REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

13/3/18
DATE SIGNATURE

13/3/18

Case Number 43511/2014

In the matter between:-

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	Applicant
And	
JEN-CHIH HUANG	First Respondent
SHOU-FANG HUANG	Second Respondent
MPISI TRADING 74 (PTY) LTD	Third Respondent
PRUDENCE FORWARDING (PTY) LTF	Fourth Respondent
CITY SHUFFLE TRADING 133 CC	Fifth Respondent
NETWAVE INTERNET CC	Sixth Respondent
ROKWA INVESTMENTS (PTY)LTD	Seventh Respondent

JUDGMENT

SATCHWELL J:

INTRODUCTION

1. Applicant (SARS) seeks confirmation of a provisional preservation order granted in terms of Section 163(4) of the Tax Administration Act 28 of 2011 (the TAA) in respect only of the first three respondents who all oppose such confirmation. The order is already final against the other respondents.

2. The *ex parte* application for a provisional order was granted on 12th June 2014 and the *rule nisi* has been extended on subsequent occasions.

EX PARTE APPLICATION AND ORDER OF JUNE 2014

Background

3. The provisional order was made pursuant to an application in terms of section 163(1) of the TAA. That section permits an *ex parte* application to be made to the High Court for the preservation of assets of a taxpayer or other person prohibiting any person from dealing with the assets to which the order relates. In the present matter, the preservation order having been granted, a *curator bonis* was appointed whose report is now available for consideration by this court.

4. In the almost four years succeeding the order, respondents have neither made application to the court anticipating any of the return dates nor for the discharge of the provisional order (see subsection 163(4) (c) of the TAA nor for variation or rescission of the order on the grounds set out in subsection 163 (7) or (9) of the TAA).

5. Respondents' opposition to the application for confirmation is, in the main, a challenge to the alleged failure by SARS to comply with the jurisdictional requirements applicable to the granting of the *ex parte* preservation order in June 2014.

6. The requirements of subsection 163(1) are not unclear. An application for such provisional order may be authorized and made where firstly, a "senior SARS official

on reasonable grounds is satisfied [that tax] may be due and payable" and secondly, "in order to prevent any realizable assets from being disposed of or removed which may frustrate the collection of the full amount of tax" which is either due and payable or which may become so. The court making any such preservation order may do so in terms of subsection (3) "if required to secure the collection of tax".

7. The *ex parte* application, comprised a founding affidavit by P Engelbrecht (Senior Manager; Centralised Projects, Tax and Customs Enforcement Investigations) to which were attached a more detailed affidavit by L Van Esch (Manager: Tax and Customs Enforcements Investigations) and numerous annexures altogether totaling some five ring-binder files.

8. The respondents were (and remain) Mr and Mrs Huang, three companies and two close corporations with interlinking directorships and memberships. Mr and Mrs Huang, married in community of property, are variously recorded as members, directors, managers, owners, shareholders therein. Significantly, third respondent, Mpisi, is a clearing and forwarding agent and the documents before me indicate an exchange of goods and funds between South Africa and the Peoples Republic of China in the course of that enterprise.

9. SARS goes so far as to aver[1] that " Mr Huang and/or Mpisi have used and continued to use various entities effectively controlled by Mr Huang, with directors and/or members who have virtually no knowledge of the business of such entities, as conduits to evade Mpisi's tax liability and to "export" large amounts of money which should have been declared, but have not have been declared, as taxable income." But that is not an issue which this court presently needs to decide.

10. There was considerable activity prior to the launch of the 2014 application:

    a. Tax returns were submitted by Mpisi for the years of assessment 2008, 2009, 2010, 2011 and 2012 reflecting nil tax owing.

[1] Paragraph 95 of the Founding Affidavit.

b. By June 2012 the South African Police Services had conducted a search and seizure of the residence of Mr and Mrs Huang as well as the business premises of Mpisi.

c. By April 2013 SARS executed a warrant for search and seizure at the residence of Mr and Mrs Huang and the business premises of Mpisi.

d. During 2013 SARS conducted an analysis of the flow of fund in various bank accounts involving both Mr and Mrs Huang and Mpisi and other entities.

e. During October 2013 an order was granted in terms of the TAA for the appointment of a tax enquiry which commenced it's hearings in November 2013.

f. Respondents were not merely passive bystanders – an application was launched for reconsideration of the SAPS warrant in May 2013 which was unsuccessful; several criminal complaints were was laid against SARS officials relating to their conduct over various periods of time and in relation to searches, seizures, contents of affidavits and so on; an urgent application was launched to halt the tax enquiry which was unsuccessful; an urgent application was made to interdict the giving of certain evidence at the tax enquiry which was unsuccessful.

