THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 12949/2013

In the matter between:

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	**FIRST APPLICANT**

And

TRADEX (PTY) LTD	**FIRST RESPONDENT**
LOUISE WIGGETT	**SECOND RESPONDENT**
BUSINESS WIZE ACCOUNTING AND MANAGEMENT SERVICES CC	**THIRD RESPONDENT**

Coram: ROGERS J

Heard: **13 AUGUST 2014**

Delivered: **9 SEPTEMBER 2014**

JUDGMENT

ROGERS J:

Introduction

[1] The applicant ('SARS') seeks confirmation of a provisional preservation order granted in terms of s 163(4) of the Tax Administration Act 28 of 2011 ('the TAA'). The first respondent ('Tradex') and third respondent ('BWA') are entities owned and controlled by the second respondent ('Wiggett'). The provisional order was granted *ex parte* on 14 August 2013. Mr Eugene Nel ('Nel') was appointed as a curator *bonis*. The return day was extended on five occasions, most recently on 25 June 2014.

[2] The parties agreed on the extensions because the respondents were seeking to bring their tax affairs up to date and to pay the outstanding taxes owed by them. When it became apparent that SARS was dissatisfied with progress and intended to press for confirmation of the provisional order, the respondents on 9 June 2014 filed answering affidavits. SARS filed its replying papers on 19 June 2014. Pursuant to the postponement order of 25 June 2014 supplementary answering and replying papers were delivered.

[3] Tradex began operations during 2002 after three years of research and development by Wiggett. It supplies technology solutions for automating and streamlining export and import processes. More recently it has expanded into consulting services in the international trade environment. Wiggett says that the period January 2010 to August 2013 was a difficult one for Tradex because it had to dedicate considerable resources in adapting Tradex's technology solution to SARS' customs modernisation program, which SARS launched in January 2010. Tradex has 38 full-time employees. It does not own immovable property.

[4] BWA started business during 2006/2007. Wiggett caused BWA to purchase properties in Montague Gardens and Caledon. She says her idea was to develop the Montague Gardens property for letting to Tradex but she has had to hold this in abeyance because of unfavourable economic conditions. BWA bought the

Montague Gardens property during May 2006 and took transfer in August 2006. The price was R2,149 million. A mortgage bond was registered in favour of Investec for R1,25 million. BWA purchased the Caledon property during April 2008 for R1,95 million though only took transfer during June 2009.

[5] Wiggett annexed to her answering affidavit two written agreements between Tradex and BWA signed on 1 March 2007. In terms of one agreement BWA was to provide Tradex with furniture, equipment, office accommodation and operational support services at market related charges. In terms of the other agreement BWA appointed Tradex as its agent in terms of s 54 of the Value-Added Tax Act 89 of 1991 ('the VAT Act'), with the result that VAT on input and output supplies made by or to Tradex as agent for BWA would be treated as supplies made by or to BWA. The reason for these arrangements between BWA and Tradex is not ventilated in the papers.

[6] Wiggett owns a property in Langebaan which she bought in February 2000 for R33 060. She also owns an undivided share (together with a Mr MM Abrahams) of a property in Hout Bay. It appears from a Windeed search attached to the founding affidavit that Wiggett (then with the surname Liebenberg) acquired a half-share in this property during 1991 and that she and Abrahams purchased the remaining half-share (as to a quarter-share each) in April 2001 for a combined price of R900 000.[1] At the same time a mortgage bond in the amount of R1 million was registered. She says that over the period 1999 to 2004 her only income was a pension from Alexander Forbes paid pursuant to the death of her late husband. Since 2005 she has also earned remuneration from Tradex.

[7] When the preservation application was brought in August 2013, Tradex owed not less than about R4,1million in respect of various taxes. Its liability for income tax for 2010 and 2011 was unknown because it had failed to render tax returns for those years. Its liability for VAT was also unknown because it had failed to render returns over the period January 2010 to March 2013. BWA had rendered no tax returns

[1] Wiggett says in her answering affidavit that she owns an undivided half-share but the Windeed search indicates that she owns a three-quarter share.

since 2006 (when it started business). Wiggett had rendered no returns since registering as a provisional taxpayer during March 2000.

Factual background

[8] In her answering affidavit Wiggett says, without seeking to excuse the respondents' fiscal non-compliance, that with the growth of Tradex's business during 2005 she engaged a full-time financial manager but that he failed to comply with his duties and was eventually subjected to a disciplinary hearing during 2010. With his departure in July 2010, she appointed a new financial manager and a bookkeeper. Wiggett herself was intensively involved on the operational side of the business, including frequent travel. The new financial manager failed to keep deadlines, which concerned Wiggett greatly. This led to the filing by Tradex of various Voluntary Disclosure Programme ('VDP') applications during October 2011. She says she did not hear anything in response to these VDP applications until the meeting of January 2013 mentioned hereunder. The new financial manager 'absconded' without notice during September 2012.

[9] There was a meeting in September 2012 between Wiggett and senior SARS executives at which the tax affairs of the respondents were discussed. According to SARS' Mr Cruikshank, the meeting was scheduled by SARS. Well before this time, Tradex during 2007 had applied for relief under SARS' Small Business Tax Amnesty ('SBTA') program in respect of its tax years up to 2007 and had submitted the VDP applications mentioned above. Wiggett says that, pursuant to the meeting of September 2012, she presented an action plan to SARS in early December 2012 but did not receive a response.

