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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES/ NO

(3) REVISED

13 November 2024

DATE

SIGNATURE

CASE NUMBER: 124034/2024

In the matter between:

THEODOR WILHELM VAN DEN HEEVER N.O.

APPLICANT

and

NOEL MASHABA

FIRST RESPONDENT

NOEL MASHABAN.O.

SECOND RESPONDENT

NW BALOYIN.O.

THIRD RESPONDENT

WOLFRAM CARL HELMUTH LANDGREBE N.O.

FOURTH RESPNDENT

GG SECURITY (PTY) LTD

FIFTH RESPONDENT

SUMMARY: *Notice of Motion- Urgent Application- Rule 6 (12)-The requirements for an urgent application in that the applicant should set forth explicitly the reasons why he or she avers that the matter is urgent and why it is claimed that no substantial redress would not be afforded at a hearing in due course.*

ORDER

HELD: *The form, service and ordinary time periods provided for in the Rules are dispense with and the matter is dealt with as one of urgency as contemplated in Rule 6 (12) of the Uniform Rules.*

HELD: *The Respondents are directed to disclose in writing the location of the Bentley Flying Spur Azure V8 with registration number LX 64 HT GP.*

HELD: *The Respondents (who may be in possession or control of the Bentley) are directed to forthwith deliver the Bentley to the Applicant at the address nominated by him.*

HELD: *The First to Fourth Respondents are ordered to pay the costs as between an attorney and client, the one paying and the others to be absolved.*

JUDGMENT

MNCUBE, AJ:

INTRODUCTION:

[1] This is an opposed urgent application in which the Applicant seeks the following relief-

'1. That the applicant's non- compliance with the Uniform Rules of Court with regard to service, filing and prescribed time periods be condoned in terms of Uniform Rule 6 (12), and that the matter be adjudicated upon as an urgent application as contemplated in the said rule.

2. That the respondents be directed to forthwith disclose in writing the location of the following motor vehicle- Bentley Flying Spur Azure V8

VIN /Chassis number S[...]

Registration number: L[...]

Colour: Midnight Emerald

3. That the respondents, or any of them who may be in possession or control of the Bentley be directed to forthwith deliver the Bentley to the applicant at an address nominated by him.

4. That the first to fourth respondents be directed to pay the costs of this application on a scale as between attorney and client alternatively to be taxed on scale C.

5. In the event that the fifth respondent opposes this application, that the first to fifth respondents be directed to pay the costs of this application on a scale as between attorney and client alternatively to be taxed on scale C.

6. Further and/or alternative relief.'

[2] The Applicant is Mr Theodor Wilhelm Van Den Heever, who instituted this application in his capacity as an appointed section 163¹ *curator bonis*. The Applicant is represented by Adv Van Niekerk. The First Respondent is Mr Noel Mashaba and adult male cited in his personal capacity. The Second Respondent is Mr Noel Mashaba N.O. cited in his capacity as a trustee for the time being of the N & N Family Trust. The Third Respondent is NW Baloyi N.O. is an adult female cited in her capacity as a trustee for the time being of the N & N Family Trust. The Fourth Respondent is Wolfram Carl Helmuth Landgrebe N.O. is an adult male cited in his capacity as a trustee for the time being of the N & N Family Trust. The Fifth Respondent is GG Security (Pty) Ltd, a private for-profit company cited as an interested party to the proceedings. The application is opposed by the First Respondents who is represented by Adv. Dreyer.

BACKGROUND FACTS:

¹ Section 163 of the Tax Administration Act 28 of 2011 (TAA).

[3] In order to understand the reasons giving rise to the present application, it is necessary to provide the background. On 14 October 2024 the Commissioner for the South African Revenue Service applied on an *ex parte* basis for a preservation order and for the appointment of the Applicant as a curator bonis in terms of section 163 of the TAA. The preservation order was granted by the Honourable Madam Justice Mali. On the 15 October 2024 the Applicant held a meeting with the First Respondent at his home in which the preservation order was discussed.

[4] During the process of doing inventory at the premises of the First Respondent, a Bentley was discovered in the garage. The First Respondent was asked about the Bentley who remarked that it belonged to a friend who was in Cape Town but failed to provide details of the friend. On 16 October 2024 the Applicant instructed the Sheriff to attach the Bentley but the Sheriff could not do so after finding that the Bentley was no longer in the garage. The Applicant then made some investigations on the circumstances surrounding the purchasing of the Bentley which revealed that it was registered in the name of the Fifty Respondent with money paid from the N&N Family Trust. This then prompted the Applicant to lodge the current application.

