

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

CASE NO.: 54768/2008

DELETE WHICHEVER IS NOT APPLICABLE		DATE:
(1) REPORTABLE: YES/NO.		
(2) OF INTEREST TO OTHER JUDGES: YES/NO.		
(3) REVISED.		
08-06-2016	<i>G. Webster</i>	
DATE	SIGNATURE	

In the matter between:

**THE COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE SERVICE**

APPLICANT

And

DAVID CUNNINGHAM KING

RESPONDENT

JUDGMENT

WEBSTER J

1. The applicant, desirous of collecting revenue from the Respondent in respect of tax owing prior to 2002 seeks an order (a) "that to the extent necessary, the statement filed by the applicant on 15 May, 2002, in terms of section 91(1)(b) of the Income Tax Act 58 of 1962, be revived as envisaged in rule 66 of the Uniform Rules of Court", and (b) "that the fixed properties known as portions 152, 153 and 154 of the farm Scheerpoort, farm number 477, held under title deed number 727729/1998, registered in the name of the respondent, are declared executable and may be attached and sold in execution to satisfy in part the applicant's claim in the sum of R20 937 093.62 (together with interest thereon at the applicable rate from 1 July 2008), being the unpaid portion of the debt in terms of the statement in terms of section 91(1)(b) of the Income Tax Act filed by the applicant on 15 May 2002".

2. The respondent opposes the application on the basis that (i) the writ of execution relied upon by the applicant is invalid; (ii) the parties settled all the disputes in a written agreement signed by the respondent and on behalf of the applicant; and (iii) consequently, that the applicant, knowing that the deed of settlement was the subject matter of litigation between the parties on the validity of the said deed of settlement in the South Gauteng High Court, Johannesburg, should not have instituted this application. In argument, the respondent raised further resistance to the application on the basis that the relief sought (in particular the sale of the properties) was mischievously intended to harass the respondent by purporting to recover outstanding tax by attaching and disposing of the respondent's immovable property at a price representing "...only about $\frac{1}{10}\%$ (one tenth of a percent) of the total debt alleged in 2002 to be R2.4 billion".
3. The background to this matter, in a very broad outline, is that in February, 2002, the respondent was assessed for income tax, in an amount of more than R900 million. These assessments, according to the applicant, "...are still the subject of appeal procedures in terms of the Income Tax Act".
4. Following upon the assessment mentioned above SARS filed a certificate in terms of section 91(1)(b) of the Income Tax Act: such certificate has the "...status of a civil judgment". According to this certificate the respondent was indebted to the applicant in the sum of R16 413 917.90.
5. Following thereupon SARS issued a warrant of execution. No movable assets were found and a *nulla bona* return was filed. SARS issued an application for the respondent's sequestration. On

the date of hearing R4 398 369.18 being the "capital portion" of the debt, was paid. It is the balance outstanding from then, together with accrued interest, totalling R20 937 093.64 that the applicant is intent upon recovering from the respondent through the intended sale in execution of the respondent's immovable property -- on the basis of the "pay now argue later rule".

6. The respondent raises various issues in his affidavit. He highlights the fact that having paid the capital sum of R4 398 369.18 the applicant did nothing further. Instead, it was prepared to release the properties forming the subject matter of the dispute from a preservation order so that the respondent could sell them and the proceeds from such sale be utilised by the respondent to pay for the costs for legal representation in the tax dispute as well as in the criminal case for fraud that had been preferred against him.
7. The respondent further refers to the civil action that was pending between himself as the plaintiff and the applicant in the South Gauteng High Court in which he sought a declarator that "...a settlement agreement allegedly concluded between the plaintiff (the respondent herein) personally and a person purporting to act on behalf of the defendant (the applicant herein) is valid and binding upon the defendant" and averred that the present application was "a reprisal ... to harass and oppress or exert pressure on the respondent, and embroil him in unnecessary, futile litigation".
8. The applicant excepted to the respondents' particulars of claim on various grounds. That exception was heard by Malan J on 3 March, 2009 and the judgment handed down on 9 March, 2009. By that date all the affidavits in this application had been served and filed. Malan J, in a fairly extensive judgment upheld the exception.