[10] SARS says that during January 2013 the tax affairs of Tradex and Wiggett were referred to its Unit: Preliminary Investigation & Enquiries. There were further meetings between SARS and Wiggett on 16 January, 4 April and 8 April 2013. On 17 January 2013 Wiggett wrote SARS a four-page letter with her view of the state of play in regard to the various respondents' tax affairs. On 7 March 2013 SARS responded, stating that unless a payment plan was submitted by 8 March 2013 'this office will continue with the process of instituting legal proceedings against your

indebted companies'. Tradex submitted a payment plan on 14 March 2013. SARS addressed further letters to her on and after 4 April 2013. In a letter dated 30 April 2013 SARS stated that it reserved the right 'to follow remedial processes should undertakings made by the taxpayer not be met', a reservation repeated in its letter of 21 May 2013, in which payment of an outstanding amount of R3 801 725,66 was demanded from Tradex.

[11] Pursuant to the meeting of 16 January 2013, Wiggett, in accordance with an undertaking she says she gave SARS, appointed a firm of Cape Town auditors, Cecil Kilpin, to conduct a due diligence investigation into Tradex and BWA's accounting records. Their report of February 2013 showed that Tradex and BWA's records were in such disarray that they needed to be reconstructed for the period 2007 to 2013. Cecil Kilpin started on this assignment during March 2013. Wiggett appointed a new financial manager in April 2013 to assist Cecil Kilpin. Wiggett alleges that she kept SARS informed of these developments.

[12] Wiggett says that Cecil Kilpin only completed the reconstruction exercise during August 2013 and began formal auditing work in October 2013 with an intended completion date of end-February 2014. Because the process took longer than expected and because Cecil Kilpin could not allocate further human resources to the audit, Wiggett in March/April 2014 engaged an experienced tax consultant, Ms Linda Hartzenberg (registered with SARS as a tax practitioner), and appointed new auditors, Boshoff Visser. Hartzenberg quickly realised that the previous auditors had incorrectly captured a large number of transactions. Wiggett alleges that the respondents' inability to meet time-lines with SARS was attributable to the fact that requested information was simply not as yet available.

[13] It is common cause that the respondents' tax affairs were not in order when the *ex parte* application was issued on 12 August 2013 and that the respondents' tax liability was likely substantially to exceed the known amount of R4,1 million. It is also clear that the respondents' financial records were in disarray. Hartzenberg has since April 2014 devoted considerable time and immense energy in trying to bring order to the respondents' tax affairs. She made affidavits which form part of the respondents' answering and supplementary answering papers. Wiggett and her staff

spent many hours in support of Hartzenberg's work, including over weekends and public holidays. Hartzenberg's very detailed affidavits contain no suggestion that Wiggett was uncooperative or attempted to conceal matters from her.

[14] Because of the approach adopted by the parties, the papers tell a developing story rather than focusing on the position that obtained when the application was launched in August 2013. Each set of affidavits provided an update from the perspective of one side or the other. Unsurprisingly, therefore, SARS' replying papers and then its supplementary replying papers contained new matter.

[15] It would be tedious to go into the detail and impossible at this stage to determine with any precision the amounts of tax for which the various respondents will in due course be held liable. It is enough to say the following. By the end of April 2014 the respondents had paid an amount of about R4,7 million in respect of the known liability mentioned in the founding papers (there have also been certain additional payments - R567 556 according to Hartzenberg, R227 167 according to SARS, which SARS has not yet appropriated to specific tax debts). However, the financial statements and tax returns which had been outstanding as at August 2013 still needed to be finalised. On 9 April 2014, shortly after Hartzenberg's engagement, SARS notified the respondents of its intention to conduct a field audit into their tax affairs. On 25 April 2014 SARS informed the respondents that the field audit would be conducted at their premises over the period 12 to 15 May 2014. SARS demanded that a substantial quantity of specified information be made available.

[16] Hartzenberg on 29 April 2014 furnished to SARS a detailed week-by-week account of the actions undertaken since her engagement and requested that the field audit be postponed, contending that it would be detrimental to both the respondents and SARS should the latter begin the field audit while Hartzenberg was still in the process of preparing the required records and returns. SARS refused Hartzenberg's request (despite a further detailed motivation from Hartzenberg dated 2 May 2014) and conducted the field audit on the notified dates. Over the period 15 May 2014 to 9 June 2014 Hartzenberg delivered to SARS Tradex and BWA's outstanding annual financial statements and tax returns and Wiggett's personal tax

returns for the period 2008-2013 together with other information requested by SARS. The following email which Wiggett wrote to SARS on 21 May 2014 conveys something of the effort which the respondents were making to meet SARS' requirements:

'Just a quick follow up in this regard – we are in the process of getting all the information ready for submission to you, but I did not spot the fact that you required the information by close of business today, 21 May. Our admin and accounting teams worked flat out for more than 12 weeks and I had to give them a bit of a break and time off after you left on Thursday. They were all at breaking point after all the long hours, weekend and public holiday work. This will impact on delivering all the information to you today, but both [Hartzenberg] and I will try our utmost in this regard and get as much of the information to you.

Can I please ask for your indulgence to submit the remainder of the information until Friday, 23 May, if we do not manage to get everything to you today?'

[17] On 9 June 2014 the respondents filed their answering papers, the same day on which SARS received Tradex's signed financial statements. In their answering papers the respondents alleged that their financial statements and tax returns were now up to date; that BWA had made losses and did not owe tax; that there was no outstanding tax owed by Wiggett; and that Tradex's estimated liability for income tax and VAT was R7 034 602 (ie over and above the amount of R4,7 million already paid). They said that a preservation order was unnecessary. They repeated an offer of security made in negotiations with SARS by way of (i) the continued operation of caveats in respect of Wiggett's Langebaan property and the two immovable properties owned by BWA in Caledon and Montague Gardens (these caveats had been noted pursuant to the *ex parte* order); and (ii) a cession *in securitatem debiti* by Tradex of book debts to the value of R10,5 million. Wiggett said the three properties are worth about R7,59 million. The respondents excluded from their offer Wiggett's Hout Bay property because of Mr Abrahams' interest as co-owner and asked that it be released from the preservation order. Wiggett alleged that the security, worth more than R18 million, was substantially in excess of any tax that might be found owing.