Tax which "may be due and payable"

11. At the time of launching of the *ex parte* application and the granting of the order in June 2014, SARS then made a preliminary estimation [2] of the tax liabilities of the three opposing respondents to be as follows:

    a. Mr Huang – R 7.1 million. (for the tax years 2008 to 2013)

    b. Mrs Huang – R 641, 920.74. (for the tax years 2008 to 2013)

    c. Mpisi – R 165 million. (for the tax years 2008 and 2013)

12. The founding papers relied upon the following for this assertion.

[2] Paragraph 94 of the Founding Affidvait.

13. Firstly, amongst the documentation and electronic data storage facilities seized by SARS was found a hard copy document known as the 'LCL list ' which indicated funds emanating from Mr Huang and apparently pertaining (in part) to Mpisi which indicated income accruing to Huang and income to Mpisi . Such income correlated with neither bank statements nor loan accounts and the reasons for disbursements or payments were unknown. However, the evidence of Mr Huang at the tax enquiry disavowed his involvement in Mpisi business affairs or knowledge of this document. It is true that the author of the document is unknown and it's authenticity could not then (at the ex parte hearing) be tested. But, as I discuss later, his own commentary in his answering affidavit continues to raise question regarding this document.

14. Secondly, insofar as the joint estate of both Mr and Mrs Huang is concerned, some of the information then available indicated that , *inter alia,* Mr Litabe of Netwave was 'given' his membership holding in Netwave by Mr Huang; Mr Huang made payments in respect of acquisition of members interests in Netwave; Mr Huang established City Shuffle which imports garments from China for on-sale to wholesalers; financial statements of City Shuffle for 2008 and 2009 identify Mr and Mrs Huang as directors in one year but allegedly another Mr Huang in the previous year; Mr Huang received payments through Absa Bank from City Shuffle; loan accounts in the name of Mr Huang in the books of other respondents;

15. Thirdly, from the documentation and the evidence of witnesses at the tax enquiry it appears that the financial affairs of the other respondents were dealt with within Mpisi which provided various accounting services thereto as well as other services ranging from IT to personnel and lease of premises. The financial and tax affairs of those other respondents were replete with lacunae and inconsistencies.

16. Sixth, in the course of the tax enquiry it emerged that directors or employees were incapable of answering questions about the business operations or financial management of Mpisi. Mr Huang, director and shareholder, claimed that he "was not permitted to get involved in managing or paying of, making of any payments". Mr Chetty (a shareholder and director and employee in Mpisi) claimed to have no

involvement in decision making although he held signing powers in respect of Mpisi documents with the Bank of Taiwan and Standard Bank and FNB . He went so far at the enquiry to say he could give no explanation for the instructions given to Bank of Taiwan to transfer funds but that "it could be Mr Huang, Mr Lee or any of the employees"[3]. Mr Lee (shareholder and employee in Mpisi), who had signed off the financial statements of Mpisi, was unable to provide answers to questions in respect of various transactions including payments of large sums of money by Mpisi to other respondents[4] as well as foreign exchange applications as a result of which large amounts of monies left South Africa. It then turned out that Lee signed only one application form which was thereafter photocopies and used for different transactions[5]. Furthermore, it appears that there are discrepancies between supplier/customs/Bank of Taiwan/Reserve Bank/SARS invoices[6] in respect of those foreign exchange applications. Unfortunately, a full and conveniently paginated record of the tax enquiry is not to hand, the founding affidavit does not refer to the source document and the heads of argument rely only on the founding affidavit. I cannot therefore verify for myself all the evidence actually given at the enquiry upon which SARS relies and refer only to that which I could extract from 15 ringbinder files and over 5 000 pages of documents.