SUBMISSIONS:

[5] All submissions made orally and by written heads of argument have been duly considered. Counsel for the Application indicates that N & N Family Trust ('the Trust') is not opposing this application. The contention is that after the preservation order was granted by the Honourable Justice Mali the Bentley has gone missing. Counsel argues that the application is urgent and nothing is in dispute therefore there is no reason not to grant the order. The Applicant acted urgently. The submission is that the whereabouts of the Bentley is unknown and is in use which will depreciate its value. The contention is that both the First Respondent and the Trust are subjects of the preservation order and the Bentley was bought using the proceedings from the Trust. The Applicant seeks enforcement of the preservation order, and the opposition is vexatious which warrants punitive costs.

[6] The contention by Counsel for the Respondents is that the matter is not urgent on the basis that the Applicant waited three weeks before instituting this application. The submission is that the Applicant does not set out facts why he would not be given substantial redress later. The argument is that the First Respondent did make a disclosure that the Bentley belongs to the Third Respondent which was not an entity in the proceedings giving rise to the preservation order. The submission is that the Bentley has no powers to attach the assets unless he brought himself within the ambit of section 20 (9) of the Companies Act 71 of 2008.

[7] Counsel contends that the purpose of a preservation order is to avoid dissipation of assets, and it is not about the tax. The argument is that the money used to purchase the Bentley do not form part of the preservation order granted 14 October 2024. The contention is that there is no case which has been made out against the Trust or Trustees.

ISSUES FOR DETERMINATION:

[8] The issues for determination are whether the application is urgent and whether or not the Bentley falls within the ambit of the preservation order that was granted on 14 October 2024.

THE LAW:

(a) Urgency:

[9] An applicant that seeks relief on an urgent basis must comply with the provisions of Rule 6 (12) (b) of the Uniform Rules which provides that –

‘In every affidavit or petition filed in support of the application under paragraph (a) of this sub-rule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he would not be afforded substantial redress at a hearing in due course.’

[10] An applicant that approaches the court on an urgent basis seeks to be granted preference and ‘jumps the queue’. In an urgent application, an applicant files

an affidavit setting out circumstances which render the matter urgent and sets out the reasons why he or she cannot be afforded substantial redress at a hearing in due course. The test is whether an applicant cannot be afforded substantial redress at a hearing in due course.

[11] The principles on urgency are now trite- (a) the urgency must not be self-created, (b) mere lip service to the requirements of rule 6(12) will not do, (c) failure to comply with rule 6 (12) is fatal to an application and (d) there are degrees of urgency. When an applicant has departed from the normal time periods, he must justify in the affidavit the extent of the departure from the normal time and why he claims that he could not obtain substantial redress at a hearing in due course.² Urgency is the very reason which justifies deviation from the times and form as prescribed in the Rules. Where the application lacks urgency, the court can on that basis decline to exercise its powers under Rule 6(12)(a).

[12] In **M M v N M and Others (15133/23P) [2023] ZAKZPHC 122** (18 October 2023) para [5] it was held *‘The rule requires two legs to be present before urgency can properly be founded, namely; first, the urgency should not be self-created and secondly, it must provide reasons why substantial relief cannot be achieved in due course. The importance of these provisions is that the procedure set out in rule 6 (12) is not there for the mere taking.’*

[13] In **East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others (11/33767) [2011] ZAGPJHC 196** (23 September 2011) para [6] it was held *‘The import thereof is that the procedure set out in Rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The Rules allow the court to come to the*

² See Luna Meubel Vervaardigers (EDMS) BPK v Makin and Another (t/a Makin's Furniture Manufactures) 1977 (4) SA 135 (W) at 137F-G.

assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.'

(b) Section 163 of TAA Preservation Order:

[14] On the onset, it must be noted that section 163 of Tax Administration Act 28 of 2011 (TAA) authorises the South African Revenue Service to approach the court on an *ex parte* basis to apply for an order to preserve any assets of a taxpayer subject to conditions. The purpose is set out in section 163 (1) of TAA. One crucial purpose is to prevent any realisable assets from being disposed of or removed which may frustrate the collection of tax that is due. The Court may grant a preservation order having immediate effect and grant rule nisi. Whether a preservation order is granted in terms of section 163 of TAA or any other empowering legislation, the purpose is the same- it is to preserve specific assets belonging to a respondent to protect the assets against damage or loss of value pending the finalisation of a legal process. See **NDPP v 999 Music CC (054695/2022) [2024] ZAGPPHC 81** (30 January 2024) para [16].