9. He found that (i) "the agreement" had not been signed by the "Commissioner" or by an official delegated by the Commissioner for the purposes of settlement of the disputes in terms of the provisions of section 88E(1) of the Income Tax Act; (ii) the letter relied upon as conferring the authority to sign on behalf of defendant was signed by one "P. Erasmus on a letterhead of SARS (and not purportedly on behalf of the defendant)... does not authorise "Delville Whatley and Associates" to conclude any settlement agreement"; (iii) that the agreement relied upon was not in a format prescribed by the Commissioner as prescribed in section 88F(3) which is a condition of the validity of any agreement; (iv) the written agreement annexed to the particulars of claim defined the parties as being the plaintiff and "the South African Revenue Services". The signatory to the agreement purported to act for South African Revenue Services and not on behalf of the defendant and, as such, the agreement was not "...a written agreement between the plaintiff and the defendant". Further grounds based on the remaining three grounds of exception were considered by Malan J. In each of them he found in favour of the applicant herein that the exceptions had been well-taken – it is not necessary to canvass them in this judgment. I am in respectful agreement with the judgment of Malan J.
10. The sole question, as I understood the argument before me was whether the applicant in bringing this application is motivated by any other consideration save collecting what is due to the applicant for the tax the respondent owes or whether (i) the intention is to "extort or oppress" the respondent (*Goldsmith v Sperrings Ltd* [1977] 2 All ER 566 (CA)); (ii) there is "...any prospect of obtaining satisfaction of the whole or any part of the judgment debt should the sale in execution be allowed to take place (*Whitfield v Van*

Aarde 1993 (1) SA 332 (E) at 339 C); (iii) or "...oppress and harass the respondent ... for the purposes of pursuing ends extraneous to the real objectives sought to be obtained through the rules of court (Beinash v Wixley 1997 (3) SA 721 (SCA) at 734 F – G).

11. It would be remiss not to allude briefly to the role-players in this matter. The applicant, in the execution of his duties is obliged to act in accordance with the statutory duties and obligations prescribed by law. Without setting out what such duties are the fundamental duty and responsibility of the applicant are set out in section 88B of the Income Tax Act 58 of 1962 which reads:

"88B Purpose of Part

(1) The basic principle in law is that it is the duty of the Commissioner to assess and collect taxes, duties, levies, charges and other amounts according to the laws enacted by Parliament and not to forgo any such taxes, duties, levies, charges or other amounts properly chargeable and payable.

(2) Circumstances may, however, require that the strictness and rigidity of this basic principle be tempered where it would be to the best advantage of the state."

12. The respondent, as I understand the papers before me, owns no property nor has he owned any property, has no income and has not had any income that would merit the attention of the applicant, relies on the generosity of his mother for his maintenance and upkeep, lives in a mansion in Sandhurst that was build on three erven that were consolidated into one for millions of rands. He owns no car -- yet drives cars that people dream of owning. He is a registered taxpayer and duly submitted his tax returns.

13. On 15 February, 2002, he was assessed for income tax in an amount of R900 million. This assessment remains disputed and the

subject matter of appeals. He is alleged to be closely associated with a company known as Ben Nevis Holdings Ltd, a company registered in the British Virgin Islands. This company also owns two wine farms, two holiday homes, a game farm as well as an executive jet aircraft valued in the vicinity of R200 million. Ben Nevis, according to the respondent holds these assets on behalf of the respondent's mother.

