Republic of South Africa
In the High Court of South Africa
(Western Cape Division, Cape Town)

CASE NO: 5961/15

In the matter between:

MARK LIFMAN	First Applicant
IMVUSA TRADING 1753 CC	Second Applicant
THE BUSINESS ZONE 983 CC	Third Applicant
CASTLHILL TRADING 79 CC	Fourth Applicant
CORPCLO 701 CC	Fifth Applicant
SEASONS FIND 764 CC	Sixth Applicant
WANT 2 INVEST	Seventh Applicant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	First Respondent
REGISTRAR FOR THE HIGH COURT, CAPE TOWN WEST	Second Respondent
THE SHERIFF OF THE HIGH COURT, CAPE TOWN EAST	Third Respondent
THE SHERIFF OF THE HIGH COURT, CAPE TOWN WEST	Fourth Respondent
THE SHERIFF OF THE HIGH COURT, WYNBERG SOUTH	Fifth Respondent
THE SHERIFF OF THE HIGH COURT, WYNBERG NORTH	Sixth Respondent
THE SHERIFF OF THE HIGH COURT, WYNBERG EAST	Seventh Respondent
THE SHERIFF OF THE HIGH COURT, MITCHELLS PLAIN SOUTH	Eighth Respondent
THE SHERIFF OF THE HIGH COURT, BELLVILLE	Ninth Respondent
THE SHERIFF OF THE HIGH COURT, CLANWILLIAM	Tenth Respondent
THE HONOURABLE MINISTER OF FINANCE	Eleventh Respondent

JUDGMENT DELIVERED ON: WEDNESDAY, 17 JUNE 2015

MANTAME, J

[1] Applicants brought this urgent interim interdict on 7 April 2015 against first respondent for an order that default judgments that first respondent obtained in terms of Section 172 of the Tax Administration Act 28 of 2011 "*the TAA*" on 1 April 2015 in this Court under Case Numbers 2699/2015 against first applicant, and 2696/2015 against second applicant as well as any other judgment granted in favour of the first respondent in terms of Section 172 of the TAA against any of the applicants be set aside or alternatively be suspended; and that first respondent be interdicted and restrained from executing on, or taking any further steps pursuant to the judgments and any further process which the first respondent may have caused to be issued pursuant to the judgments should be suspended and stayed with immediate effect.

[2] A further relief requested by applicants was that the movable goods attached and removed by third to tenth respondent under the warrants of execution be returned to the applicants or its representatives was no longer pursued at the hearing of this matter. Instead, Counsel for the applicants submitted that the aforesaid respondents should keep the goods and not sell them, up until the finalisation of this matter.

[3] This matter was not heard on the same day and a timetable was agreed upon by the parties for the further conduct of the matter. This matter was then postponed to the semi urgent roll on 16 April 2015; when it appeared before me.

[4] It is common cause therefore that applicants are taxpayers. First applicant represented all other applicants in these proceedings as they are juristic persons and he is the sole member of the said close corporations. Pursuant to first respondent's statutory duty to collect revenue from the taxpayers, it therefore became certain that the undisputed tax debt of R13 215 062.21 is owed by the applicants. This outstanding debt by the applicants spans over a period of some 10 years. This became apparent when first respondent conducted an enquiry in terms of Section 50(1) of the TAA against first applicant and its 35 entities under the Lifman Group. This enquiry took place between 26 May 2014 and 25 February 2015. During this

enquiry, applicants submitted outstanding tax returns based on their own declarations, and the individual tax debt of each applicant was made up as follows:-

First Applicant	-	R3 052 518.23
Second Applicant	-	R8 794 477.88
Third Applicant	-	R294 216.82
Fourth Applicant	-	R77 445.37
Fifth Applicant	-	R853 867.75
Sixth Applicant	-	R142 536.16
TOTAL	=	R13 215 062.21

[5] It is not in dispute that this tax debt arose from voluntary submissions made by the applicants in their income tax and Value Added Tax returns.

[6] According to first respondent this tax debt does not include further tax debt of the applicants which it addressed in their letters of finding that were issued in consequence of first respondent's inquiry process. That process is still pending.

[7] It remained undisputed further that during the period of engagement between applicants and respondent, applicants indicated their desire and commitment to be tax compliant and to settle any amount that has become due and payable which may have been raised through assessment, or through an inquiry or otherwise.

[8] As a result thereof, applicants and first respondent entered into a security agreement which saw first respondent registering caveats on some of applicant's properties on 04 March 2015 with the consent of the applicants.