17. Fourth, once the tax enquiry commenced significant employees became unavailable. For instance, the accounting manager of Mpisi, Ms Chen, did not appear because she was supposedly on maternity leave and then it emerged that Ms Chen had resigned from Mpisi. Another example is that the internal auditor of Mpisi was requested to provide information and documentation including management accounts to the tax enquiry but failed to do on the grounds that she had been instructed by Mr Huang not to make such available.

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[33] Page 811 of the papers.
[4] Page 905 of the papers.
[5] Paragraph 167 – 168 of the Founding Affidavit.
[6] Paragraph 170 to 171 of Founding Affidavit.

18. Fifth, Mr Lee, a shareholder in Mpisi , testified at the enquiry that he disposed of accounting records in an another company[7] by simply throwing "them away in dustbins" on the grounds that the company was being closed down because it was not making money. When it was pointed out that the bank account of that company showed millions of Rand entering and departing through the Bank of Taiwan, Mr Lee disavowed any knowledge of the company bank account and claimed only Mr Richard Mu – of Mpisi – could explain. But Mr Mu of Mpisi then became unavailable.

19. Sixth, analysis of the flow of funds in Bank of Taiwan statements and in such financial records as were available indicated large inter company transfers between Mpsi and the other respondents and to other entities many of which were not tax compliant as well as to unknown or unidentified parties and out of South Africa - which no one in Mpisi could or sought to explain at the tax enquiry. I might add, no explanation was offered in the answering and subsequent affidavits.

20. Seventh, entities other than respondents (known as the "Razi entities) which are apparently not tax compliant had made payments to Mpisi[8] whilst Mpisi had made payments to the same entities (in the "Razi group)[9] - all through the Bank of Taiwan – which no one seems capable of providing lawful justification therefore (see the evidence of Huang, Lee, Tsai, Litabe and Chetty at the tax enquiry) or including such inflows as 'income' for tax purposes. The basis of financial transactions were not explained by those senior management or employees who should have known or through a paper trail. Monies appear to have ebbed and flowed both onshore and offshore like the tides with far less explanation than the relationship between the sun and the moon.

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[7] Supreme - which company SARS believes to be part of the interlocking grouping of entities which operate as a conduit for the tax-evading flow of funds.

[8] See pages 791 and 792 of the papers

[9] Page 793 of the papers.

21. Nothing has been presented to me to suggest that the estimation of tax which may be due and payable which was made by SARS prior to the 2014 application for a provisional order was not based on reasonable grounds.

Risk of "realizable assets disposed of or removed"

22. The affidavit of Engelbrecht is superficial on the issue of the apprehension of dissipation of assets which may be available to satisfy collection of tax which may be due or payable. At paragraph 77 thereof, he asserted "it is mainly on the basis of the evidence obtained during the tax inquiry, the massive extent of the non-compliance by and probable tax liabilities of those whose affairs are being investigated, and the evidence as to the manner in which funds and assets of those under investigation have been dealt with, that SARS came to realize that there is an appreciable risk that assets may be disposed of or removed with the consequence that the collection of the full amount of taxes (in an amount still to be determined) will be frustrated".

23. I agree with the critique by Mr Vorster, appearing for opposing respondents, that the Founding Affidavit is, in itself very slim on any detail as to the alleged risk of dissipation. I asked Mr Maritz, appearing for applicant, to prepare a schedule for the court indicating the past instances of actual dissipation and the perceived risks of possible removal of assets. Regrettably, I received no more than a rehash of Engelbrecht's affidavit with page numbers attached. It would seem that SARS takes lightly some of the requirements placed upon it before it can exercise these very draconian powers. Mr Vorster argued that the Founding Affidavit failed to identify any incident which would give rise to an apprehension of dissipation. Mr Maritz preferred to focus on the general context.

24. But the risk or apprehension required by section 163(1) does emerge from the annexures to Engelgbrecht's founding affidavit. The value of annexures to a founding affidavit as evidence was addressed in *Executive, FSB v Dynamic Wealth 2012 (1) SA 453 SCA* at paragraph [15].

25. I cannot see that this court should ignore the existence of such information merely because there is absence of formulaic repetition of the contents of annexures in Engelbrecht's founding affidavit or because there is absence of interpretation thereof in Engelbrecht's founding affidavit. Engelbrecht told the court he had read all the material, had formed an opinion thereon and what his opinion was. He gave the court the opportunity to read the original material and assess the reasonableness of his opinion and form it's own view so as to exercise its discretion as to whether or not the order was "required" in terms of subsection 163 (3).