[18] In its replying papers, filed on 19 June 2014, SARS said that it had not yet verified the tax estimate of R7 034 602 and that the respondents had ignored Tradex's potential liability for interest and penalties. SARS expressed doubt about the correctness of the recently submitted Tradex financial statements (audited by Boshoff Visser) because they differed from draft financial statements prepared by Cecil Kilpin. SARS also did not accept that BWA's financial statements were correct. SARS said *inter alia* that management fees might need to be attributed to BWA for purposes of income tax (this was on the basis that BWA allegedly provided accounting and management services to Tradex, a connected party) and that VAT input credits claimed by BWA in respect of rental properties needed to be reviewed. In respect of Wiggett's personal tax affairs, SARS said that it still needed to verify her returns for 2007 to 2013 and pointed out that she had not rendered any returns in respect of 2000 to 2006.

[19] In regard to the security offered by the respondents, SARS cast doubt in particular on the value of the book debts, referring to bad debts previously raised by Tradex.

[20] This was the state of the papers when the matter came before me on 25 June 2014. In accordance with my postponement order, the respondents filed supplementary answering papers on 10 July 2014 in which they dealt with three 'new' matters raised in SARS' replying papers. The first matter concerned Wiggett's personal tax affairs. She claimed that her personal returns for the period 2000 to 2006 had not been the focus of any discussion in the lengthy interactions with SARS. Be that as it may, Hartzenberg had recently assisted her to finalise these tax returns and SARS had assessed her thereon for tax of R459 906.

[21] The second matter concerned the value of the offered security. In regard to the book debts, the respondents alleged that Tradex's only bad debtor had been excluded from the tendered security and that the rest of its debtors were blue-chip customers. These were listed in a schedule to the proposed security cession. The respondents said, however, that they needed to modify the proposed cession for the reason that, if Tradex ceded all of its debtors to SARS as security, it would have no cash flow. The modified cession related to named debtors amounting to R7 008 242.

[22] In regard to the three immovable properties, the respondents said that an offer of R4,2 million had recently been received for the Montague Gardens property. They tendered payment of the net proceeds into an attorney's trust account. The sworn valuations which the curator had obtained for the Langebaan and Caledon properties were (I take the median values) R360 000 and R2 million respectively. This would give the properties a combined value of R6,56 million, though Wiggett believed the Caledon property in particular was worth much more than the sworn valuation, given that BWA had bought it in 2008 for R1,95 million. Her estimated values for the Langebaan and Caledon properties were R600 000 and R3 million respectively.

[23] The third 'new' issue dealt with in the supplementary answering papers was the supposed manipulation by the respondents of SARS' e-filing system to render amended returns reflecting less tax than previously. Hartzenberg dealt in some detail with the e-filing system in her supplementary affidavit.

[24] SARS filed its supplementary replying papers on 22 July 2014. SARS said that its auditing of the respondents' tax affairs was far-advanced but not finalised. SARS said that it was nevertheless apparent that the respondents owed substantially more than the amount of about R7 million estimated by the respondents in respect of Tradex. In summary, SARS says that for the years 2007 to 2013 the respondents face potential tax liabilities of R10 476 579 (Tradex), R65 196 (Wiggett) and R224 414 (BWA). I understand these liabilities to be adjustments which SARS anticipates making over and above the financial statements and returns as submitted by the respondents.

[25] SARS continued, in its supplementary replying papers, to be dismissive of the value of the book debts offered as security. SARS' deponent also pointed out that the debtors list annexed to the proposed cession stated balances as at February 2014, about five months previously.

[26] On 6 August 2014 SARS' attorneys filed an affidavit by the curator. At the commencement of argument Mr Goodman SC, who appeared for the respondents, said that, if this affidavit was allowed, his clients wished to file a further

supplementary answering affidavit which had already been prepared. Ms Nkosi-Thomas SC, who appeared for SARS together with Mr L Sigogo, was unable to satisfy me that Nel's late affidavit should be received and I ruled that it would not form part of the contested proceedings. There was no formal condonation application. Delays had already occurred. Further delay would have resulted from standing the matter down so that I (and SARS' counsel) could read the responding affidavit (which might in turn have led to a further replying affidavit). Furthermore, the heads of argument were filed prior to service of Nel's affidavit, so that the court was deprived of considered assistance from counsel on the implications of Nel's affidavit.

The relief claimed

[27] The preservation order which SARS seeks contains, in summary, the following components: (i) that the respondents the prohibited from 'alienating, income bring, dissipating [or] dealing in any manner whatsoever that will cause a decrease in the value of' all of their assets, whether specified in the order or not; (ii) that SARS be authorised to cause caveats to be registered over Wiggett and BWA's immovable properties; (iii) that Nel be appointed as the respondents' curator *bonis*, with all the respondents' assets to vest in him; (iv) that various powers be vested in Nel, including the taking of control of the respondents' assets and the transfer of shares to him and the realisation of assets for existing tax liabilities or to satisfy future assessments; (v) that the respondents deliver all their records and supply information to him, act in accordance with his directions and subject themselves to interviews at his instance; (vi) that a named senior counsel be appointed as 'mediator' with various functions to resolve disputes that might arise between the parties.