[9] Prior to the security agreement being concluded, first respondent had a meeting with first applicant on 3 March 2015 at its Head Office in Pretoria where applicants were represented by a legal team. At the meeting, applicants were notified in writing about first respondent's intention to seek civil judgment on the outstanding tax debt of the applicants, should applicants fail to adhere to the agreed payment date, that is, 31 March 2015. At that time, a previous letter had already

been dispatched to applicants on 5 February 2015 notifying them about the same debt that needed to be settled before end March 2015.

[10] On 31 March 2015, applicants failed to honour their undertaking to pay the tax debt as agreed, and as such, first respondent proceeded to obtain civil judgment on 1 April 2015 in terms of Section 172 of the TAA.

[11] This Court is now called upon to decide whether the interim relief sought by applicants is justifiable in the circumstances.

[12] Mr Potgieter argued that, there are jurisdictional and procedural requirements that had to be met prior to first respondent taking civil judgments. Section 172(1) of TAA reads as follows:-

> *"If a person has an outstanding debt, SARS may, after giving the person at least 10 business days' notice, file with the clerk or registrar of a competent court a certified statement setting out the amount of tax payable and certified by SARS as correct."*

According to applicants' counsel, there is a peremptory stipulation in this section, compelling first respondent to give 10 business days' notice to the taxpayer, of which SARS failed to do. The warning in the letter dated 3 March 2015 by first respondent does not constitute a "notice" as required by Section 172(1) of the TAA. The said provision must be read with Section 162 of the TAA which stipulates as follows:-

> "(1) *Tax must be paid by the day and at the place notified by SARS or as specified in a tax Act, and must be paid as a single amount or in terms of an instalment payment agreement under Section 167."*

In essence, applicants were deprived their *prima facie* right to be notified in terms of the statute. Counsel referred to ***Murphy v South African Railways and Harbours 1946 NPD 252,*** where a plaintiff contended that a correspondence informing the defendant in writing of the possibility of legal proceedings, was sufficient to constitute notice of intention to commence legal proceedings where the institution of

proceedings was prohibited by statute unless such notice was served on the defendant at least a month before such proceedings may be commenced with. The court rejected the contention, at page 255, and stated that the legislation itself made provision for a notice of claim, and a notice of legal proceedings. It was submitted that the same applies in this matter. Section 162 of the TAA makes provision for the determination of time and manner on which tax must be paid, which is generally on a date stated on a notice of assessment, or as on these facts on a date agreed. It is only when there is failure by the tax payer to pay the debt on the due date, that the requirement of Section 172(1) that "*person has an outstanding tax debt*" is met, and it is only at that date, in this case being 1 April 2015, that first respondent is entitled to give notice of 10 days prior to applying for judgment in terms of Section 172.

[13] It was applicants' submission that first respondent is not entitled to pre-empt the tax debt becoming due by giving a taxpayer a "*general notice*" that it will apply for judgment in terms of Section 172, more than 10 days before it actually becomes outstanding. Further, logic and precedent dictates that the formulation of words by first respondent in respect of the possible procedures in which it may enforce its rights does not constitute notice in terms of Section 172. First respondent would have been empowered to actually give applicants notice on 1 April 2015, and only 10 days later, first respondent would be entitled to act in terms of Section 172(1) of the TAA. First respondent's actions prior 1 April 2015 was clearly premature.

[14] In addition thereto, Section 25(1) of the Constitution guarantees the right to property. It provides as follows:-

> "(1) *No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.*"

According to applicants, this therefore applies to juristic persons such as applicants' close corporations. The effect of judgments and the execution process would be to deprive applicants of their property. Counsel made reference to ***First National Bank of South Arica v Minister of Finance 2002(4) SA 768 CC at para 45; Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett & Others v Buffalo City Municipality & Others; Transfer Rights Action***

Campaign & Others v MEC for Local Government & Housing in the Province of Gauteng & Others 2005(2) BCLR 150 (CC), where the Constitutional Court held that a deprivation of property would be arbitrary if the deprivation is without "*sufficient reason*" or is procedurally unfair. It is therefore applicants contention that filing of certificates by first respondent was without sufficient reason, unfair and consequently arbitrary.

[15] Further, the alleged notice which first respondent rely on, breaches the provisions of Section 33 of the Constitution and Section 3 of PAJA, as it failed to give the required notice envisaged in Section 172 of TAA; it removed the 10 days to determine how the affairs of the applicants can be structured prior to judgment being granted, it was not a clear statement as to when exactly the certificate will be submitted to the Registrar; there was no justifiable nor reasonable circumstances to depart from the provisions of Section 3(2) of PAJA.

