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Court rules that SARS must present all the facts in preservation orders

By Heinrich Louw

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In The Commissioner for the South African Revenue Service v Sunflower Distributors CC and Others (66077/2015) [2015] ZAGPPHC 896 (17 November 2015), the court had to decide whether a provisional preservation order granted in favour of the South African Revenue Service (SARS) should be made final.

In this case, the 'First Respondent', Sunflower Distributors CC, was placed under a final winding-up order on 15 September 2015, after the provisional order was granted on 28 July 2015. The author of the SARS founding affidavit stated that the preservation order was applied for as an interim measure to preserve realisable assets until the final winding-up order is granted and until the Master of the High Court has appointed final liquidators and they have taken charge of the assets. The provisional preservation order was granted on 8 September 2015.

The provisional preservation order was obtained in terms of s163 of the Tax Administration Act (TAA), after an ex parte application was brought by SARS in the High Court. The basis for the ex parte application and the granting of the provisional preservation order is that the Respondents were involved in an elaborate VAT scheme.

The key issue in this case was whether the evidence presented by SARS justified the granting of the final preservation order. The 'Second Respondent' objected that the SARS' founding affidavit relied on hearsay evidence and that a letter written to SARS by the First Respondent's auditor, a certain Van der Linde, was material to SARS' application and had not been annexed to the affidavit. The Second Respondent argued that the failure to annex this letter and the reliance on hearsay evidence in the founding affidavit were material omissions meaning that SARS' application could not be granted.

SARS' founding affidavit referred to the findings of a certain Swanepoel, a SARS official who had conducted a value-tax audit of the First Respondent. Van der Linde was an auditor at an auditing firm, which had been appointed by the First Respondent. Van der Linde assisted the First Respondent with the value-tax audit. In applying for the final preservation order, SARS referred to the audit, which Swanepoel conducted by randomly choosing 10 examples of transactions, which were conducted during the tax period in issue, namely July 2011.

A letter of findings was subsequently sent to Van der Linde on 8 November 2011. Van der Linde responded to the letter of findings in a letter dated 22 November 2011. This response dealt extensively with the alleged administrative failures of the First Respondent to claim certain input tax, identified in the letter of findings of 8 November 2011. The thrust of Van der Linde's detailed letter was that the First Respondent was perfectly entitled to deduct the input tax that it paid to its suppliers from the output tax, which the client that it supplied paid to it, and that it was not operating a scheme.

The court held that as the application for a provisional preservation order is an ex parte application, SARS had a duty to act in the utmost good faith. The court stated that it would not hold itself bound by any order obtained where there was a misapprehension of the facts.

Where an applicant obtained relief, but did not disclose all the necessary facts in its application, the court will consider the following factors in deciding whether to grant final relief:

- the extent to which the rule of disclosure has been breached;
- the reasons for the non-disclosure;
- the extent to which the first Court might have been influenced by proper disclosure;
- the consequences from the point of doing justice between the parties.

The effect of this failure to annex this letter or deal with it in the founding affidavit meant that the duty to act with the utmost faith had not been complied with by SARS. Coupled with the significant hearsay evidence relied on by SARS in its founding affidavit, the court decided not to confirm the provisional order.

Section 163 of the TAA is a far-reaching provision, which can have a significant impact on the business and/or livelihood of a taxpayer, as it deprives such a taxpayer, temporarily at least, from dealing with its assets. This judgment protects the taxpayer when faced with opposing such an application by SARS. It shows that the court will not easily grant such an order in favour of SARS and that taxpayers, in defending such applications, can know that SARS must provide full disclosure of all the relevant facts in order to succeed with such an application.

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