14. In May, 2002, SARS filed a statement with the Registrar in which it was certified that the respondent was indebted to SARS for assessed taxes in the sum of R16 413 917.90. It is this figure that the applicant relies upon. As mentioned earlier in this judgment the respondent paid R4 398 369.18 to stave off sequestration.
15. The true financial worth of the respondent is unknown but it is clear that he is no pauper, he is acutely intelligent and is an astute businessman well-versed in the maze of finance, investments, company law and tax law. It is against this background that the issues in this matter must be considered.
16. Firstly, it was conceded by the applicant, and correctly in my view, that since "...the previous warrant has not been withdrawn, that the applicant ...[is]...accordingly not entitled to have a new warrant issued in respect of same debt". The issue therefore need not be considered any further as no order is sought in this regard.
17. The second issue is whether there is a need for the applicant to revive the statement in terms of section 91(1)(b) of the Income Tax Act. There is no dispute that the respondent still owes the applicant in terms of that certificate.

18. It is clear that the applicant has access to vast sums of money. The "settlement agreement" purportedly entered into with the respondent clearly shows this. It shows further that he could easily satisfy the writ issued in 2002 if he wanted to do so.

19. In my view, the applicant is not motivated by any ulterior motive in seeking to sell the immovable property owned by the respondent. The concession by the applicant that the property could be sold in order to fund the respondent's legal costs cannot be construed in any way save that the applicant was acting in accordance with the provisions of the Prevention of Organised Crime Act 121 of 1998. The respondent's action in not selling the immovable property despite an increased offer of the higher price (R1.4 million and the R2.5 million) is proof enough that his intention was never to sell the property as further borne out by the vigorous opposition in this application. He has consistently resisted paying tax as appears clearly from the papers. Section 88B makes it clear that one of the functions of the applicant is "...not to forgo any such taxes, duties...or other amounts properly chargeable and payable".

20. Secondly, there is a distinction between the situation where no steps are taken after a judgment has been granted and no execution follows and the situation where a warrant of execution has been issued "Once a writ of execution has been issued it remains in force and, subject only to prescription, may be executed at any time without being renewed until the judgment has been satisfied in full" -- Civil Procedure in the Superior Courts – LTC Harms. According to my reading of rule 66(1) it is only where there has been no writ issued where superannuation occurs. Where a writ was issued (within three years) the provisions of rule 66(2) apply. The sub-rule reads as follows:

"(2) Writs of execution of a judgment once issued remain in force, and may, subject to the provisions of subparagraph (ii) of paragraph (e) of subsection (2) of section three of the Prescription Act, 1943 (Act 18 on 1943), or subparagraph (ii) of paragraph (a) of s 11 of the Prescription Act, 1969 (Act 68 of 1969), at any time be executed without being renewed until judgment has been satisfied in full."

21. The applicant, in my view, and strictly considered, does not require the revival of the section 91(1)(b) statement for "judgment" it has against the respondent for it is not affected by the provisions of Rule 66(a) because of the writ that was issued and duly executed. It appears that the applicant acted *ex abundante cautela* in asking for the extension of the section 91(1)(b) certificate.

22. It is my further view that the sale of respondent's immovable property will not "be futile and lead to useless litigation and not give the applicant any real remedy". In selling the property the applicant will not only be discharging his statutory obligation but recovering what is owing to the Fiscus. The failure to do so would open floodgates to those in similar circumstances as the respondent.

23. **It is accordingly ordered:**

1. **THAT the fixed properties known as portions 152, 153 and 154 of the farm Scheerpoort, farm number 477, held under title deed number 727729/1998, registered in the name of the respondent, be and are hereby declared executable and may be attached and sold in execution to satisfy in part the applicant's claim in the sum of R20 937 093.62 (together with interest thereon at the**

applicable rate from 1 July 2008), being the unpaid portion of the debt in terms of the statement in terms of section 91(1)(b) of the Income Tax Act filed by the applicant on 15 May 2002.

2. THAT the respondent pays the costs of the application such costs to include the costs occasioned by the employment of two counsel.

G. Webster

G. WEBSTER
JUDGE IN THE HIGH COURT