit. Harms DP in *National Director of Public Prosecutions v Zuma* 2009 (1) SACR 361 (SCA) at 26 stated as follows:

'*Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) 634-5; Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA) para 55; Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions [2008] ZACC 13;*

2008 (2) SACR 421 (CC) para 8-10. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version. Sewmungal NNO v Regent Cinema 1977 (1) SA 814 (N); Trust Bank van Afrika Bpk v Western Bank Bpk NNO 1978 (4) SA 281 (A)'.

[59] A similar view was expressed by Heher JA in *Wightman t/a JW Construction v Head Four (Pty) Ltd & another* 2008 (3) SA 371 (SCA) at paras 12 and 13 in which he stated that -

'*Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.*'

[60] This Court has a discretion as to whether or not to grant an interdict (*LAWSA* 11:408). Such wide discretion includes the refusal of an interim interdict, even if the requisites have been established but it is one that must be exercised according to law and upon established facts.

[61] There is no dispute between the parties that there exists no tax debt currently owed by the second respondent to SARS, nor is it disputed that various tax debts are owed by her father and various enterprises with which he was involved to SARS.

[62] Mr *Gauntlett* questioned the probabilities of a young model earning in the region of R20,000 per annum enjoying the serial generosity of a benefactor on an unparalleled scale and argued that they should dismissed as far-fetched, too implausible to be capable of belief, highly improbable in human experience and as amounting to a 'breathtaking fairytale'. SARS contends that the second respondent's assets stand to be preserved to secure the collection of her unquantified future tax debt that may arise in due course, no doubt as a consequence of her procuring the assets she has, and her father's tax debts on the basis that '*the preservation of any assets of a taxpayer or other person*' (my emphasis is permissible under s163(1). The first defendant is alleged by SARS to have misused the juristic personality of various of the respondents for improper purposes and has, and continues to use his family members as fronts or nominees for him according to the applicant. This is evident in the fact that bank accounts and the assets of the second respondent and Zonnekus Mansions have been used as his personal accounts in an attempt to hide his true wealth and taxable income from SARS.

[63] Furthermore, it is argued for SARS that the manner in which the receipt of the R142 million by the second respondent was dealt with by her father, whose contact details were provided in the application to sell foreign currency and who, it is alleged, has signing powers over the account to which the funds were transferred, illustrated her father's control over the funds. SARS contends that Candice van der Merwe accordingly holds assets on behalf of her father, or some of the other respondents, against which SARS may execute in the collection of the taxes and that it is required that these assets be preserved to secure the collection of tax. It is for these reasons undesirable to leave him in

control of his daughter's assets. The second respondent, it is argued, raises no *bona fide* dispute that the transactions regarding the R142 million 'probably have tax implications and therefore must be investigated'. On this basis alone, reasonable grounds have been shown for the preservation order against Candice van der Merwe to secure tax in relation to her assets while the receipt of the assets is being investigated.

[64] Mr *MacWilliam* persisted that Candice van der Merwe's explanation for her receipt of $15.3 million, the cars and cellphones she obtained with the Audi R8 were gifts, remitted by Rawas, and that the contrary been so, the second respondent's conduct in having funds previously overseas and beyond the reach of SARS imported into the country is conduct contrary to an intention to dissipate. SARS, it is argued, could have investigated the source of the funds to verify her explanation. The receiving bank did scrutinise and validate the transactions, as did the South African Reserve Bank and the Financial Intelligence Centre. The vast majority of the funds were used to acquire immovable property in Cape Town and improve such property, conduct also incompatible with dissipation. In addition, the involvement of her father was not surprising given that she is young with no business experience.

[65] Having regard to the version put up by the second respondent, I am persuaded that this Court is entitled to exercise its discretion to find that such version, in the words of Harms JA, '*consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers'*. The probabilities that a young model, earning in the region of R20,000 per annum,

would following a few short visits to a resort in the Seychelles, enjoy the serial generosity of a donor or benefactor on an unparalleled scale I find to be far-fetched and implausible. No support was put up by the second respondent, whether by way of confirmatory affidavit or otherwise, to confirm her visits to the Seychelles, nor the basis of her contract or the secrecy and confidentiality requirements associated with it. No explanation is provided as to why, having left the Seychelles, any such secrecy or confidentiality obligation, if it had existed, would remain binding on the second respondent. There is no confirmation from her modelling agency, or any person associated with it, that it was aware of any contract she held in the Seychelles or which provides details of any such contract. There is no explanation provided as to why the second respondent shies away from disclosing details of her assignments in the Seychelles or the persons she came into contact with there in the face of the current application.