26. The risk or apprehension may be summarized from those same facts which I have set out in dealing with the estimation of tax above. Huang (and thus the estate of his in-community spouse Mrs Huang) are embroiled in the affairs of entities which are not tax compliant; one such entity is Mpisi which transfers and receives funds for which flows the management and employees are either unable to or prohibited from attempting to explain; monies depart this country through, *inter alia,* the Bank of Taiwan which removal is based upon documentation which is unexplained, contradictory and inconsistent; monies move between entities and individuals without satisfactory explanation or any attempt to provide same.

27. I note that the 'Razi' entities are not respondents in this matter. Yet, funds moved back and forth between them and Mpisi and were handled on their behalf by Mpisi and disappeared like the proverbial moondust.

28. To my mind, Engelbrecht did not overstep the mark in forming the opinion that an application needed to be made for a provisional order "in order to prevent any realizable assets from disposed of or removed which may frustrate the collection of the full amount of tax that .. the official on reasonable grounds is satisfied may be due and payable".

CONFIRMATION OF THE PROVISONAL APPLICATION

29. Subsequent to the granting of the provisional order, the three remaining respondents requested extensions of the return date on various occasions on the grounds that they wished to finalise their annual financial statements for the 2013 and 2014 financial years. I have no knowledge of the connection between finalization of such financial documents and preparation of an answering affidavit in this main application and make no comment thereon, save to note that there has been neither claim of 'hardship' nor application based upon the "hardship" consideration as set out in subsections (7) or (9) and that I take this into account (as one of many, many factors) in determining the outcome of this application.

30. Much has happened since the provisional order was granted nearly three years ago which include:

    a. The 786 page Preliminary Forensic Accounting Report Bowman Gilfillan Inc forwarded to SARS on 15 July 2015.
    b. Affidavit and Report of the Curator Bonis dated 29th April and 18th July 2016.
    c. Expert Summaries prepared by A Greyling and K-A Lagler both accounting experts whose reports are both dated June 2016.
    d. Three reports were prepared by Hill Accounting Income Tax and Financial Services appear to be undated but are attached to an affidavit prepared by the author dated 27th July 2017.
    e. Tax assessment by SARS and objection thereto by the opposing respondents.

31. The significant outcomes - set out in the answering and replying and subsequent affidavits together with all annexures are in respect of the both liability for tax and the disposal or removal of assets - may be summarized as follows.

Tax Liability

32. SARS commissioned an investigation by Bowman Gilfillan which presented a preliminary report. Respondents commissioned a report by Hill Accounting. Respondents commissioned two opinions on the 'reasonableness' of the assessments made by SARS. It is not for this court to determine any tax liability in respect of any taxpayer. Suffice to say, that there seems to be some consensus that there is " tax due and payable" although the amount is currently under objection.

33. The figures presented to the court are:

    a. Tax liabilities estimated by Bowman Gilfillan[10] as follows:
        i. Mr Huang – R 88, 462,474.
        ii. Mrs Huang – R 6, 780,967.
        iii. Mpisi – R 273, 722, 001.

    b. Tax indebtedness calculated in the Hill Accounting Report[11] indicated it calculated the tax indebtedness as follows:
        i. Mr Huang – R 14, 630, 751.
        ii. Mrs Huang – R 2, 776,166.
        iii. Mpisi – R 85, 668,419 (income tax and VAT).

    c. SARS estimated the tax liability of the respondents (without reference to interest or penalties) as follows:
        i. Mr Huang – R 88 million.
        ii. Mrs Huang – R 6.5 million.
        iii. Mpisi – R 178 million (income tax), R 75 million (VAT)

    d. SARS has now assessed the tax indebtedness of Mrs Huang in excess of R 9 million, Mr Huang at R 121 million and the tax indebtedness of Mpisi at R 298

[10] Page 786 of the Report.
[11] Pages 4799 to 4870 of the Reports.

million (excluding VAT). Objections thereto have been noted by all three of the opposing respondents which objections are under consideration[12].

