IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 19128 / 2020

In the matter between:

EBS INTERNATIONAL (PTY) LTD	First Applicant
MEGATECH SYSTEMS (PTY) LTD	Second Applicant

and

SHAUN EDWARD WRIGHT	Respondent

Coram: Wille, J
Heard: 19th of April 2022
Delivered: 9th of May 2022

JUDGMENT

WILLE, J:

INTRODUCTION

[1] This is an opposed motion essentially about certain contractual warranties together with an indemnity. The first applicant purchased from the respondent all his shares and loan accounts in the second applicant.[1] This, in terms of a written agreement.[2] The respondent, *inter alia,* represented that the tax affairs of the second applicant were in order and these representations were underpinned by way of

[1] This during 2016.
[2] The 'sale' agreement.

certain warranties, with an indemnification, to make good, *inter alia*, any liability, cost, expense, or damage which the first applicant may suffer as a result of a breach of the written warranties in the agreement of sale.

[2] Some years after the sale the tax authorities assessed the affairs of the second applicant and ruled that (whilst under the sole directorship of the respondent), the second applicant had significantly understated its tax liabilities. It is thus the case for the applicants that these tax irregularities (in the form of the understatement of the second applicant's tax liabilities) resulted in a clear breach of the warranties, which in turn triggered the indemnification to make good.

[3] Further, (and in addition), it is the case for the applicants that the respondent breached his fiduciary duties to the second applicant because he historically understated the tax liability of the second applicant to the tax authorities. This, in his tenure as the sole shareholder and the sole director of the second applicant. One of the core issues for determination is whether the subsequent tax assessments by the tax authorities (in connection with these tax understatements) amounted to *conclusive evidence* that the respondent breached both his contractual and fiduciary duties to the applicants. More so, reliance is essentially placed on a breach of the *contractual obligations* upon the respondent which indicates a breach of the warranties and accordingly triggers the indemnity to make good the amount that the second applicant was obliged to pay to the tax authorities given certain new subsequent tax assessments.

[4] The respondent's case, in the main, is that the applicants have relied on these new subsequent tax assessments *mala fide* and that this current application is an abuse of the court process. The respondent's main protest is that if this court were to acknowledge that these subsequent new tax assessments meet the threshold of *'conclusive proof'* it would deprive the respondent of his basic right to a fair hearing before adverse findings are rendered to his financial detriment.

[5] On the contrary, the applicants aver that this shield must fail, having regard to the undisputed facts and the canons in our revenue laws.[3] This, is also because; (a)

[3] The Tax Administration Act, 28 of 2011.

the respondent was afforded at least (2) opportunities to make extensive submissions to the tax authorities in connection with these subsequent new tax assessments; (b) the respondent made such submissions on at least two occasions and, (c) as a matter of law, once a tax assessment is rendered it is deemed to be conclusive evidence that the *particulars in the assessment* are correct.

[6] Several further shields are raised by the respondent, namely; (a) that the second applicant has no *locus standi* on behalf of the first applicant and *vice versa*; (b) that the second applicant's claim for a breach of the respondent's fiduciary duties has prescribed in law due to the effluxion of time; (c) that the first applicant's claim is subject to the dispute resolution clause; (d) that the breaches have not caused the second applicant any losses and (e) the shield of *res judicata* in the form of *issue estoppel* is raised.

THE 'CONDONATION' APPLICATION

[7] The applicants seek condonation for the late filing of their replying affidavit and should this relief be granted, then in that event, the respondent, in turn, pilots an application to strike- out certain references in the applicants' replying affidavit. The applicants' replying affidavit was filed more than a month late. An extension of time was sought which was refused by the respondent. This, together with opposition to the condonation application subsequently filed in response thereto by the applicants. The condonation issue is discretionary and I have a true discretion (a narrow discretion) which must be exercised judicially. Weighing in on this discretion, *inter alia,* is the issue of any real prejudice against the respondent.