[28] All these provisions came into effect upon the *ex parte* grant of the preservation order. SARS now seeks confirmation.

Section 163 of the TAA

[29] Section 163 of the TAA was amended by Act 39 of 2013 promulgated on 16 January 2014. The amendment of s 163 was stated to be with effect from 1 October 2012 (the commencement date of the TAA). Despite this provision for retrospectivity, counsel were eventually in agreement that, because the present proceedings were launched and the *ex parte* order granted before the amendments were promulgated, the case needed to be adjudicated without reference to the amendments. This is in my view correct (see *inter alia Corium (Pty) Ltd & Others v Myburgh Park Langebaan (Pty) Ltd & Others* 1995 (3) SA 51 (C) at 64B-I). My references to s 163 are thus to the original text.

[30] A preservation order may be made if it is 'required to secure the collection of tax' (s 163(3)). As I read s 163, the 'tax' need not currently be due and payable. A preservation order would be permissible if it appeared that tax in a currently unquantified amount was likely to become due and payable.

[31] However, the fact that tax is or is likely in the future to be due and payable is not enough. The preservation order must be 'required to secure the collection of' the tax. Section 163(3) does not say in what circumstances preservation will be regarded as 'required' to secure the collection of tax. In *Commissioner for the South African Revenue Service v CJ van der Merwe* [2014] ZAWCHC 59 Savage AJ said the following in that regard (para 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 a 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'

[32] I agree with Savage AJ that the test is not one of 'necessity'. In another context, information has been said to be 'required' for the exercise or protection of a right if the information would 'be of assistance' in the exercise or protection of the right (*Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC & Others* 2001 (3) SA 1013 (SCA) para 28). In *Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA) the court said (para 10) that the word 'assistance' indicated that 'required' did 'not mean necessity, let alone dire necessity' and that 'reasonably required' was 'about as precise a formulation as can be achieved' provided that 'reasonably required' was understood to connote 'a substantial advantage or an element of need' (para 35). On a similar approach, preservation of assets could be said to be 'required to secure the collection of tax' if preservation would confer a substantial advantage in the collection of the tax. I venture to suggest that, once one has concluded that a 'substantial advantage' has been shown, one could simultaneously conclude that there was 'an element of need' sufficient to meet the 'required' (ie 'reasonably required') test.

[33] I am less confident of Savage AJ's rejection of dissipation as being the focus of attention. In the amended s 163(1) it is made explicit that a senior SARS official may only authorise a preservation application 'in order to prevent any realisable assets from being disposed of or removed which may frustrate' the collection of tax. The explanatory memorandum which accompanied the amendments said that the object was to 'clarify' the main purpose of a preservation order.

[34] While the latter statement (and the amendments themselves) may not be admissible material for interpreting s 163 in its original form, there are indications in the original text that the focus is dissipation. The word 'preservation' is used to describe the order. Section 163(1) envisages an *ex parte* application, which would generally only be justified out of concern of dissipation (cf *National Director of Public Prosecutions v Rautenbach* 2005 (4) SA 603 (SCA) para 13). If more urgent action

is needed than an *ex parte* order, s 163(2)(a) authorises SARS itself to seize assets 'in order to prevent any realisable assets from being disposed of or removed which may frustrate' the collection of tax. In determining whether a preservation order should be varied or rescinded in terms of s 163(9), the court is required to balance hardship to the taxpayer on the one hand and 'the risk that the assets concerned may be destroyed, lost, damaged, concealed or transferred' on the other.

[35] However, the learned judge may have meant no more than that SARS does not need to prove the requirements for an ordinary anti-dissipation order (or, as it is sometimes styled from the English law, a *Mareva* injunction). At common law, the applicant must establish *prima facie* that the respondent will dissipate his assets with the intention of defeating the applicant's claim (see, generally, *Knox D'Arcy Ltd v Jamieson and others* 1996 (4) SA 348 (A) at 372G-I and *Janse van Rensburg NO and another v Minister of Trade and Industry and another* 2001 (1) SA 29 (CC) at para 33). I do not think that 'required' in s 163(3) entails proof of such an intention on the part of the taxpayer. However, SARS is required to show, I think, that there is a material risk that assets which would otherwise be available in satisfaction of tax will, in the absence of a preservation order, no longer be available. The fact that the taxpayer *bona fide* considers that it does not owe the tax would not stand in the way of a preservation order if there is the material risk that realisable assets will not be available when it comes to ordinary execution. An obvious case is that of a company which, believing it owes no tax, proposes to make a distribution to its shareholders.

[36] In every case where a taxpayer is liable or likely to become liable for tax, there is a theoretical possibility that the value of its assets may for some or other reason be diminished by the time SARS is able to execute. I do not think the lawmaker intended that a preservation order would routinely be available to SARS in every case of an actual or anticipated tax liability. There must be something by way of 'requirement' which places the particular case outside the ordinary run of cases. The existence of material risk that assets will be diminished is, as I have said, the obvious example. It is in such circumstances that the court could conclude that preservation would confer a 'substantial advantage' (ie over the position that would prevail without the order) and that there was thus 'an element of need' (cf the

Clutchco case *supra*). I do not exclude the possibility that there may be other examples but I cannot currently conceive what they might be.

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

[38] Regarding the approach to factual disputes, Mr Goodman argued that the confirmation of a preservation order was final relief and that the *Plascon-Evans* rule applied. In *Van der Merwe supra* Savage AJ held that proceedings for the confirmation of a preservation order are interim in nature and that the facts should be assessed in the same way as for an interim interdict.