[15] A preservation order under section 163 of TAA is also concerned with dissipation. In **Commissioner For the South African Revenue Service v Tradex (Pty) Ltd and Others 2015 (3) SA 596 (WCC)** para [36] it was held '*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.'*

ANALYSIS:

[16] The starting point is to determine whether or not the application is urgent. Once I am persuaded that the application is indeed urgent, then I must determine the merit of the application that is whether or not the Bentley falls within the ambit of the

preservation order dated 14 October 2024. It is recognised that urgency is determined by the circumstances of the case or application. On the facts, the disappearance of the Bentley is the basis for the Applicant to aver that this matter urgent. The Applicant avers *'I am fearful that if the vehicle is either destroyed, or even if insured if it remains hidden, it will stifle the operation of the preservation order and create a situation whereby I am unable to fulfil my court ordered duties.'*

[17] The First Respondent in opposing this application avers as follows *'The urgency that the applicant asserts is both self-created and without a basis in fact.'* It is disingenuous of the First Respondent to aver that the Applicant waited two weeks before lodging this application. According to the Applicant's version the First Respondent when asked about the Bentley he had indicated that it belonged to his friend who was in Cape Town. Secondly, this caused the Applicant to investigate the ownership of the said vehicle. Why was the First Respondent not forthcoming with this information after the essence of the preservation order was explained to him? According to the First Respondent's version, he gave information about the Bentley on 17 October 2024 in the presence of his attorney. It begs the question, why would it be necessary for the Applicant to embark on an investigation about the purchase of this Bentley if he was provided with all material information?

[18] The lack of information on its whereabouts is not a neutral factor. It is about the prejudice that the Applicant as curator bonis appointed by the Court at the instance of the Commissioner for SARS will suffer dissipation of the value of the vehicle. In other words, the risk of dissipation of value is the key factor as it constitutes commercial interest. It is recognised that commercial interest may in appropriate cases justify invoking the provisions of Rule 6 (12)-see **Twentieth Century Fox Film Corporation & Another v Antony Black Films (Pty) Ltd 1982 (3) SA 582 (W)** at 586G. In his replying affidavit, the Applicant makes an averment which is relevant to the determination of urgency when he states *'... despite undertaking to cooperate with me, the first respondent has made no documents or records available to me despite several undertakings from both the first respondent and his attorney.'*

[19] On the issue of urgency, having assessed the totality of the evidence and facts, I am satisfied that the application is urgent. I am not persuaded that the urgency is self- created as Counsel for the Respondent argues and the First Respondent avers. After all, the notion of ‘self -created urgency means more than mere delay.’³ It must be noted that the facts show that the Applicant was doing investigations on the purchase of the Bentley. It was prudent upon the Applicant to do due diligence pertaining to the Bentley before making any application. The next issue is whether or not the Bentley falls within the ambit of the preservation order granted on 14 October 2024.

[20] What is apparent is that the said Bentley as of 15 October 2024 was in the possession of the First Respondent when he was interviewed about it. I find it strange that no sooner did the Applicant require further information on the ownership of the Bentley then it disappears from the garage. Factually as on 15th October 2024, the First Respondent was in possession thereof. The preservation order gives certain powers to the Applicant including –

‘all investments, movables and immovable assets and any realisable assets over which the respondents enjoy a right of possession or control, regardless of whether such property is in the possession or control of the respondents.’ To determine whether the Respondents enjoy the right of possession over the Bentley cannot be done in a vacuum, rather it must be done from the surrounding facts. The facts demonstrate that the First Respondent had possession over the Bentley who concedes to this fact. Therefore, the Bentley falls within the ambit of the preservation order.

[21] I make the above finding after interpreting the preservation order granted on 14 October 2024 utilising the trite principles as envisaged in **Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)** paras [18] – [20]. As of 15 October 2024, the First Respondent was in possession of the Bentley. Such possession is assessed within the context of annexure FA5 which indicates that the First Respondent represented the Fifth Respondent at the time of buying the Bentley. The First Respondent not only was he instrumental in the buying of this

³ See *Chung- Fung (Pty) Ltd and Another v Mayfair Residents Association and Others* (2023/080436) [2023] zagpjhc 1162 (13 October 2023) para [26].

vehicle, he had it in his garage thus it was under his possession. I am persuaded that he (First Respondent) enjoyed the right of possession. This caused the Bentley to fall within the ambit of the preservation order. Interestingly the preservation order does not specify that a particular Respondent must enjoy the right of possession. So the right of possession could very well apply to any of the Respondents. In any event, the crucial fact is that the Bentley was purchased by N & N Family Trust money, which in my view, caused the vehicle to fall within the ambit of the preservation order.