[8] Some months have now passed since the filing of this replying affidavit. The thread of the opposition by the respondent is the assertion that the replying affidavit was not filed timeously because the applicants were desperately seeking to bolster their 'limp' case in reply. On the contrary, the applicants say that this further time was needed because the applicants were obliged to respond to the respondent's unfounded allegations of bad faith on their part. It is, *inter alia,* their case that it is the respondent who elected not to assist with the investigation into the tax affairs of the second applicant and, the applicants are before this court in good faith.

[9] The replying affidavit consists of; (a) a general overview of the basis for the tax relief application chartered for by the second applicant which in turn led to the new tax assessments; (b) this was supported by more than (88) lever arch files of information; (c) the replying affidavit without annexures is (100) pages long; (d) the annexures consist of an additional (669) pages; (e) included are (91) spreadsheets and schedules produced by the first applicant which have been populated with line by line items that cross-reference the supporting documentation. It is argued that this took an inordinate amount of time to compile and there is simply no real prejudice against the respondent. It seems to me that nothing prevented the respondent (in the circumstances of this case) from electing to pursue an application for the filing of a fourth set of affidavits to cure any issues of prejudice as he had ample time to do so before the commencement of this hearing.

[10] In addition, the applicants had erroneously omitted to file (2) confirmatory affidavits of the persons who allegedly assisted in the review of the second applicant's tax records referenced in the replying affidavit. The applicants also now belatedly request leave for these (2) confirmatory affidavits to be entered into the record for this opposed hearing. For the reasons alluded to briefly above, I am of the view that the replying affidavit and the annexures thereto fall to be admitted into the record for this hearing, including the (2) confirmatory affidavits in support thereof.

THE APPLICATION TO 'STRIKE OUT'

[11] It is a matter of trite law that for material to be struck out, the material must either be scandalous, vexatious, or irrelevant. The court must be satisfied that the party seeking the references to be struck out will be prejudiced if the material is not so struck out. The applicants contend that the application by the respondent is simply broad-stroked, lacking in specific detail. On this, I agree because no explanation at all is piloted for the precise reason why each paragraph and annexure objected to is either scandalous, vexatious, or irrelevant. In summary, it seems to me that the application to strike out lacks the requisite and adequate particularity needed to ground and underpin the relief sought.

[12] The context and the need for the filing of this species of 'replying' affidavit are

significant and also bear some scrutiny. The applicants' initial application was met with allegations of bad faith and the 'new evidence' in reply consists essentially of an attempted rebuttal of these bad faith allegations. Most importantly, the respondent does not allege any real prejudice if the material sought to be struck out, remains. Accordingly, I hold the view and order that this application falls be dismissed. The costs associated with this application are a discrete issue and will be dealt with in my order on costs.

THE RELEVANT 'FACTUAL' MATRIX

[13] The respondent was the only director and shareholder of the second applicant during the relevant period.[4] When the sale agreement was concluded the following complement of warranties was offered to the first applicant, namely; (a) the second applicant's tax affairs were in order; (b) the second applicant had no outstanding liabilities (including tax liabilities) and, (c) the second applicant's financial records comprehensively reflected a true and fair view of its financial position at the time. Flowing from this, the respondent also sought to indemnify the first applicant against any liability (inclusive of any costs, expenses, or damages) incurred if any of these aforesaid warranties turned out to be incorrect, inaccurate, or untrue in any respect.

[14] Thereafter, the first applicant noted certain perceived irregularities in the second applicant's books of account and taxation records. This reduced the capital available to the second applicant and caused the tax liability of the second applicant to be severely understated.

