

Commissioner for the South African Revenue Services v Esibonga Investment and Others (Case no: 16177/21)

Introduction

This was an application by Mr. and Mrs. Watson (the "Watsons") in anticipation of the return date of a provisional preservation order granted in favor of the Commissioner for the South African Revenue Service ("SARS") as envisaged in s163(4)(c) of Tax Administration Act, 28 of 2011 ("TAA"). The provisional order, which was granted in terms of s163(1) of the TAA, related to the preservation of a certain immovable property registered in the names of the Watsons.

By way of background, s163(1) of the TAA provides that a senior SARS official may, in order to prevent any realizable assets from being disposed of or removed which may frustrate the collection of the full amount of tax that is due or payable, authorize 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 as may be specified in the preservation order, from dealing in any manner with the assets to which the order relates. The purpose of this order has been explained as follows in *National Director of Public Prosecutions v Rautenbach 2005 (4) SA 603(SCA)* at para 13:

"It is to ensure that the property concerned is not disposed of or concealed in anticipation of such proceedings."

With reference to s163(4)(c) of the TAA, the court to which an application for a preservation order is made may, upon application by the taxpayer or other person, anticipate the return day for the purpose of discharging the preservation order if 24 hours' notice of the application had been given to SARS.

It is important to also have regard to s163(9) of the TAA which states that the court which made a preservation order may on application by a person affected by that order vary or rescind the order or an order authorising the seizure of the assets concerned or other ancillary order if it is satisfied that—

- the operation of the order concerned will cause the applicant undue hardship; and
- the hardship that the applicant will suffer as a result of the order outweighs the risk that the assets concerned may be destroyed, lost, damaged, concealed or transferred.

Considering the above background, the relevant facts, arguments made by the respective parties, question before and findings of the High Court are summarised below.

Facts

Esibonga Investments Pty Ltd ("Esibonga"), an entity registered in 2018 to render services of a bookkeeping nature, did not submit tax returns for the period 2018 – 2020. SARS conducted an in-depth information gathering process and audit in respect of Esibonga and determined that the entity had a tax debt of R987 972 392,40. Pursuant thereto, SARS obtained a compulsory winding up order.

Esibonga's bank accounts showed that an amount of R2.1million was paid, on 21 August 2019, to Smith Tabata Buchanan Boyes (STBB), the transferring attorneys of the property registered in the names of the Watsons.

The property was not registered in the name of Esibonga, but in the names of the Watsons. It was on this basis that the purchase of the property required a thorough investigation by the liquidators of SARS.

Arguments made by the relevant parties

SARS sought and obtained the order to prevent the property from being disposed. SARS feared that Esibonga may dissipate the property, which dissipation would hinder the collection of the tax amount due. The preservation order was granted authorizing the Registrar of Deeds to (i) register a caveat notice on

the property to ensure that the property was not transferred without notice to SARS and the *curator bonis*, (ii) appointing a *curator bonis* and (iii) authorizing him to take control of the property.

The Watsons argued that there was no evidence of dissipation to warrant the granting of the order, in that SARS failed to show that in the absence of a preservation order, there was a material risk that the asset available for the satisfaction of tax will no longer be available. In addition, SARS failed to show the existence of a material risk that they, the Watsons, would dissipate the property in order to frustrate the collection of tax by SARS.

Notwithstanding the aforementioned argument presented by the Watsons, they did not provide any evidence that the operation of the preservation order caused or will cause them undue hardship and such hardship outweighed the risk that the property may be destroyed, lost, damaged, concealed or transferred, as required by s163(9) of the TAA.

According to the Watsons, they did not know and had never met any of the other respondents. They alleged that they paid the funds to acquire the property to a Zimbabwean foreign exchange agent and that they were advised that the funds would be paid to the South African conveyancers for payment towards the purchase price. They further allege that they had no dealings or involvement of any kind with Esibonga and learnt for the first time of the entity's name upon receipt of the application for the preservation order. The Watsons consequently argue that the channelling of the funds through Esibonga was not on their instructions and they therefore deny any indebtedness to Esibonga.

Question before the court

In this matter, the debtor was Esibonga, and the property was registered in the names of the Watsons. The facts suggested that Esibonga was dissipating its funds when it purchased the property and registered it in the name of the Watsons. The question which arises is whether an applicant (in this case, the Watsons) need show a particular state of mind on the part of the respondent (i.e. Esibonga), i.e., that it is getting rid of the funds, or is likely to do so, with the intention of defeating the claims of creditors.

Findings of the High Court

The court found that s163(1) of the TAA extended the protection of property against being disposed or concealed to include persons in the position of the Watsons. In order to be discharged from the preservation order, the court must be satisfied that a reasonable person in the position of the Watsons could not have known that Esibonga paid (on their behalf) or if they knew about the payment, that such payment was not in furtherance of the dissipation of Esibonga's assets.

The Watsons did not take any reasonable steps to investigate whether, in the circumstances, the payment of the purchase price by Esibonga was required and was reasonably made.

It was incumbent upon the Watsons to consider whether it could be said that they took reasonable steps to investigate whether, in the circumstances, the payment of the purchase price for their home by Esibonga was required and the payment was reasonably made.

To avoid a successful and complete dissipation by Esibonga, which dissipation would frustrate the collection of taxes, it was necessary to preserve the property. It is for this reason that the court dismissed the Watsons' application.

26 January 2022