[39] The cases decided with reference to the Prevention of Organised Crimes Act 121 of 1998 are distinguishable because under s 25(1) of that Act the court's discretion to grant a restraint order arises if there are 'reasonable grounds for believing' that a confiscation order may be made in due course. This phrase indicates that the court is not called upon to decide on the veracity of the evidence; the court need only ask whether there is evidence that might reasonably support a conviction and a consequent confiscation order (see, eg, *Rautenbach supra* para 27).

[40] Despite this distinction, I think that Savage AJ was correct to hold that the *Plascon-Evans* rule does not apply. Although the confirmation of a preservation order may have features which render it appealable, it is nevertheless interim in that its duration is limited and it does not finally determine the amount of tax, if any, for which the taxpayer is liable (cf *Phillips & Others v National Director Of Public Prosecutions* 2003 (6) SA 447 (SCA) paras 20-23). There will often be factual disputes in confirmation proceedings. The lawmaker could not have intended that, in the absence of a trial, those disputes would have to be decided in favour of the respondent. The court, in my view, should determine, on the affidavits, where the

balance of probability lies on the issues relevant to the existence of the jurisdictional facts and to the exercise of its discretion.

'Requirement' in present case?

[41] Delinquency in the conduct of a taxpayer's tax affairs may in appropriate circumstances be part of the material from which one could infer that there is an appreciable risk that assets available for collection of tax will be diminished. There is, however, no automatic connection between the two. A person may be disorganised and late in regard to its tax administration without there being any appreciable danger that its assets will be diminished by the time tax comes to be collected.

[42] SARS in its founding papers focused on the failure on the part of the respondents to file tax returns and to have their tax affairs in order and their failure to comply with time-lines set in interactions between themselves and SARS. There were generalised statements to the effect that a preservation order would 'enable the Commissioner to collect the totality of the tax' owed by the respondents, that the appointment of a curator *bonis* 'would ensure that' SARS recovers all taxes owed and that in the absence of an order SARS 'will in all likelihood sustain severe prejudice' because the prospect of recovering the outstanding taxes 'seems bleak'. No facts were alleged, however, constituting a *prima facie* case that there was an appreciable risk of assets being diminished.

[43] SARS was required to make out its case in the founding papers. While a great amount of detail was placed before the court in the subsequent sets of affidavits, focusing on updated efforts to achieve compliance and offering conflicting (and, on the papers, irresoluble) versions of the amount of tax likely to be found owing, SARS' theme remained essentially the same as in the founding papers, namely that the respondents' delinquency in completing their financial statements and making their returns and the initial disarray in their records were a basis for confirming the preservation order.

[44] SARS alleged in the founding affidavit that Wiggett and BWA had not only failed to render tax returns but had 'also acquired assets whose value is not commensurate with the declared and/or perceived income', this being a reference to the immovable properties. However, the assumption that Wiggett and BWA's immovable properties must have been acquired from undeclared income is obviously fallacious. Wiggett bought the Langebaan property during February 2000, before any period relevant to the present tax disputes. She acquired a half-share of the Hout Bay property as long ago as 1991. She and Abrahams acquired the remaining half-share during April 2001 (I suspect this was from her late husband's estate). Again, this is before the period now in issue. In any event, it appears from the Windeed search attached to the founding affidavit that the acquisition of the further share in the Hout Bay property during 2001 was funded by way of a mortgage bond.

[45] In the case of BWA, the Montague Gardens property was purchased during 2006, apparently funded in part by way of mortgage finance from Investec. It is likely that BWA's acquisitions of the Montague Gardens and Caledon properties were partially funded by way of loan finance from Tradex. This is not necessarily sinister, having regard to Wiggett's explanation concerning the intended inter-relationship between Tradex and BWA. Any loan made by Tradex to BWA would be an asset in Tradex's hands. The inter-company loan accounts were among the matters addressed in emails between SARS and Hartzenberg following the field audit of mid-May 2014. Nothing was made of the existence of such loans in SARS' subsequent replying and supplementary replying papers (apart from the tax treatment of interest or imputed interest). The extent of the loan accounts between the two entities and between them and Wiggett does not appear. SARS did not attach any of the respondents' draft financial statements to its affidavits. The only set of financial statements in the entire record are draft statements for Tradex's year ended 29 February 2008, a document attached to Hartzenberg's letter to SARS dated 2 May 2014. In that letter Hartzenberg was explaining to SARS various errors made by the previous auditors in preparing the draft financial statements (ie she was saying that the attached draft statements were incorrect).

[46] In argument, Ms Nkosi-Thomas said that one could infer dissipation from the fact that Wiggett caused Tradex to plough its cash flow back into the business rather than causing the respondents to pay their tax liabilities. That was not SARS' case in the founding papers. The submission was based on a statement by Wiggett in her answering affidavit that she has, over the past 15 years, 'reinvested all available resources in the continual development of [Tradex's] technology solution'. In any event, such conduct does not amount to dissipation, just the opposite. Wiggett was attempting to build up Tradex's business. Nurturing and expanding its operations would, unless the business were badly run, cause the business to become more valuable, not less.

[47] SARS did not seek to make the case that Tradex's business was being run into the ground or becoming less valuable. There is no reason to doubt that its business has expanded. It has contracts with a number of blue-chip customers. If the amount of the taxable income which SARS says it anticipates assessing for Tradex's most recent financial years is close to the mark, the business must be even more successful and profitable than Wiggett says. There is no basis for finding that Wiggett is not in earnest in trying to make a success of Tradex or that she lacks the abilities, at least from an operational perspective, to do so (though her administration skills may be wanting).