[66] Furthermore, no details are provided by the second respondent regarding who she had become friendly with in the Seychelles with whom she discussed her asset dreams, or why such dreams would be fulfilled. Similarly, there is no detail provided, when given the opportunity to provide it in answering to this application, as to who the persons were who visited her in Cape Town, what the purpose of such visit was, what her relationship with such persons is or why she discussed housing preferences with such persons. No explanation is provided for the extraordinarily large cash transfer made to her when a property had not as yet been secured by her for purchase, how the amount of the transfer was arrived at or why. There is also no indication provided regarding the nature of the interactions which took place with the donor or benefactor prior

to the transfer of the funds, with whom these interactions occurred, what was discussed or any detail provided as to the basis on which the funds were transferred to her. Nor is there any detail as to who Rawas is. There is also no information put up which provides details as to who the benefactor or donor is or details of the second respondent's relationship with such benefactor or donor and what interest such benefactor or donor would have in making such large asset transfers to her. Furthermore, there is no explanation advanced as to why two motor vehicles would be purchased for her cash shortly after one another, the name of the donor or benefactor by whom they were purchased is not disclosed, nor is the underlying reason for the purchase of both vehicles.

[67] The failure on the part of the second respondent to provide such material information, when provided with an opportunity to do so in her answering affidavit, must be considered against the case put forward by SARS, including the history and sum of her father's tax debts, the explanation for her father being cited as contact person in relation to the receipt and sale of the foreign currency and her loans and donations to various entities with which members of her family hold a direct or indirect interest, without explanation as to on what basis funds provided to her to purchase property were used to alleviate financial difficulties experienced by enterprises with which her family hold varied interests.

[68] What is clear to me is that the second respondent's denials made are bald and uncreditworthy and that they are palpably implausible. It follows that this Court is justified in rejecting them merely on the papers and that there is no basis on which to warrant the referral of any issues to oral evidence, nor would

this serve a just and expeditious determination of the application before this Court. In any event, in light of the evidence put up by the second respondent in her answering affidavit, I am not persuaded that oral evidence would serve any purpose in determining the truth in that the opportunity to make the necessary disclosure on affidavit existed and was available to the second respondent but was not taken up in the appropriate manner. It follows that cross examination, given the factual paucity of the second respondent's version, would only serve as an opportunity to fill gaps in her version which is not the purpose of such a referral. The application for confirmation of the preservation order is accordingly is one capable of determination on the papers and without a referral to oral evidence.

Confirmation of order

[69] The second respondent takes issue with the furnishing by SARS of new material evidence in its replying affidavit. In addition, issue is taken with the fact that the applicant must act *bona fide* and disclose all the information that it has available to it to the court when proceeding *ex parte* – the *uberrima fides* rule. *Zuma v National Director of Public Prosecutions* 2009 (1) SA 1 (CC) para 296. When the confirmation of the order is sought the same rule does not apply given that, as was said by Smalberger JA in *Trakman NO v Livschitz* 1995 (1) SA 282 (A) at 288F-H –

'*Material non-disclosure, mala fides, dishonesty and the like in relation to motion proceedings may, and in most instances should, be dealt with by making an adverse or punitive order as to costs but cannot, in my view, serve to deny a litigant substantive relief to which he would otherwise have been entitled.*'

[70] I am unable to find that there to exists grounds on which to support any suggestion that the applicant did not act with *uberrima fides* when it obtained the provisional preservation order against the second respondent *ex parte*. Certain of the information included in the replying affidavit, I accept was new and had not been placed before the court at the time that the provisional order was sought. The Court is told that this is because such evidence, such as the SARB letter, was not available to it. However, even disregarding the reply filed by the applicant, the view I take of the matter is that the applicant has shown that a final preservation order is required against the second respondent to secure the collection of tax on its version contained in the founding papers considered against the second respondent's answer provided thereto. The second respondent sought the dismissal of the order, alternatively a postponement of the matter pending the determination of constitutional and other issues relevant to her which may be raised by her or the other respondents. There is no basis on which to grant either order.

[71] It was also argued by the second respondent that SARS was obliged to prove, in accordance with s 182(1), that the assets were received from the first defendant, or were his assets. I find there to exist no merit in such contention given that s182(1) provides that '(a) *person (referred to as a transferee) who receives an asset from a taxpayer who is a connected person in relation to the transferee without consideration or for consideration below the fair market value of the asset is liable for the outstanding tax debt of the taxpayer*'.

[72] The sudden wealth acquired by the second respondent lies squarely within her knowledge and she was obliged in such circumstances to provide the

answer necessary to substantiate her opposition to a final order being granted. The case put up by her in answer to that of the applicant is so highly improbable in human experience that it cannot be accepted. For these reasons, I am satisfied that the provisional preservation order granted in terms of s 163(3) stands to be confirmed.

[73] This being the case, there is no reason as to why costs should not follow the result, including the costs of three counsel.

Order

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

1. The provisional order granted by this Court on 30 August 2103 against the second respondent is confirmed with costs, including the costs of three counsel.

KM SAVAGE
ACTING JUDGE OF THE HIGH COURT

Appearances:

For applicant:	J J Gauntlett SC, H Snyman SC and H Cassim instructed by MacRoberts Attorneys
For second respondent:	MacWilliam SC with Adv A Kantor Instructed by Carl der Merwe Attorneys