

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case Number: 4389/2022

Reportable: YES

Of Interest to other Judges: NO

Circulate to Magistrates: NO

In the matter between:

THE NATIONAL PROSECUTING AUTHORITY

Applicant

and

DYNOLOG RENTAL (PTY) LTD t/a DYNAMIC TRUCK RENTAL

(Registration number: 20[....]07)

First Defendant

PHILIPPUS CHRISTOFFEL WILLEM VAN DER BERG

Second Defendant

BENADETTE VAN DER BERG

Third Defendant

PHILIPPUS CHRISTOFFEL WILLEM VAN DER BERG N.O

BENADETTE VAN DER BERG N.O

WEALTH ASSOCIATES FIDUCIARY SERVICES (PTY) LTD N.O

(Registration number: 201[....]07)

First Respondent

(In their capacities as Trustees of Dynamic Trust

with Trust ID: IT1[....]7)

PHILIPPUS CHRISTOFFEL WILLEM VAN DER BERG N.O

BENADETTE VAN DER BERG N.O

WEALTH ASSOCIATES FIDUCIARY SERVICES (PTY) LTD N.O

(Registration number: 201[....]07)

Second Respondent

(In their capacities as Trustees of Phiberg Family Trust
with Trust ID: IT1[....]6)

SEDPROP DEVELOPMENTS (PTY) LTD

Third Respondent

(Registration number: 201[....]07)

HEARD ON:

10 NOVEMBER 2022

CORAM:

MATHEBULA, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII on 21 FEBRUARY 2023. The date and time for hand-down is deemed to be 21 FEBRUARY 2023 at 15H00.

[1] This matter was initiated by way of *ex parte* application to obtain a provisional restraining order. Before such an order could be granted by the court, the respondents became aware of the application. The parties negotiated a postponement and it culminated in the matter proceeding on opposed basis. These turn of events did away with the proceedings as envisaged and now the applicant seeks a final restraint order.

[2] The applicant is a statutory body established by law bestowed with the power to institute and conduct criminal proceedings on behalf of the State.¹ The first respondent is a legal entity incorporated in terms of the company laws of the Republic. The second and third respondents are not only husband and wife but directors of the first respondent. All three (3) respondents are arraigned before the Regional Court, Bloemfontein with a plethora of charges. These are transgressions

¹ Section 20(1) of the National Prosecuting Authority Act 32 of 1998, as amended.

of the provisions of the Income Tax Act 58 of 1962, Tax Administration Act 28 of 2011, Unemployment Insurance Contributions Act 4 of 2002 and Skill Development Act 9 of 1999.

[3] The background of this application can be summarised briefly as follows. The case on behalf of the applicant set out in the founding affidavit is that the respondents stole and contravened the specified Acts resulting in a loss running into millions of Rands. These monies are allegedly owed to the South African Revenue Service (SARS). The exact figure is some kind of a moving target because of the ever increasing penalties and interests added to the capital amount. These offences are alleged to have been committed between February 2017 to February 2020.

[4] In the supporting affidavit it is alleged that during the aforementioned period, the second and third respondents were directors. Not only that, they were also actively involved in its affairs as evidenced by numerous payments made to them couched as directors' remuneration. Some funds were also channelled into a Trust of which both of them are Trustees and Beneficiaries. The main allegation is that the second and third respondents were disguising the true financial position of the first respondent.

[5] Turning to the very purpose of this application, movable and immovable assets were identified said to be held by the respondents were enumerated. These include bank accounts, a fleet of trucks and immovable properties in and around Bloemfontein and Kathu. There are also properties owned by one or two of the respondents of which the one or others are believed to be having an interest in it. The primary purpose of the order sought is to preserve the assets to be realised in due course in satisfaction of a confiscation order. Assuming such an order will ultimately be made.

[6] The respondents disavow the allegations made on behalf of the applicant. The opposition is founded on the grounds that these proceedings constitute an abuse of the applicable legislation, which is used *in terrorem* and designed to intimidate them. They allege *fraus legis* as it is not applicable and that the charges of theft and transgressions of tax legislation are bad in law. Their strong point is that not all material facts were disclosed in the papers and bank statements were incorrectly

interpreted. Lastly, that a substantial period of twelve (12) months elapsed before an *ex parte* application was launched against them. Which was not supported by any evidence.