[48] Despite SARS' possession of financial statements for Tradex, the conduct of a field audit and SARS' statutory rights of access to the respondents' records, SARS did not, in its replying and supplementary replying papers, allege that Wiggett was causing Tradex, innocently or deliberately, to dissipate its assets by distributing dividends or paying unreasonable salaries or engaging in other suspicious transactions.

[49] Tradex does not own anything of significance by way of fixed assets. Its value lies in its intellectual property and human capital and their exploitation for purposes of generating profit from the supply of services to its customers. If there were a *prima facie* case that Tradex would be run better under the care of a curator *bonis*, one might be able to say that a preservation order was 'required', because then one could conclude that there was a reasonable prospect that, without a preservation

order, the business would be less valuable by the time tax came to be collected. But as I have said, no facts to support such a conclusion were advanced in the founding papers or subsequently.

[50] The respondents say that, as a fact, Nel has not, since his *ex parte* appointment, added any value to Tradex's business. They say he has no experience or knowledge in the field in which Tradex operates. His appointment simply adds an unnecessary and inconvenient layer of expense. They even allege that his interventions have at times been detrimental to the respondents' best interests. SARS, on the other hand, says that the respondents have not co-operated with Nel. I cannot resolve these disputes and do not wish to express criticism of Nel. But I cannot on the papers find, even on a *prima facie* basis, that Tradex's business is any better off with his involvement than without.

[51] In the case of Wiggett and BWA, their only assets of substance (apart from Wiggett's shareholding in Tradex) are the immovable properties previously mentioned. Wiggett has owned the Langebaan and Hout Bay properties for some years. There is no allegation or evidence that Wiggett has attempted to dispose of or encumber these properties.

[52] In the case of BWA, the Montague Gardens property was purchased in February 2006 and the Caledon property in April 2008. Subsequent to the launching of the application Wiggett has received offers for the Montagu Gardens property, which she has disclosed in her affidavits and which she has been willing to entertain on the basis that the net proceeds will be held in trust pending the determination of the respondents' tax liability. Save as aforesaid, there is no allegation or evidence that BWA has attempted to dispose of or encumber its properties.

[53] There are further considerations which militate against a finding that a preservation order was or is required. Wiggett registered as a provisional taxpayer during March 2000. SARS must have been aware for some years that she had failed to render returns. The same is true of BWA. In general, SARS had been engaging with the respondents for nearly a year by the time it launched the present proceedings in August 2013, not to mention the earlier SBTA and VDP applications.

There was the meeting in September 2012 between Wiggett and senior SARS executives. There was considerable correspondence following the meeting of 16 January 2013 culminating in the demand for payment in SARS' letter of 21 May 2013.

[54] More than two and a half months after this demand, SARS on 12 August 2013 issued the present application. SARS did not say that anything had happened in recent months to cause it to believe that the respondents' assets were likely to be diminished unless a preservation order was granted. One gains the distinct impression that SARS launched the application 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 respondents. This is consistent with the series of postponements on which the parties subsequently agreed with a view to affording time to the respondents to bring their tax affairs in order.

[55] While I can understand SARS' frustration, that is not the purpose of the preservation application. There are other statutory mechanisms available to SARS to deal with taxpayers who fail to provide information, to render returns or to make payment of tax (see, in particular, the information-gathering provisions of Chapter 5 of the TAA, SARS' power to issue estimated and so-called jeopardy assessments in terms of Chapter 8, the tax-recovery provisions of Chapter 11, the administrative non-compliance penalties which can be imposed in terms of Chapter 15 and the criminal offences created by Chapter 17).

[56] I should also mention that the delinquency of the respondents in the rendering of their tax returns, while entirely unacceptable, appears to have been attributable in substantial measure to the fact that the financial managers engaged by Wiggett let her down. Furthermore, delinquency in rendering returns does not necessarily translate into a failure timeously to pay tax. The respondent most likely to have a substantial tax liability is Tradex, whose outstanding tax returns at the time the application was launched was only in respect of its 2010 and 2011 tax years. Although Wiggett and BWA's delinquency extended over a much longer period, they do not appear to have substantial tax liabilities. Hartzenberg says Wiggett's total liability as recently assessed for 1999-2013 is R459 906 (SARS alleges that there

may be adjustments which will add a further R224 414 in tax). On the respondents' version (supported by Hartzenberg's work), BWA has suffered losses and thus owes no tax at all (SARS alleges that there may be adjustments which will result in a tax liability of R65 197 for the 2007-2013 years)[2]. I cannot on the papers determine whether the tax calculations for BWA are correct but on any reckoning BWA cannot be said to have been in breach of a failure to pay a significant amount of tax.

[57] As I have observed earlier, the question whether a preservation order is 'required' cannot be answered in the abstract. The practical utility of the actual terms must be considered. I have summarised the terms of the order of which SARS seeks confirmation. That order draws no distinction between Tradex, Wiggett and BWA.

[58] The order interdicting the respondents from alienating, encumbering, dissipating or dealing in any manner with their assets in a way 'that will cause a decrease in the value of' their assets could notionally be granted without the appointment of a curator. However, in the case of Tradex, which is an active trading entity, the grant of such an order (if it meant that the company could not use its cash flow to meet ordinary business expenses) would have the effect of forcing the company to shut down. SARS, on my understanding, does not seek to close down Tradex's business. The granting of a preservation order which had that effect would not be just. It would also not be 'required' unless there were reason to believe that a forced sale of the company's assets or its business would achieve a better outcome business for SARS than if the business were to continue in operation. There is no basis for such a view.

[59] If the interdict sought by SARS is only intended to restrict dealings in property which would cause a decrease in the value of Tradex's assets, it would be unacceptably vague in its operation. And for the reasons I have explained, SARS' papers do not advance facts to show that Tradex, prior to the launch of the application, was dealing with its assets in a way which would cause a decrease in their value.