[16] Applicants submitted that they have established a *prima facie* right that will be infringed and that is contained in their notice of motion. The balance of convenience favours the applicants as first respondent decided to remove the trading goods of the applicants as the business rescue practitioner can take control of the second, third and seventh applicants and act in accordance with the procedures in Chapter 6 of the Companies Act which cannot prejudice first respondent at all, as the debt remains and is to be liquidated. First respondent has not shown any irreversible harm or palpable inconvenience by acting in accordance with the prescripts of Section 172 of the TAA nor that it would suffer an irreparable harm. This should be weighed against the irreparable harm that applicants will suffer if the execution process continues; and in essence, they have no alternative remedy but to seek this interim relief.

[17] First respondent opposed this application on the basis that the contention by applicants that they failed to give them notice is untrue. Applicants were at all times aware of first respondent's demand. In the founding affidavit, first applicant alleged that the date that was agreed on was an unrealistic timeframe, although on the other hand he agrees that his legal representatives agreed to the payment date being 31 March 2015. The tax debt of the applicants arose over many years and had

applicants submitted their tax returns timeously, the amounts would have been declared and applicants would have been expected to pay years ago. Applicants were appraised of the fact that first respondent will proceed to obtain civil judgments in terms of Section 172 of the TAA for purposes of recovery of debt. Applicants did not respond to that letter or dispute first respondent's entitlement to proceed with the collection of debt.

[18] According to first respondent, the first jurisdictional requirement for the filing of a certified statement in order to obtain a judgment in terms of Section 172(1) is that: "*a person has an outstanding tax debt.*" It cannot be disputed that each of the applicants in respect of whom a certified statement was filed with the Registrar, (excluding seventh applicant), has an outstanding tax debt. That jurisdictional requirement was therefore satisfied.

[19] First respondent contended further that, the second jurisdictional requirement for the exercise of the power to file a certified statement in terms of Section 172(1) is that this power may only be exercised "*after giving the person at least 10 business days' notice.*" There is no stipulation for the form or content of such notice. It is not specified whether the notice should be made to a person with outstanding tax debt or whether it must be a notice that first respondent intends to file a certified statement with the registrar in order to obtain a civil judgment for recovery of tax. It was submitted therefore that letters of 20 February 2015 and 3 March 2015 constituted a written notice which satisfied the second jurisdictional requirement for the exercise by first respondent of the powering terms of Section 172(1) of the TAA. Further, these letters should not be interpreted in isolation, but in the context and having regard to the background circumstances preceding the sending of these letters to the taxpayers. That context includes the agreement concluded between applicants and first respondent, prior to 20 February 2015, in respect of adjusted returns submitted by the taxpayers, the amounts of which had to be settled by end of March 2015; the request for deferral of payment of the assessed amounts which was made on 9 February 2015. This without doubt indicates that the taxpayers were well aware of the precise amount which was due, owing and payable by each of the taxpayers in respect of which assessment had been issued. The letter of 3 March 2015 was the most explicit and gave the taxpayers more than enough notice. The notice given by

first respondent on 3 March 2015 was formulated in clear and precise terms. It is absurd to suggest that the date and manner of payment should be contained in the notice and further reference to Section 162 of the TAA is a misleading reference in the context of this case. In any event, if applicants did not know where or when to pay, they would not have requested for a deferral of payment. In his own founding affidavit, first applicant confirms that there was an agreement that he would be allowed until the end of March 2015 to pay the amounts.

[20] Mr Maritz for first respondent submitted that in ***Anil Singh v Commissioner for the South African Revenue Service 2003 (4) SA 520 (SCA),*** the Court was concerned with the question whether a tax liability was established by raising of an assessment where notice of the assessment had not yet been given to a taxpayer. In that matter SARS took a judgment against a vendor in terms of the VAT Act pursuant to an assessment raised, without notice of the assessment having been given to the vendor before the statement was filed to obtain the judgment. Whereas in this matter, assessments have been issued and notice thereof have been given to the taxpayers. The taxpayers have unequivocally accepted the correctness of the assessment and that the amounts payable in terms thereof are due. The taxpayers have agreed to make payment of the assessed taxes by 31 March 2015, but failed to do so. No objection or appeal against the assessments have been raised or was contemplated by the taxpayers. As the facts currently stood, they are faced with an insurmountable hurdle in seeking interdictory relief against the enforcement of their tax liability. Even if there was an objection or appeal lodged by applicants, it was argued that in ***Metcash Trading Limited v Commissioner SARS 2001 (1) SA 1109 (CC)***, the Constitutional Court re-affirmed the principle that the taxpayer must "*pay now argue later*." In this case, applicants have failed to do any of this, and as such, the application should be dismissed with costs.