[15] No doubt, this triggered the initiation of certain arbitration proceedings by the first applicant against the respondent in an attempt to recover this perceived reduction in the second applicant's capital value. This resulted in an independent tax consultant being appointed to investigate the second applicant's potential increased tax liability. Acting upon the subsequent expert tax advice so received the second applicant sought to regularize its affairs and filed for certain tax relief from the tax

[4] From December 1997 until 2016.

authorities. [5]

[16] This relief (if granted), primarily allows for certain exemptions from penalties (and interest) that would ordinarily otherwise have been payable by the second applicant if the correct historical tax returns had been submitted to the tax authorities. Pending the outcome of this tax relief application, the parties proceeded with the arbitration proceedings.

[17] During these latter proceedings, the erstwhile accountant (of the second applicant) testified about certain further alleged accounting irregularities that were not the subject of any disclosure by the respondent to the first applicant (at the time of the purchase and sale of the business of the second applicant). In this connection, it was specifically averred, *inter alia,* that the second applicant had paid for all the expenses of the respondent's daughter's holiday apartment and had subsequently claimed these as impermissible tax-deductible business expenses.

[18] The arbitrator ultimately found, *inter alia*, that the incorrect treatment of the respondent's expenditure had given rise to a contractual breach of the warranties in the sale agreement. The arbitrator directed that the respondent's liability under the indemnity would be activated once a tax liability had been assessed to the detriment of the second applicant.

[19] The second applicant engaged with the tax authorities in the spirit of complete disclosure and transparency. During this process, the applicants discovered yet a further comprehensive collection of historical accounting records which the respondent concedes he did not disclose to the first applicant. These additional accounting records were sufficient to finally satisfy the second applicant that its relief application to the tax authorities was comprehensive, proper, and complete. The tax relief application was filed and the respondent made extensive legal and financial representations in connection with this tax relief application.

[20] As a direct result of the final agreed tax relief application (having been signed by both the second applicant and the tax authorities), the said tax authorities

[5] The 'VDP' relief (the 'tax relief' application).

assessed the second applicant to pay further taxes (with interest and penalties) in the amount of R6 286 600,55. This amount was paid by the second applicant. The second applicant managed to negotiate with the tax authorities for a waiver of further additional penalties to the sum of R4 219 108,27.

THE APPLICANTS' CASE

[21] The applicants' main case is that the respondent breached the contractual terms of the written sale agreement in that the respondent violated the warranties in terms of the sale agreement. This in turn triggered the indemnity to make good. The applicants say they are at liberty to make a 'contractual' election (because of the breaches of the written contract at the instance of the respondent) and they have accordingly elected to claim specific performance against the respondent and seek payment of the sum of R6 286 600,55. In addition, they pilot a claim for a breach of fiduciary duty by the respondent against the second applicant and they say that damages have been suffered by the second applicant equal to the sum of R6 286 600,55.

[22] I was advised and understand that the applicants now only persist with certain of their other additional relief (other than interest and costs) in the form of a referral of certain of the remaining disputes to oral evidence on the terms that this court may deem appropriate in the circumstances. This latter relief concerns the *quantum* of the costs, charges, disbursements, expenses, liabilities, and fees that the respondent may be held liable to pay. I am requested to refer this issue to oral evidence unless the parties agree to refer the dispute to arbitration or a referee.[6]

[23] The request is further made that the parties are directed to inform the court within one month in the event of an order being granted of the forum in which the dispute will be resolved, and if the dispute is to be referred to oral evidence. to file a joint practice note dealing with the further conduct of the matter on these issues.

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[6] This is in terms of section 38 of the Superior Courts Act, 10 of 2013.

THE RESPONDENT'S CASE

[24] The core argument piloted in opposition to this application is that the respondent is not bound by the particulars of these tax assessments because they were issued under an unmerited tax relief process that was motivated by malice and in which the respondent had no input or sway. It is significant to record however that the respondent does concede that the second applicant was found somewhat wanting in that, it was as a fact, found that the second applicant was tax non-compliant. This concession is presumably made because a taxpayer's liability for tax is automatically triggered by a legislative process that imposes tax to be levied as a matter of law.