---

[2] SARS' most recent summary of adjustments is in para 44 of the supplementary replying affidavit at 759-760.

[60] Just as an interdict against dealing in assets could notionally be granted without the appointment of a curator, so a curator could notionally be appointed without an interdict against dealing in assets, leaving it to the curator to determine what dealings in the taxpayer's assets should be permitted. That is perhaps what SARS intended. However, the question would still remain whether the appointment of a curator would achieve an appreciable advantage for SARS, in the sense that there would be a material risk of Tradex being worse-positioned to meet its tax liabilities if a curator was not appointed. It must be emphasised, in this regard, that it a curator's function is not to assist SARS to investigate the taxpayer's tax liabilities; his or her functions focus on the discovery and preservation of assets from which tax liabilities, whatever they might turn out to be, may be met. Again, I have given my reasons for concluding that, in this case, the appointment of a curator is not, in this sense, likely to achieve a material advantage for SARS.

[61] In the case of Wiggett and BWA, their only material assets are immovable properties. (There may be inter-company transactions between Tradex and BWA but the latter does not, on the evidence before me, conduct business with third parties.) If SARS had shown a material risk that Wiggett and BWA would deal in their immovable properties in a manner adverse to SARS, an interdict against disposal or encumbrance (with the registration of caveats) would have been appropriate. Even in that event, though, I cannot see that the appointment of a curator would have served any purpose.

[62] If SARS had, without resorting to litigation, requested Wiggett and BWA to give undertakings and to permit caveats to be registered pending the final determination of their tax liabilities, it is likely that they would have agreed (regardless of whether or not SARS was strictly entitled to this protection). Certainly, subsequent to the grant of the *ex parte* order Wiggett and BWA have openly tendered caveats. If the only question had been whether caveats should be registered against the properties, the litigation would have been resolved at an early stage.

Conclusion

[63] I thus consider that in the present case a preservation order was not, and is not, 'required' to secure the collection of tax within the meaning of s 163(3).

[64] The respondents have, however, made certain open tenders. Mr Goodman stated during argument that these tenders remained open regardless of the view I were to reach on the application. In accordance with the tender, I propose to direct that, pending the final determination and payment of the taxes found to be owing by the respondents, the caveats registered against the immovable properties remain in place unless the parties agree in writing to their removal or the court otherwise directs. The Hout Bay property will be excluded from this regime.

[65] I do not propose to make an order giving effect to the security cession offered by Tradex. I simply record that the cession has been offered as part of an open tender and was said by Mr Goodman to remain open even if I were to find in his clients' favour. SARS would be able, on this basis, to accept the tender, at any rate within a reasonable period of time following this order. It will, of course, be open to the parties to negotiate modifications to the terms of the cession if they consider this necessary.

[66] Mr Goodman also made an open tender that Wiggett would furnish a suretyship for any taxes found to be owing by Tradex or BWA. The purpose of this tender was so that the net value of her Langebaan property (against which a caveat will continue to be noted) would be available *inter alia* to meet the tax liabilities of the other respondents. Again, I do not intend to make an order that a suretyship be provided. I simply record that the tender was made on the basis that it would remain open. Mr Goodman referred me, in that regard, to s 161 of the TAA, in terms whereof a senior SARS official may require security from the taxpayer to safeguard the collection of tax *inter alia* if the taxpayer has frequently failed to comply with its obligations under tax legislation, which appears accurately to describe the respondents' delinquency. In the case of a corporate taxpayer which cannot itself provide security, a senior SARS official may, in terms of s 161(5), require members

of the company to provide suretyships. On this basis, SARS could demand a suretyship from Wiggett in respect of the tax liabilities of Tradex and BWA.

[67] Mr Goodman did not specifically tender a suretyship from BWA in respect of the tax liabilities of Tradex and Wiggett. However, he handed up a draft order in terms of which the net proceeds of the Montague Gardens property would be paid into the respondents' attorneys' trust account, to be paid to SARS in respect of the respondents' tax liability, jointly and severally, upon assessment thereof. At least in respect of that property, therefore, the tender acknowledges that BWA's property will serve as security for the tax liabilities of Tradex and Wiggett. In accordance with the open tender, I propose to include a provision to this effect in my order.

[68] The respondents having succeeded, they are entitled to their costs. However, I consider that the parties should bear their own costs in respect of the postponements of 4 September 2013, 29 November 2013, 20 March 2014 and 29 May 2014. (The first of these orders is not in the court file so I do not know whether those costs were reserved. In the case of the second and third postponements, the orders stated that there would be no order as to costs. The order of 29 May 2014 recorded that costs would stand over for later determination.) I also consider that the parties should bear their own costs in regard to the postponement of 25 June 2014. Because of the procedure they elected to follow, SARS through no fault on its part only filed its replying papers on 19 June 2014. Neither side filed their heads of argument timeously. The matter was simply not ready to proceed.

[69] I also do not think it would be just for SARS to be ordered to pay all of the respondents' costs relating to the latter's answering and supplementary answering affidavits. Those affidavits were to a material extent devoted to setting out the steps taken by the respondents, subsequent to the launch of the application, to bring their tax affairs in order and to their view of the tax owing in respect of the periods for which they had been delinquent in rendering returns. The parties were, perhaps, misguided in placing such extensive detail on these matters before the court. But to the extent that it was relevant, it was only because of the respondents' prior delinquency that it was necessary for details to be provided of the events subsequent to the launching of the application. I shall thus exclude the costs

associated with Hartzenberg's affidavits and 50% of the costs associated with the other affidavits filed on behalf of the respondents.