[7] The third respondent who deposed to an affidavit on behalf of all of the respondents, outlined the distressed financial position of the first respondent since 2017. In order to keep the first respondent afloat, it traded on an overdraft. She was quick to point out that the first respondent was not trading recklessly. In addition, the second and third respondents as well as their Trusts advanced monies to it to sustain its liquidity. She revealed the many plans set in motion to ease the situation. Among them was to sell the portion of the property known as 7 De Bloem Avenue, Bloemfontein. The sale was delayed as a result of the slow decision from the Municipality pertaining to the application for subdivision of the said property.

[8] It would appear that the respondents are not at odds with the amount claimed by SARS. They are doing everything in their power to extinguish the debt. These efforts were conveyed to the court *a quo* to grant them extension to settle it. These were interrupted by this application.

[9] The case for the respondents is that there is no factual basis to allege that the respondents are involved in racketeering activities, money laundering or any gang related activities in regard to the charges. Therefore, the provisions of the Prevention of Organised Crime Act 121 of 1998 (POCA) are not applicable to their case. I agree. The case made is that the allegations of theft are contrived and bad in law. The point is that there were no physical deductions of monies and all these were book entries. Therefore, the monies for Value Added Tax (VAT) and Pay As You Earn (PAYE) were not capable of being stolen. Reference is also made to allegations being made about the payment of directors' fees which they are entitled to in terms of the Companies Act 71 of 2008. This is provided for in the law and it is a long shot to even raise this aspect to demonstrate the commission of any offence. Papers do not reveal any elaborate scheme on the part of the respondents to disguise any payments using the monies belonging to SARS.

[10] The affidavit of the third respondent avers that crucial information was withheld from the court and dispute the assertion that there were any monies in the bank

accounts. Also that the motor vehicles referred to are subject to a finance agreement with finance houses namely Wesbank and Doorlean Investments. Only one motor vehicle is fully paid and owned by the first respondent. The first respondent only has possession of the other motor vehicles while the ownership vests with the financier until the debt has been paid in full. These are undisputed facts.

[11] Both counsel made compelling submissions and it is imperative that they are repeated here. Counsel for the applicant submitted that there is one argument determinative of this case i.e. whether there is evidence upon which a court can on reasonable grounds find that the respondents may at a later stage be convicted of any offence(s). Once it was answered positively that was sufficient and the question of an exact amount was not relevant for the purpose of the proceedings before this court. This submission is clearly wrong. That is an important element of the offence of theft.

[12] Counsel articulated with succinct eloquence all the provisions of different Acts allegedly contravened by the respondents. In this matter the respondents have failed to ring-fence the monies for their tax obligations and that constituted theft. On the prevailing facts, she argued, they could be found guilty of theft. On their own version, the respondents outrightly admitted that they used the monies due to SARS for their operational expenses. Counsel for the applicant countered the argument and submitted that POCA does apply in this matter. Her argument was simply that the amounts withheld from SARS qualified as proceeds of unlawful activities. In addition, the respondents were creating a dispute of fact where there is none to create confusion.

[13] In rebuttal, counsel for the respondents argued strongly that it was only the first respondent who had not complied with its tax obligations. That granted did not automatically mean that the applicant will secure a conviction. The most important point made was that none of the statutory offences levelled against the respondents were in existence at the stated period. Therefore, the conduct sustaining the charges did not constitute an offence at the time.

[14] The next contention was that the court must look at the *actus reus* of each and every accused person to conclude that there was evidence required to secure a

conviction. In this matter the second and third respondents were not charged in their capacity as directors. Counsel pointed out that the applicant has not made out a case in the papers concerning the offence(s) that may lead to conviction. It must be sufficiently stated in the papers what are those “any other offences” that they might be found guilty of.

[15] He submitted that the second and third respondents are also taxpayers and it is common cause that they are tax compliant. He differed with counsel for the applicant that the amount is irrelevant. The case that the respondents are called to meet is failure to pay not theft/fraud. He emphasised that the provisions of one Act cannot be used to achieve something dealt with in another Act.

[16] He pointed out that in this matter the second and third respondents were being punished for the omissions of others. All the same the failure to pay was not wilful, but due to difficult business climate that existed at the time. The cardinal point made was that some offences either did not exist or were repealed. Therefore, the application should be dismissed with costs on a punitive scale.

[17] The general rule is that final relief may only be granted if those facts as stated by the respondent, together with those facts stated by the applicant that are admitted by the respondent, justify the granting of the order.² The exception to this general rule can occur where the allegations or denials are so far-fetched that the court is justified in rejecting them only on the papers. The robust approach to the determination of disputes of fact in certain circumstances allows more discretion in ordering final relief on consideration of affidavits filed. This is the best approach that will be followed in this matter.