[25] The respondent advances that although the liability under the relief program was independently and expertly determined by the relevant tax authorities, this entire process was flawed because it was driven by an improper motive on behalf of the first applicant since inception. In essence, it seems that part of the shield raised by the respondent is an accusation of gross dishonesty against the professional independent experts employed by the applicants to apply for and submit the tax relief program to the ultimate financial detriment of the respondent.

CONSIDERATION

[26] As a general proposition, a company is legally obligated to register as a taxpayer and pay income tax on its taxable income once it meets the relevant and appropriate registration requirements. In addition, it will be so required to submit a return indicating a tax loss sustained or a profit earned, if it has met the registration criteria. Whether or not a company is liable for tax is simply a question of the application of the relevant legislative taxing provisions to the facts.

[27] Compliance with tax laws is a non-negotiable imperative for any business and the respondent was fully aware that it was imperative to and for the second applicant to be a law-abiding taxpayer. This is precisely why the warranties and indemnities were negotiated into the sale agreement. It is against this factual canvass that the respondent charters the position that the applicants have 'concocted' the tax relief

program liability out of malice and spite against the respondent.

[28] To counter this argument the applicants, say that the tax relief procedure was the best way forward for the second applicant (as a non-compliant taxpayer) to regularise its affairs as far lesser penalties and interest would have ultimately been imposed on it, than if this relief procedure was not initiated by the applicants. This is so because this resulted in the tax authorities waiving penalties against the second respondent to the excess of R4.2 million.

[29] It must be so that liability for taxes is neither voluntary nor dependent on a taxpayer's knowledge or ignorance of the liability to pay tax. It is argued by the applicants that the respondent misrepresents the nature and the extent of his involvement and participation in the tax relief program. This is not difficult to follow because the respondent was possessed of every reasonable opportunity to ensure that the second applicant's tax affairs were in order before the conclusion of the sale agreement. He was after all the second applicant's sole director and shareholder. Moreover, the respondent was invited to engage with and participate in the tax relief process initiated by the applicants. In addition, the respondent made substantive legal and financial submissions to the tax authorities.

[30] The respondent employed his tax consultant and strongly motivated for the rejection of the tax relief program. Further, the respondent disputed some of the second applicant's voluntary disclosures to the tax authorities. These submissions on behalf of the respondent were independently considered by the tax authorities. Extensive legal representations were also made on behalf of the respondent claiming, *inter alia,* a specific entitlement to certain tax deductions claimed at the instance of the second applicant.

[31] The applicants also seek refuge in the relevant tax legislation[7], which contains a deeming provision that the particulars in assessments by the tax authorities are deemed to be correct. In terms of the sale agreement, the respondent warranted that the second applicant was fully tax compliant and had accurately accounted for and paid all its tax liabilities. On this basis, it is the applicants case that the particulars of

[7] Section 170 of the Tax Administration Act, 28 of 2011.

the tax relief assessments, irrefutably establish that the respondent breached his warranties in the sale agreement and that the first applicant is entitled to the relief now sought in terms of the indemnities.

[32] It is contended that the respondent is accordingly now liable under and in terms of the specific indemnities given to the first applicant, namely to hold it harmless, *inter alia,* against; (a) any breach of the tax-related warranties; (b) any liabilities, costs, expenses or damages which the first applicant may suffer in connection with any of the tax-related warranties not being correct in every respect; (c) any liability that arose from a claim by a third party for any act or omission (the cause of which arose before the effective date of the sale agreement) and, (d) any costs, charges, disbursements, expenses and/or fees including but not limited to legal and other professional fees incurred by the first applicant in respect of defending and/or instituting any claim in respect of any of the tax-related warranties. I pause to mention that this latter claim must by its 'true' nature be a claim sounding in damages.