34. At the very least, on the basis as set out by Hill Accounting, the advice given to Mr and Mrs Huang and Hill Accounting by the advisor selected by them and whose reports the respondents have annexed, the three opposing respondents are liable for payment of tax as set out in the report of Hill Accounting. No concession was made at the hearing that these calculations are accepted by the respondents or that they acknowledge that they are so liable for tax in those (or any) amounts – but these are the figures which the respondents have presented to the court.

35. On such amounts of tax which are now due and payable or may be due and payable, the opposing respondents' own expert has not included interest and penalties. There has also, not on these papers, been any offer to make payment of such amount of tax nor any offer of security in respect of that tax which may ultimately be agreed by settlement or ordered by a court.

Prevention of "realizable assets from being disposed of or removed".

Report of Curator Bonis

36. The first concern of this court is the result of the report of the Curator Bonis[13]. It indicates a state of financial chaos – from numerous bank accounts for no particular reason to an absence of records to an inability to prepare such records to an impossibility to correlate inflows and outflows of funds.

37. In particular, the curator found that 'financial management processes and procedures were very limited", 'bank reconciliations were not done frequently', the taxpayer was unable to 'conform the source of a large proportion of the income into its bank accounts', 'the submission of the SARS returns was incomplete and irregular' and ' the

[12] The reports of Greyling and Lagler deal with the question of 'reasonability' of SARS assessments which is not a matter for consideration by this court.
[13] Pages 4196 to 4260 – dated 29th April and 18th July 2016.

accounting systems in operation... was not fully implemented or integrated which meant the data obtained from it was fundamentally incorrect or incomplete'.

38. Clearly there are many business and enterprises whose affairs and management thereof are undisciplined and incoherent but that does not and would not entitle SARS to ask a court to appoint a curator to barge in and run the business. Financial mismanagement in a mainly cash business cannot be seen as grounds for assuming or finding that assets of a taxpayer are about to be or have been or are in the process of being removed or disposed of with the result of frustrating the collection of tax. The grant of a preservation order in terms of section 163(3) must be seen as an extraordinary remedy and, as submitted by Mr Vorster, not part of the usual arsenal available to SARS in the collection of taxes.

39. But, where there is such mismanagement and incoherence in the financial affairs and this is coupled with and related to direct evidence of removal or dissipation of assets, then this becomes one of many relevant factors in making a determination whether or not a preservation order in terms of 163(3) is "required".

Bowman Gilfillan Report

40. Second, the preliminary report on tax liability provided by Bowman Gilfillan found that the corporate entities operated with " no clear operational mandate" suggestive of "an endeavor to conceal and to confuse". This, inter alia, involved "extensive use of unrecorded cash transactions and significant revelations of misrepresentations, forgeries and falsifications to tax, customs and Reserve Bank authorities" . Such behavior fueled "compelling suspicions of extensive tax evasion, racketeering and money laundering activities".[14] The BG Report addressed only the direct tax implications but did make reference to evidence of "criminal activity".

41. I was not proferred an analysis of the BG report but on reading same noted references to 'unknown receipts' and merely 'cheque deposit' in bank statements; 'petty cash'

[14] Executive Summary page 2926.

allocations was used to record significant value payments; payments were made resulting in "unrecorded cash income and expenses"; expenses claimed could not be verified ; funds were received from Mr Huang and had to be categorized; material differences in depreciation of assets and wear and tear allowances; loan accounts and salaries needed adjustment; turnover was under-declared; bank transactions were identified in relation to unidentified entities; the source of deposits into Mpisi could sometimes not be traced; certain of the LCL entries on that list could not be found in the records; variances between amounts declared to customs and funds leaving the country; comparison of invoices and ledgers indicated the incomplete nature of Mpisi invoices; differences were noted between customs data and bank accounts; variations between payments made to foreign suppliers and the value declared to customs; and so on.

42. As I have indicated the BG Report is very long and it is impossible to replicate detailed instances which justify each of the conclusions set out in the executive summary but there can be no doubt, notwithstanding the critique contained in the Hill Accounting Report, that it is reasonable to apprehend therefrom that dissipation or removal of assets both within and without the Republic of South Africa has already taken place.

The Hill Accounting Reports

43. The three reports commissioned by the respondents and included in these papers, give some indication of sleight of hand insofar as use of and flow of funds are concerned. Where the reports critique the work of Bowman Gilfillan, I make no comment since that will be a matter for the tax court in due course is the objections are disallowed and there is an appeal.