[21] In my judgment, I will not deal with the issue of urgency, as this matter appeared before me on a semi-urgent roll. This means therefore that its urgency fell away on 7 April 2015, when applicants and respondents reached an agreement for the further conduct of this matter, pending the adjudication of Part A of the relief claimed by the applicants. This is the issue before me for adjudication.

[22] Further, I have taken due notice of the fact that the parties before me argued extensively on the fact that second, third and seventh applicants have filed for business rescue on 2 April 2015, 7 April 2015 and 9 April 2015 respectively. As first respondent has correctly put it, the business rescue proceedings need not be adjudicated in these proceedings. Be that as it may, that does not mean that I will not comment on those proceedings in my judgment, as I will make some observations and further issue some directives to certain functionaries later in my judgment.

[23] It is common cause that first respondent is tasked by legislation to provide for the effective and efficient collection of tax; to make provision in respect of tax assessment; to make provision for the payment of tax; to provide for the recovery of tax; and to recover interest on outstanding tax debts amongst the others. In the course of first respondent executing their mandate, it became apparent to the applicants that their rights were trampled upon, hence they deemed fit to come before this court and seek an interim interdict.

[24] For the applicants to be successful in their interim interdict; they should satisfy this Court that they have established the trite principles such as a *prima facie* right, the balance of convenience, any irreparable harm and that there is no alternative remedy, other than this interdict.

[25] Interdicts in their nature are based on rights to sustain a cause of action. The right upon which applicants base their application on is that first respondent failed to give notice to the applicants as required by the provisions of Section 172(1) of the TAA. The letter dated 3 March 2015 that first respondent relies on does not constitute a "*notice*" as required by Section 172(1) of the TAA.

[26] The word "*notice*" in Oxford Dictionary means "*notification or warning of something especially to allow preparations to be made.*" It is applicant's contention that there is a peremptory stipulation in Section 172(1) compelling first respondent to give the person at least 10 business days' notice, to file with the clerk or registrar of a competent court a certified statement setting out the amount of tax payable and certified by SARS as correct. Applicants do not dispute the existence of a tax debt

as it arose pursuant to their voluntary submission of outstanding returns by themselves.

[27] I turn to agree with first respondents submissions that this Court should have due consideration to the background circumstances preceding to the sending of the letters to the applicants, in order for it to arrive at a correct finding. It is common cause therefore that preceding these letters, on 3 November 2014, an agreement was entered into between first respondent and first, fourth and sixth applicants. In that agreement applicants indicated their desire to be fully compliant and to pay to the first respondent any amount due and payable which may be raised through assessment pursuant to the inquiry or otherwise, and applicants further tendered as security some of the assets or property which first respondent registered the caveats by consent of first applicant on 4 March 2015. Upon perusal of this agreement, though the assessment process was not yet finalised at that stage, applicants were more than willing to settle any tax debt resultant on those assessments, hence applicants were prepared to give security in advance.

[28] On 5 February 2015, first respondent's attorneys addressed a letter to first applicant. The purpose of the letter was to advise applicants of the "*current tax debt*", at that time it was standing at the amount of R11 662 015.09. Applicants were notified in this letter that payment of the current tax debt was expected before the end of March 2015.

[29] Applicants, through their attorneys, responded to this letter on 9 February 2015 not disputing any of the contents, but rather proposing to settle their indebtedness of R11 662 015.09 by way of monthly instalments of R300 000.00, and first instalment to be paid on 13 February 2015 and so on. Applicants even proposed to increase this offer should they sell any immovable properties registered in their names. This proposal was rejected by first respondent on their letter dated 20 February 2015.

[30] On 3 March 2015, first respondent's attorneys caused a letter to be dispatched to applicants' attorneys informing them that the current tax debt must be met by end March 2015, failing which, SARS will resort to all procedures available to

it to collect the debt from the taxpayers which may include obtaining civil judgments and if necessary, sequestration and liquidation proceedings. In their replying papers, applicants do not take issue with the fact that first respondent intended to seek civil judgment but only take issue with the fact that no notice was given to the applicants as required in terms of Section 172(1) of the TAA.