[18] In motion proceedings an applicant must set out all the material facts of the case in the founding affidavit. Both counsel analysed it correctly that the question is whether there is evidence on reasonable grounds for believing that the respondents may at a later stage be convicted of any offence. Certainly this does not assume that because a charge sheet has been issued and served then that on its own fulfil the

² Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634H.

requirement that someone will be convicted. Those charges must be sustained by evidence.

[19] Counsel for the applicant was at pains to explain exactly what offences the respondents may be convicted with. It must be clear to the respondents the exact terms of the case they are invited to meet. Clearly this submission is unhelpful and does not advance the case of the applicant. If counsel could not herself divulge the offences referred to, it is a long task for the court to make such assumption.

[20] The respondents are not charged with theft of the VAT. It was also correctly conceded in line with the judgment of the Spilg J in **Grayston Technology Investment (Pty) Ltd and Another v S**³ that VAT and PAYE are incapable of being stolen. In this matter, on the respondents' version, there was no money to even cover the key expenses of the first respondent. It was *inter alia* kept afloat by loans provided by the other respondents. There were no funds to ring fence for the purposes of paying the tax liability. It stands to reason that there is no evidence upon which the respondents may be convicted of the common law offence of theft.

[21] The first respondent is the taxpayer that failed to meet its tax obligations. It is a separate entity on its own. The other taxpayers are tax compliant. There is no evidence on the papers, as counsel for the respondents correctly argued, that they did anything to be visited with the criminal charges. They mentioned the names of the people who were managing the affairs of the first respondent. It is insufficient, without facts, to lay the omission of others at their feet. The fact that they received directors' fees does not, on its own, make them a party to any crime. They are entitled to directors' fees as directors of the first respondent.

[22] It also transpired that there are fundamental defects on the charge sheet. The provisions of the legislation relied upon were either not in operation at the stated period or repealed. To illustrate this point section 234(2)(k) of the Tax Administration Act 28 of 2011 was not in existence at the relevant period. It was only inserted into section 234 during January 2021. Section 234(p) of the Tax Administration Act was also repealed.⁴ Lastly section 17 of the Unemployment Insurance Contributions Act 4

³ [2016] 4 All SA 908 (GJ).

⁴ See section 35 of the Tax Administration Laws Amendment Act 24 of 2020.

of 2002 was repealed.⁵ There is no such offence. The neglectful manner the charge sheet is drawn is indicative of a very weak case advanced by the applicant.

[23] The primary purpose of this application is to coax the first respondent to settle its tax liability. Section 163 of the Tax Administration Act 28 of 2011 has similar provisions as POCA. The slight difference is that the former is designed to recover debts to SARS while the latter deals with forfeiture of assets. On the facts of this matter, there is no justification to approach this court relying on the provisions of POCA. There are no allegations that the respondents are involved in racketeering, money laundering or gang related activities. This is a business entity that fell on hard times and was unable to meet its obligations. I agree with counsel for the respondents that it is an abuse of the process. The point is that there are many criminal and administrative penal sanctions that can be imposed in transgressions of this nature.

[24] This application was brought more than a year after the summons was issued in the Magistrate's Court. The first court appearance of the respondents was on 1 September 2021. There is no morsel of evidence in the papers as to why it was suddenly necessary to launch the application or what took the applicant so long to proceed with it. It is also not the case of the applicant that the respondents will dissipate any assets to the detriment of SARS. The sudden haste is unexplainable. This application ought to fail in its entirety.

[25] Counsel for the respondents urged me to award costs on an attorney and client scale. In **Plastics Convertors Association of South Africa (PCASA) obo Members and Others v National Union of Metal Workers of South Africa and Others** at paragraph 46 the Court stated the following: -

"[46] ...The scale of attorney and client is an extra-ordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible conduct. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium".⁶

⁵ See section 271 of Act 28 of 2011.

⁶ (2016) 37 ILJ 2815 (LAC).

[26] Although this application is lacking in substance, there are no cogent reasons to award costs on the punitive scale. There is nothing convincing that the applicant acted in a high handed manner in bringing the application. What is apparent is that the law was not well researched to sustain the application. The facts were equally weak. A usual costs order will suffice.

[27] The following order is made: -

27.1. The application is dismissed with costs.

M.A. MATHEBULA, J

APPEARANCES:

Counsel on behalf of the Applicant:

Instructed by:

Ms S. Khumalo

Director of Public Prosecutions

BLOEMFONTEIN

Counsel on behalf of the Respondents:

Instructed by:

Adv. L.J. Lowies

J. Malan Attorneys

C/O Blair Attorneys

BLOEMFONTEIN