IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED.

26/10/2022

DATE SIGNATURE

CASE NO: 40873/20

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	Applicant
and	
KABELO JOHN MATSEPE	Respondent

JUDGMENT

MBONGWE, J

INTRODUCTION

[1] This matter served before me in the motion court on the 25 April 2022. In the application, the applicant sought an order for the sequestration of the estate of the respondent on the ground that it was factually insolvent. The respondent opposed the application. At the end of the hearing and after considering the merits, I gave the orders prayed for by the applicant in the notice of motion. The respondent has since filed a notice in terms of Rule 49 of the Uniform Rules of court requesting written reasons for the order made.

[2] It is common cause that the debt relied upon by the applicant arises from a series of individual income tax and VAT assessments that were issued to the respondent by SARS. The assessments were in respect of the periods 2016 – 2018 and November 2015 – March 2018. The total amount of the assessments stood at R61 531 311.27 when summons were issued against the him to recover the amount. It is also common cause that the respondent did not object to the assessments timeously or at all. While he alleges to have raised an objection, which the applicant denies, the respondent has not produced any proof in this regard. The respondent had a further opportunity to provide proof when the court had allowed him to file a further affidavit by 31st January 2022 and the applicant a response by 15th February 2022. The respondent filed his further affidavit and, in fact filed another unauthorised affidavit dated 01st March 2022. Except for his bold allegations, the respondent has not proved that he had raised objections to the

assessments, at least timeously. In terms of section 100(1)(b) of the Tax Administration Act 28 of 2011 ("the Act"), an assessment becomes final if no objection is made or made timeously. Section 100(1)(b) of the Act which read thus:

> *"An assessment or a decision referred to in section 104(2) is final if, in relation to the assessment or decision, no objection has been made, or an objection has been withdrawn."*

[3] The respondent was served with summons wherein the assessed amount was claimed. He did not defend the action resulting in the applicant proceeding in accordance with the provisions of section 172 of the Tax Administration Act 28 of 2011 ("the Act") to seek default judgment against him. Default judgment was granted on 12th August 2020.

[4] The position as I heard the matter was as follows; there is no record of pending proceedings in which the respondent seeks a rescission of the default judgment; as already stated, the respondent did not object to the assessments and they have since become final. There is no pending appeal instituted by the respondent under Chapter 9 of the Act against any aspect of the assessments. The default judgment against the respondent remains extant.

APPLICABLE LEGAL PRINCIPLES

[5] The above concise summary of the circumstances in this case preclude this court from entertaining any opposition to the assessments giving rise to the respondent's indebtedness to SARS. All that is remaining is to apply the law to the existing situation. The respondent has not shown that he has had the assessments invalidated and /or that the default judgment against has or is in the process of being rescinded. He therefore remains indebted to SARS. In *Medox Ltd v*

Commissioner, South African Revenue Service 2015 (6) SA 310 (SCA), the appellant had sought an order declaring a series of tax assessment null and void. The appellant complaint was that these assessments did not take into account its assessed loss for the 1997 tax year. The appellant had realised that this was the case in 2009; - twelve years later. He had not objected to the assessments he alleged were incorrect. The court, in declining the application stated:

> *"As it is common cause that Medox did not object in terms of section 81 of the Act to any of the assessments issued in respect of the 1998 and subsequent tax years, it will immediately be apparent that Medox's contention that it has aright to have these assessments declared null and void, flies in the face of the provisions of s81(5) of the Act. The latter subsection expressly provides that where no objection is made to an assessment, such assessment shall be final and conclusive. In addition, it should be bourn in mind that more than three years have elapsed from the date of each of these assessments, with the result that, by virtue of the provisions of s 81(2)(b) of the Act, the Commissioner is precluded from reopening the assessments. This court has over the years dealt with the provisions worded similarly to section 81(5) of the Act and confirmed that, where no objection is made to an assessment issued by the relevant tax authority, the assessment is final and conclusive as between the tax authority and the taxpayer. These decisions have been collected in Commissioner for Inland Revenue v Bowman NO 1990 (3) SA 311 (A) at 316B – C. Further, at 316 E, Goldstone AJA, writing for the court, reiterated that an assessment to which no objection has been made 'becomes binding upon the taxpayer as a statutory obligation'."*

[6] The necessity to raise an objection to a tax assessment in the event of disagreement with it was expressed by the court at para 15 where it states that:

> [to] *''grant aggrieved taxpayers carte blanche to approach the High Court in virtually every instance where they disagree with an assessment made by the Commissioner."*

[7] It is apparent from the import the court has given to the provisions of section 81(5) in relation to this case that there is no marked difference in meaning between the provisions of both sections 81(5) and section 100(1(b) of the Act. The essence in both is that, in the absence of an objection to a tax assessment, that assessment becomes final and binding. An approach to the court for relief where no objection to an assessment had been made and the validity of the assessment successfully challenged, is an exercise in futility. Similarly, there can be no valid opposition to an application for sequestration emanating from an unpaid tax amount the assessment of which was not successfully objected to.

GROUNDS OF OPPOSITION

[8] The respondent has raised five grounds on which he basis his opposition. These grounds are considered hereunder.