44. I was alerted to discussion by Hill Accounting of what is there described, from a total of R 13 million, as a loan by Mpisi to Mrs Huang in the amount of R 8.5 million [15].

    a. However, the affidavit by J Toba (Senior Manger in the Legal Division, Delivery Support and Dispute Resolution for SARS) in response to the further affidavit of

[15] Page 4818 of the papers.

the opposing respondents points out that the South African Reserve Bank identifies that sum of R 13 million as being in respect of "freight' and in the 2014 year of assessment as being for "freight" , "payment for passenger services" and "commission or brokerage".

b. The upshot is that, according to the documentation in the possession of the Reserve Bank, these foreign outward payments are not a loan in the accounts of Msibi and were misdescribed when these funds left South Africa. On the analysis of Hill Accounting at least 8.5 million of the R 13 million should constitute income taxable in the hands of Mrs Huang but these funds have now gone offshore.

45. This evidence gives rise to my third concern. There is clear evidence of foreign outward payments involving both Mrs Huang and Msibi where such payments have been wrongly/incorrectly/dishonestly/inaccurately/inconsistently identified as and therefore justified as 'freight' etcetera when the books of Msibi refer to portion thereof as being in the 'loan account'. There can be no doubt that this constitutes an actual dissipation or removal of assets which may frustrate the collection of the full amount of tax due and payable.

Respondents' affidavits

46. In their affidavits, the respondents have denied any knowledge of any dissipation of assets and invited SARS to clarify the grounds for such apprehension. But denial alone is insufficient where the facts are within the knowledge of persons such as Mr Huang and his co-director in Mpisi or his employees in Mpisi or Mrs Huang in relation to her suggested 'loan account' in Mpisi [16].

47. I agree with respondents' counsel, Mr Vorster, that SARS has not been clear or forthcoming but has waffled and referred to context rather than providing precise instances of past dissipation or detailed grounds for current apprehension. The Founding Affidavit is vague, the Heads of Argument repeat that vagueness and the

[16] See the discussion in *Wightman t/a JW Construction v Headfour (Pty) Ltd and another 2008(3) SA 371* at paragraph 13.

schedule presented to me purporting to indicate 'material risk of disposal of assets' prefers to refer once again to the affidavits rather than source documents (or even give page or ring binder number which has made the task of wading through fifteen ring binder files extremely difficult).

48. However, I do not find the affidavits in respect of each of or all of the opposing respondents meet the case put up by SARS. Much of that contained therein is irrelevant ('rogue units' for instance or merely argumentative and consists of complaints of victimization). But the following are substantive issues:

    i. Mr Huang disavows and claims to have never seen the LCL list but his evidence at the tax enquiry first disputed that he kept "any business documents at home" and then stated that "I did not produce these documents" thereafter that he did not know why these documents were at his house and finally speculated that perhaps some of his senior managers may have come to dinner and left the documents there. I do not agree with Mr Maritz that this document must necessarily have emanated from Mr Huang but I do accept that this is a document which, has been (in part) correlated with the books and accounts of Mpisi (such as they are) by Bowman Gilfillan and that the document therefore pertains either to Mr Huang – at whose house it was found - or to Mpisi – to whose business enterprises it pertains and whose senior managers may be the authors according to Mr Huang himself, director of Mpisi. Mr Vorster is correct that the provenance is murky and evidential value limited – but this is part of the context and sets the scene.

    ii. The quality of interpretation of the evidence given by Lee at the tax enquiry is challenged. But Mr Lee had the benefit of a first interpreter who left and a second interpreter about whom there was no complaint and the assistance of his personal legal advisor (now his attorney). It is notable that the recordings of evidence have been tendered with the opportunity to check the accuracy of interpretation but that respondent

has brought no mistakes or miscommunications to the attention of this court.

iii. The departure of staff from Mpisi as maintained by SARS is challenged as being "misleading, false, reckless" in its intention to mislead the court and the service of subpoenae on employees of Mpisi (such as Mr Lin and Ms Chikomo) as "unreasonable". But the difficulty remains that the absence of staff, the inability of those who remained to give evidence at the tax enquiry, the failure of those persons who remained to properly explain and clarify procedures and practices and the business operations of Mpisi is regrettable. Where explanations will not be and are not offered by those from whom an explanation is expected, then the court is placed in the invidious position of having nothing to gainsay the documents upon which SARS relies. Mr Huang's explanation that he had no involvement in the day to day management or the finances of Mpisi; the departure of Mr Mu for China; the evidence of Mr Chetty that he had no knowledge of the finances of Mpsi but signing powers on bank documents do not assist the respondents at all.