[31] This brings us to the question of whether indeed applicants were not given "*notice*" within the confines of Section 172(1) of the TAA or even after employing the meaning of the word "*notice*" from the English Oxford dictionary quoted at paragraph [25] above. Firstly, if one employs the literal meaning of the oxford dictionary, could it be said that applicants did not receive any notification or warning of what first respondent intended to do? Could it be said that they were not allowed to make preparations of whatever they needed to do, as applicants argued that first respondent removed the 10 day period to determine how the affairs of the applicants could be structured prior to judgment being granted. Secondly, applicants' cause of complaint is based upon the fact that, in terms of Section 172(1), in actual fact, they were not given the 10 day period by first respondent as this is a jurisdictional requirement they are entitled to in that section. According to applicants the letter dated 3 March 2015, that first respondent relied on, is a "*general notice*" and could not serve as a notice within the confines of Section 172(1) of the TAA.

[32] After careful consideration of Section 172(1) of the TAA, I come to the conclusion that applicants are disingenuous in their reading and interpretation of this Section. Firstly, they do not dispute the fact that they have an outstanding tax debt, and that first respondent intended to take a civil judgment amongst others should they fail to make payment by end of March 2015. Applicants are not upfront with this Court as to what would empower first respondent to rely on these two above underlined undisputed points amongst others, if it is not Section 172(1). Applicants took issue with the 10 business days' notice that he was not given by the first respondent. In my opinion, this point is absurd, as the purpose of giving notice is to give notification or warning to that person or entity to allow preparations to be made.

[33] In my view, preparations started when applicants and first respondents entered into an agreement on 3 November 2014; to when he was advised on the

current debt on 5 February 2015. In turn, first applicant requested for a deferral of payment in his letter of 9 February 2015 which was rejected by first respondent in their letter of 20 February 2015. The letter of 3 March 2015, in my view, gave applicants more than enough notice to do whatever they intended to do to structure their affairs. It was not necessary for the first respondent to expressly state that applicant was giving applicants 10 days of their intention to apply for a civil judgment, as it has afforded more than the 10 business day period for that purpose. In any event, a further 10 days after 1 April 2015, would not have made any difference as applicants have struggled with payment of this debt for over 3 months. First respondent complied with the jurisdictional and procedural requirements as stipulated in the section. For those reasons, I am satisfied that applicants were given adequate notice within the confines of Section 172(1) of the TAA and have not established a *prima facie* right to be granted an interim interdict. As a result, this application fails.

[34] I now turn to deal with the consequences of the business rescue proceedings in as far as this application has failed. Section 133 of the Companies Act 71 of 2008 ("the Companies Act") provide as follows:-

> *"133. **General moratorium on legal proceedings against company**.-(1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except-*
>
> *(a) with the written consent of the practitioner;*
> *(b) with the leave of the court and in accordance with any terms the court considers suitable;*
> *(c) as a set-off against any claim made by the company in any legal proceedings, irrespective of whether those proceedings commenced before or after the business rescue proceedings began;*
> *(d) criminal proceedings against the company or any of its directors or officers;*

(e) *proceedings concerning any property or right over which the company exercises the powers of a trustee; or*

(f) *proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner.*

[35] In the present matter, I am satisfied that Section 133 has no retrospective application for steps taken prior to the filing for business rescue. First respondent obtained judgment on 1 April 2015 and applicants filed for business rescue as follows; second applicant on 2 April 2015, third applicant on 7 April 2015 and seventh applicant on 9 April 2015. In my view first, third to tenth respondents actions, prior to the dates of filing for business rescue could not be had to be in breach of Section 133 of the Companies Act.

[36] Regarding applicant's dispute of liability to first respondent debt or any alleged debt amounting to approximately R7, 4 million in their business rescue application, I direct that copy of this judgment be made available to the appointed Business Rescue Practitioner Raneel Maharaj or any subsequent Business Rescue Practitioner who may in future be appointed in his stead, should he not be available. I further direct that a further copy of this judgment should be dispatched to the Companies and Intellectual Property Commission for their perusal and attention. These directions are based on the fact that throughout these proceedings, applicants never disputed the current tax debt that arose as a result of their self-assessment in the total amount of R1 321 506.21; unless applicants dispute of liability is based on some other debt other than this one.

[37] In the result, I therefore make the following order:

- Application for an interim interdict is dismissed with costs, including costs of three Counsels.

MANTAME, J