NON – JOINDER OF MOSHATE

[9] It is common cause that respondent's debt arises from a series of tax assessments SARS issued in respect of the respondent in his personal capacity and not in respect of Moshate. It was consequently not necessary to cite Moshate as a party in these proceedings. In any event the respondent did not file any objection to the series of assessments and the period within which he could do so has long lapsed.

[10] According to the respondent, Moshate should have been joined because:

> "*Moshate was appointed by VBS Mutual Bank Limited as a service provider to render marketing and capital raising services for the bank for a commission. I have not in my personal capacity rendered any of the said services....Accordingly there is no rationale which justifies the applicant to decide to issue assessments against me relating to transactions between VBS Bank and Moshate.*"
>
> [paras 7 – 8 of the respondent affidavit]

[11] I pause to state that the above statement is concerning especially considering that the respondent is legally represented in these proceedings. The respondent's assertions display an oblivion of the duties and obligations the company laws impose on him as the director of the company. To perceive his company and its status as a conduit to make money and a shield against a statutory demand for payment of tax is baffling, to say the least. Misplaced as it is, this perception is the crux of the respondent's opposition to this application.

[12] The order sought in these proceedings is against the respondent, the director of Moshate, and does not affect Moshate. The respondent's opposition premised on the non-joinder stands to be dismissed.

[13] The respondent also premises its opposition to the relief sought on the principle in *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T). The principle concerned is that the application for the liquidation of a company must not be resorted to in order to enforce payment of a debt that is bona fide disputed by the company. This principle clear finds no application in the present matter. Firstly, the respondent is not a company. Secondly, the debt to SARS is

not disputed in that the respondent had not objected to the series of assessments it arose from and such assessments became final. In *Trinity Asset Management v Grindstone* 2018 (1) SA 94 (CC) at 119 [86] the Constitutional Court explained the Badenhorst principle thus; The Badenhorst principle does not, therefore, support the respondent's opposition. The opposition in this regard must therefore be rejected.

[14] In respect of the value added tax (VAT), the respondent alleges that the services that Moshate rendered to VBS Bank, namely, marketing and raising capital, were exempt from VAT. This argument cannot stand for two reasons: - the respondent did not object to the VAT assessments and, secondly, the financial services exempted from VAT are listed in section 2 of the Value-Added Tax Act 89 of 1999. Marketing and raising of capital are not in the list. These services are accordingly subject to VAT.

INSOLVENCY OF THE RESPONDENT

ASSETS

[15] The applicant's assertion that the respondent has no payment towards its debt was not disputed. In proving and submitting that the respondent is incapable of paying its debt and that the respondent is in fact factually insolvent, the applicant has listed four assets of the respondent (immovable and movable) as follows;

15.1 An immovable property on which a bond in favour of VBS Mutual Bank in the amount of R5 391 535,00 was registered in November 2017. A sworn valuation of this property at R4m (Four million rand) is attached to the applicant's founding affidavit. These details were not disputed by the respondent.

15.2 Three motor vehicles registered in the name of the respondent purchased in September, October and November 2017 and valued at R115 000 -00, R115 000-00 and R880 000-00, respectively. A sworn valuation of each motor vehicle is attached to the founding affidavit of the applicant and has not been disputed by the respondent.

[16] The applicant submitted that flowing from the above information, the value of the respondent's assets totals R5 110 000-00.

LIABILITIES

[17] The respondent's liabilities amount to R66 922 864.27 made up as follows:

17.1 R5 391 535 in respect of the loan from VBS Mutual Bank;

17.2 R61 531 311.27 to SARS as at 12 August 2020 when default judgment was granted.

[18] The facts in paras 7, 8 and 9 indicate that the respondent's liabilities exceed his assets by R61 812 846.22 and that the respondent, by its inability to pay its debt to the applicant, is factually insolvent.

[19] In response to the comparison of the value of his assets as against his liabilities, and in a purported opposition to the granting of the sequestration application, the respondent contended that, but for the disputed debt to SARS, his assets exceed his liabilities. This is clearly no valid defence in the light of the findings above.

ADVANTAGE TO CREDITORS

[20] The applicant contended that it will be to the advantage of the respondent's creditors, including the applicant, that his estate be sequestrated in the circumstances as there is a reasonable possibility of payment of a dividend to his

proven creditors. The applicant further submitted the sequestration will allow for an investigation and interrogation of the respondent regarding his affairs and may result in further assets being unearthed.

COMPLIANCE

[21] I am satisfied that the applicant has complied with the procedural requirements in an application for sequestration as set out in section 9(4A) of the Insolvency Act in that;

21.1 Service of the summons was effected on the respondent personally by the Sheriff;

21.2 A copy of the summons was also served by the Sheriff at the offices of the Master of this court;

21.3 The applicant has alleged in its founding affidavit that no process in this matter could be served on the employees of the respondent, if he has any, as a result of the respondent's refusal to furnish details of employees he may have. These allegations were not disputed nor that the respondent had informed the Sheriff that he had no employees.

21.4 SARS has furnished security for the costs of this application.

CONCLUSION

[22] It was on the basis of the above established factual insolvency of the respondent that the orders for the final sequestration of the estate of the respondent were made.

MPN MBONGWE, J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES

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JUDGMENT ELECTRONICALLY TRANSMITTED TO THE PARTIES ON 27th OCTOBER 2022.