[70] Before concluding, I make the following observations. Firstly, although s 163 permits SARS to bring a provisional preservation application *ex parte*, it would be contrary to basic principles of fairness and constitutional values to read the section as providing that the application may be brought *ex parte* in the absence of circumstances justifying a departure from ordinary procedure (cf *Knox D'Arcy supra* at 379F-I). Where the application is brought on grounds which would sustain a conventional anti-dissipation order at common law, an *ex parte* order may often be warranted (though not necessarily in the case, for example, the taxpayer whose only material assets comprise immovable property). In other circumstances, there might be little or no reason justifying an absence of notice to the taxpayer.

[71] Second, even where *ex parte* proceedings are warranted, it by no means follows that the provisional order should contain all the terms which SARS wishes to form part of the final order. For example, although s 163 permits a provisional order to incorporate the appointment of a curator *bonis*, it will often be the case that such appointment is not reasonably required to secure the interim position pending the return day. The appointment of a curator *bonis* is a considerable intrusion into the rights of the taxpayer. Furthermore, once a curator is appointed, the question of his or her expenses immediately arises.

[72] For example, in the present case, without notice to the respondents, Nel was appointed as their curator with the right immediately to take control of their assets and to cause shareholdings to be transferred into his name. The respondents, without having been heard, were ordered *inter alia* to deliver their books and records to him, to act in accordance with his instructions and were obliged to subject themselves to interviews and to furnish the curator with details of all their assets and how they were acquired. All their assets were forthwith to vest in him. If SARS had otherwise been entitled to a preservation order and if *ex parte* proceedings were warranted, I cannot think there was justification for a curator to be appointed as part of the provisional order. *Ex parte* relief should be confined to that which is

reasonably required to secure SARS' position pending the return day (cf *Knox D'Arcy supra* at 379J-380B).

[73] Third, SARS should not, in my view, frame preservation orders on a one-size-fits-all basis. The order sought in the present case was on the same terms as a similar application I heard some months ago. Those terms apparently accord with orders sought by and granted to SARS in several matters in Gauteng. It is unnecessary to comment on the propriety and competence of each of these 'standard' terms. I merely say that the relief should be tailored to the circumstances of the case.

[74] Fourth, s 163 is a procedure for preserving assets. It is not an execution mechanism. Once tax has been assessed or is otherwise due and payable, the pay-now-fight-later regime applies unless a senior SARS official otherwise directs (s 164). SARS may, if the taxpayer fails to pay on due date, obtain civil judgment in terms of s 172 of the TAA. SARS is not required to give notice of the application for civil judgment if the giving of such notice would prejudice the collection of tax (s 172(3)). SARS may thereupon levy execution in the ordinary way against assets belonging to the taxpayer. SARS can also institute sequestration or liquidation proceedings (s 177-178) and is in certain circumstances accorded rights of recovery against third parties (ss 179-184).

[75] Section 163 finds its primary application where the amount of tax has not yet been ascertained (ie where SARS cannot execute in the ordinary way). This being so, I do not think it appropriate that a preservation order should (as here) contain, as a standard provision, a power on the part of the curator to realise assets in satisfaction of the taxpayer's tax liability. I do not overlook that s 163(7) empowers a court which grants a preservation order to make ancillary orders regarding how the assets must be dealt with, including 'the realising of assets in satisfaction of the tax debt'. However, I do not understand how, in general, it is justifiable, at a time when the tax liability is unknown and contentious, to empower a curator to set about selling assets and appropriating monies towards an alleged tax debt. The order should rather make provision for SARS to approach the court at a later stage (once the tax has been properly determined) for the granting of authority to the curator to

realise the preserved assets in satisfaction of the tax debt. In other words, a court is unlikely to be able to make an informed and fair decision on this question at the time the application is initially granted and confirmed.

[76] I make the following order:

(a) In accordance with the respondents' open tender, the caveats registered against the properties referred to in paras 2.2.2 (Erf 1692 Langebaan), 2.2.4.1 (Farm Flou Hoogte, Farm 658, Portion 6 [Remaining Extant], Caledon Road, Caledon) and 2.2.4.2 (Erf 6495 Montague Gardens [also known as the Estuaries Property]) read with para 3 of the order of 14 August 2013 shall, pending the determination of the respondents' tax liabilities to the applicant in respect of their tax years up to and including 2013 and the payment of the taxes assessed, remain in place unless removed earlier pursuant to the written agreement of the parties or upon further order of this court.

(b) Should the immovable property referred to in para 2.2.4.2 (the Montague Gardens property) be sold and transferred with the applicant's consent and thus released from the caveat, the net proceeds thereof must be paid into the respondents' attorneys' trust account and thereafter be paid to the applicant in respect of the respondents' said tax liabilities, jointly and severally, upon assessment thereof.

(c) Save as aforesaid, the application is dismissed and the provisional order of 14 August 2013 discharged.

(d) The applicant shall pay the respondents' costs, including the costs of the appearance on 13 August 2014 but excluding the following: (i) the reserved costs of any earlier postponements; (ii) the costs associated with the affidavits of Ms L Hartzenberg; (ii) 50% of the costs associated with the other affidavits filed on behalf of the respondents..

ROGERS J

APPEARANCES

For Applicant:	Ms LG Nkosi-Thomas SC and Mr L Sigogo Instructed by: Maponya Inc 950 Pretorius Street Arcadia, Pretoria c/o Strauss Daly Inc 15th Floor, 34 Bree Street Cape Town
For Respondents:	Mr R Goodman SC Instructed by: Hayes Inc Themis Law Chambers Unit 32, Roeland Square Roeland Street Cape Town