iv. Subsequent to execution by SARS of the search and seizure warrants in June 2013, Mr Lee (now deceased) approached the SAPS at Bedfordview on 11th December 2013 (or 12th November 2013) and deposed to an affidavit (obviously without the assistance of his then firm of attorneys) in his capacity as a director and shareholder of Mpisi stating that Mpisi had been presented with a Bank of Taiwan document by SARS the contents of which were contrary to Mpisi invoices which had now led Mr Lee to state "I suspect that there is somebody who I'm not sure of but busy fraudulating the Company. So I request more further Police Investigation in this Matter."

v. Subsequent to the tax enquiry, Mr Richard Mu deposed to an affidavit[17] wherein he admitted to siphoning some three hundred millions of Rands to the Peoples Republic of China through the Bank of Taiwan. That affidavit states that Mu was employed by Mpisi over a period of some 6 years as an accounts supervisor during which time he colluded with employees of the Bank of Taiwan to devise a scheme for the remittal of funds to the Peoples Republic of China using accounts opened in the names of a number of entities (the 'Razi' entities which are not respondents). (Insofar as the 'Razi' entities are concerned, there is no evidence that any of the respondents are shareholders or directors thereof but the addresses of Mpisi properties were utilized in their interaction with the Bank of Taiwan.)

1. Mu specifically states in his 'affidavit[18] that "the monies deposited into Bank of Taiwan's account held at Nedbank Ltd did not emanate from Mpisi or any of its associated or related entities'. He makes it clear that he opened bank accounts at the Bank of Taiwan in the names of Razimate, Razinet and Raziglo and that the clients he and his confederates employed was to procure transfer of funds into those accounts for onwards transmission to China. The only suggestion of a connection to Mpisi (other than his employment and introduction to some Mpisi clients) is that he says "I would manipulate the clearance documents and invoices to match the amount to be transferred as well as well as the nominated payee" which does not clearly suggest any use of Mpisi documents or invoices.
2. It is then difficult to comprehend on what basis Mr Huang can state in his affidavit that "insofar as there were large inter-company transactions between Mpisi and the Razi entities during the 2013 year or assessment, these transactions were not

[17] Page 1825 of the papers.
[18] Neither deposed to nor authenticated in accordance with the Rules of the High Court.

authorised by Mpisi but instead the result of a fraudulent scam conducted by Mr Richard Mu."[19] The purported 'confession' of Mu is of no assistance to Mpisi or its director Mr Huang in respect of the admitted (and apparently inexplicable) transmission of funds from Mpisi own funds to China. The sum involved is apparently in the region of some R 1 billion. Insofar as the Mu 'affidavit' is thought to offer a version to explain the outflows of Mpisi funds from South Africa – this version does not appear to assist. At most, it could perhaps explain 30% thereof – Mr Mu's R300 million!

"PRESERVATION ORDER REQUIRED"

49. The test for the granting of a preservation order in terms of section 163 is that the court must be satisfied that such order is "required to secure the collection of the tax". It seems to be accepted that 'necessity' does not have to be shown (*Clutchco (Pty) Ltd v Davis 2005 (3) SA 486 SCA* in the context of 'required' *and particularly Commissioner for the South African Revenue Service v Van der Merwe WCC case No 13048/13 dated February 2014* when dealing with section 163(3)).

50. Rogers J married the language used in earlier cases in his comment in *CSARS v Tradex 2015(3) SA 596 WCC* at paragraph [32] that "...preservation of assets could be said to be 'required to secure the collection of tax' if preservation would confer a substantial advantage in the collection of the tax. I venture to suggest that, once one has concluded that 'a substantial advantage' has been shown, one could simultaneously conclude that there was 'an element of need' sufficient to meet 'the required' (ie 'reasonably required') test".