[22] It was therefore not supposed to be released to any other party other than the Applicant without due process. That is the very essence of a preservation order- the need to attach assets so that the control of the property passes from the First Respondent to the curator bonis as the officer duly appointed in terms of section 163. I am not convinced by the argument that if the Applicant needed to attach the Bentley, he needed to utilise the provisions of section 20 (5) of the Companies Act 71 of 2008. The preservation order in my humble view sufficiently gives certain powers to the Applicant to attach and therefore there would be no legal requirement to evoke the provisions of the Companies Act.

[23] The argument by the Respondents' Counsel that the Third Respondent is not covered by the preservation order ignores the contention that the Bentley was purchased by the proceeds from the N & N Family Trust- see Annexure FA4. In addition, there is annexure FA5 which is an affidavit deposed to by Mr Saul Brent Marks, who avers that *'Bentley JHB sold the Bentley to GG Securities, represented at all material times by Mr Noel Mashaba (with identity number *****).'* What is clear is that the First Respondent facilitated in the purchase of this Bentley. After holistic assessment of all the evidence, I am satisfied that the Bentley is linked to the proceedings and therefore falls within the ambit of the preservation order. The issue in my view is not the ownership per se, rather than where the money came from. In this case, the money came from the N & N Family Trust.

[24] For fear of repeating myself, the contention by the Respondents' Counsel that the preservation order is not retrospective therefore it does not link the Bentley is with respect not sound in my humble view. I hold this view simply because the

proceeds or the money came from an entity linked to the proceedings to wit N & N Family Trust. It is also interesting that N & N Family Trust is not opposing this application. To allow an interpretation as one proposed by the Respondent's Counsel will make a mockery of the purpose and essence of a preservation order. Secondly, it is incorrect to say that the preservation order does not operate retrospective because the First Respondent was found in possession of the Bentley a day after the preservation order. I find that the balance of convenience dictates that I give such an interpreting to the preservation order on the basis of possession that the First Respondent enjoyed as of 15 October 2024.

CONCLUSION:

[25] In conclusion, having considered the facts in this matter and submissions made by way of written and oral arguments, I am satisfied that the Applicant has made a case for urgency and that the said Bentley falls within the ambit of the preservation order as highlighted above. The First Respondent had the Bentley under his possession when it disappeared from his garage. The said vehicle was bought by the Trust money thus the Second to Fourth Respondents as trustees cannot absolved themselves of the responsibility to investigate the location of the said vehicle and disclose it.

COSTS:

[26] It is trite that the basic principle on costs is that the Court has a discretion which has to be exercised judicially. It is further trite that costs follow the result. There are exceptions to this basic rule such as where the successful party is deprived of the costs or where a party has had only a technical success and the nature of the litigation.⁴ I find no reasons to depart from the trite principle that costs should follow the result. The First, Second, Third and Fourth Respondents are ordered to pay costs as between attorney and client scale, the one paying and the others to be absolved. I am persuaded that the facts warrant such costs.

⁴ See *Bouwer and Another NNO v Master of High Court, Pretoria* (916/2022) [2023] ZASCA 135 (19 October 2023) para [22]

Order:

[27] In the circumstances the following order is made:

(1) The form, service and ordinary time periods provided for in the Rules are dispense with and the matter is dealt with as one of urgency as contemplated in Rule 6 (12) of the Uniform Rules.

(2) The Respondents are directed to disclose in writing the location of the Bentley Flying Spur Azure V8 with registration number LX 64 HT GP.

(3) The Respondents (who may be in possession or control of the Bentley) are directed to forthwith deliver the Bentley to the Applicant at the address nominated by him.

(4) The First to Fourth Respondents are ordered to pay the costs as between an attorney and client, the one paying and the others to be absolved.

MNCUBE AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

On behalf of the Applicant	: Adv. U. Van Niekerk
Instructed by	: JI van Niekerk Attorneys
	: 270 Main Street, Waterkloof
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	: Suite 101
On behalf of the First Respondents	: Adv. C. Dreyer
Instructed by	: Faber Goetz Ellis Austin Inc
	: Ground Floor, East View,
Bryanston	
Date of Hearing	: 7 November 2024
Date of Judgment	: 13 November 2024