51. The very purpose of section 163 is to allow for the granting of a "preservation order". To my mind, the focus must therefore be to ensure, insofar as is possible, that assets

[19] At paragraph 496 of the respondents answering affidavit.

are preserved so as to be available for payment of taxes. Such assets are either realizable assets already seized by SARS or as may be specified in the order or "all realisable assets held by the person" or "all assets which after transfer would become realisable (subsections (163 (3) (a, b, c or d).

52. Whereas the common law anti-dissipation order requires *prima facie* proof that respondents will dissipate assets with the intention of defeating applicant's claim, the very enactment of section 163 of the TAA suggests that SARS need not meet the standards of the common law. No proof of intention on the part of the taxpayer is required in section 163.

53. But such a preservation order is not simply to be had for the asking. In meeting the standard of persuading the court that such a preservation order is "required" for the purposes of the section (ensuring availability of assets for payment of tax which assets would otherwise go walkabout), SARS should cover a cover a canvas which ranges from the existence of material risk that assets will be diminished through to the practical advantage of a preservation order.

54. I am satisfied (notwithstanding disputes which can be fully ventilated if and when this matter is heard in the tax court) on these papers that there has been delinquency in the tax affairs of the respondents and that there is a tax liability in respect of each respondent still to be finalized by way of settlement or litigation.

55. I am satisfied that , on a balance of probabilities, dissipation of assets in the past has been shown. Payments have been made in and out of Mpisi both to and from or for and behalf of Mr Huang and Mrs Huang and their joint estate. Such removal of hundreds of rands in unexplained expenditure, thousands of rands of outflows to other entities or individuals with unjustified or contradictory justification, millions of rands of opaque transactions with contrary or refuted warrant – from Mr Huang and Mrs Huang and their joint estate and from Mpisi can only but persuade this court that there has already been removal and dissipation of assets both within and without the Republic of South Africa.

56. The result is that there is a more than reasonable apprehension of the material risk of continuing and future dissipation. The methodology is known and practiced, the means are available, the design is accepted and pursued.

57. It has only been the appointment of the curator bonis which has disrupted the patterns of the past and which has introduced a more transparent means of operation. The incoherence of the past business operations of Mpisi permitted the dissipation which took place and the allocation of funds to Mrs Huang to remit from the country and the director of and shareholder in Mpisi, Mr Huang, to renounce all knowledge of and responsibility for the removal of assets.

58. I appreciate that the appointment of the curator was and remains an intrusion into the rights of the taxpayer. However, Mr Hunag made it clear at the tax enquiry that he did not consider himself to be involved in the day-to-day operations of Mpisi; Mrs Huang was then and may still be an employee of one of the other respondents; neither have indicated any hardships in respect of this appointment. I have concern that respondents have given no indication which personnel would manage the affairs of Mpisi should the curator cease to be in control. The prior state of mismanagement as identified by the curator and Bowman Gilfillan, the claimed non-involvement of Huang, the demise of Lee, the departure for China of staff, the ignorance of Chetty all suggest an absence of any competency which would ensure that realizable assets are not disposed or nor removed as previously happened.

59. In any event, it has not been shown that the appointment of the curator has been to achieve anything other than to improve the efficiencies of Mpisi and no decrease in value has been alleged. Insofar as the not inconsiderable personal assets of Mr and Mrs Huang and their joint estate are concerned, neither have needed to approach the court in terms of subsection (7) and (9) of section 163 of the TAA.

ORDER

60. Applicant sought to have the order of 12th June 2014 made by Ledwaba DJP confirmed whilst the respondents sought to have such application dismissed.

61. I see no reason to amend the order or make an order in a different form. The continuing work of the curator bonis appears to me to be of inestimable value.

62. Accordingly, orders are made as follows:

    a. The provisional order handed down in this court on 12th June 29014 by Ledwaba DJP is confirmed.
    b. Opposing respondents – first, second and third respondent - are to pay the costs of the application jointly and severally, the one paying the other to be absolved, such costs to include the costs attendant upon the employ by applicant

13th

DATED AT JOHANNESBURG THIS ~~14~~ TH DAY OF MARCH 2018.
HANDED DOWN AT PRETORIA.

Satchwell J

Heard at Pretoria 5th, 6th, 7th March 2018
For Applicant:
MacRobert Attorneys (C A Wesssels)
Advocate N Maritz SC
Advocate C Naude

For Respondents:
Chen and Lin Attorneys Inc.((B Meyer)
Advocate H Vorster