[33] The tax assessments establish, *inter alia*, that indeed over a prolonged period, the respondent failed to ensure that the second applicant complied with its tax obligations. The particulars of the tax assessments also demonstrate a possible breach of the fiduciary duties owed to the second applicant, by the respondent. I say this because the respondent mined the profits from the second applicant by declaring and paying himself dividends on an annual basis. It is so that where the breach of a warranty has been indemnified the injured party's claim under the indemnity is not based on the breach of the warranty, but on the indemnity clause itself. This is by the contextually formed approach that falls to be applied to the proper construction of all deeds of contract as confirmed in *Endumeni*[8] as follows:

'…Judges must be alert to and guard against, the temptation to substitute what they regard as reasonable, sensible, or business-like for the words actually used. To do so regarding a statutory instrument is to cross the divide between interpretation and legislation…'

[8] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

[34] In *Dexgroup*[9] it was again confirmed that the context and purpose of the provision under consideration are not secondary matters introduced to resolve linguistic uncertainty, but rather are fundamental to the process of interpretation from the outset. In summary, the respondent furnished warranties and indemnities to the first applicant to the extent that the respondent would make good any undisclosed tax liabilities that came to light after the conclusion of the sale agreement, including any costs consequent upon the instituting of a claim for breach of the warranties as set out in the agreement of sale.

[35] That having been said, the 'fiduciary duty damages' that may have been suffered by the second applicant, which may, in turn, be recoverable from the respondent is, in my view, an entirely discrete issue and is essentially a pure 'damages' claim. This potential damages claim is *sui generis* and is neither an action based on delict nor an action based on fault[10]. The claimant simply falls to be placed in the position it would have been as if there had been no breach of the fiduciary duty.[11] Turning now to the subsequent new tax assessments. By the provisions of the appropriate tax legislation[12], the particulars of an assessment raised by the tax authorities (for obvious reasons) are deemed to be correct.

[36] The relevant provisions indicate as follows:[13]

'…The production of a document issued by SARS purporting to be a copy of or an extract from an assessment is conclusive evidence –

(a) of the making of the assessment; and

(b) except in the case of proceedings on appeal under Chapter 9 against the assessment, that all the particulars of the assessment are correct'

[37] Accordingly, it must be so that once an assessment is raised by the tax

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[9] *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd & Others* 2013 (6) SA 520 (SCA) at par [16].
[10] *Cohen v Segal* 1970 (3) SA 702 (W) at 706.
[11] *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T) at 197 and 200-201.
[12] Section 170 of the Tax Administration Act, 28 of 2011.
[13] Section 170 of the Tax Administration Act, 28 of 2011.

authorities the particulars of the assessment are 'deemed' to be conclusive against the person so assessed, subject to the proviso set out in section (b) thereof. No doubt one of the core issues to be decided (on motion) is whether or not this assessment is binding on the respondent. Again, this must be seen in the context of a breach of a warranty and, in the context of the indemnification given by the respondent to the first applicant in terms of the sale agreement.

[38] It is common cause that the warranty was breached and, that the indemnities that were tendered were triggered. The question now arises whether the claim by the first applicant, as a direct result of the breach of the warranties, is one of a claim for specific performance in these circumstances. The argument by the applicants on this score is that the tax authorities considered the input and representations from the respondent and this notwithstanding, were independently satisfied that the second applicant was compelled to apply for the appropriate tax relief given the genuine understatement of the second applicant's tax liabilities.

[39] The tax relief was granted after the same had been verified and met the requisite eligibility requirements as indicated in and by the appropriate legislation.[14] By contrast, the respondent takes the position that the disclosures on the part of the second applicant were engineered by the first applicant and were not voluntary. Put in another way, the respondent's case is that the directors of the first applicant in some manner coerced and influenced the second applicant to apply for the tax relief. This out of spite and malice towards the respondent.

[40] On this, I disagree because the tax authorities independently verified that the subsequent tax disclosures made by the second applicant, were as a matter of fact, voluntary disclosures. I am far from persuaded (on the material before me) that the tax relief applied for was simply 'rubber-stamped' by the relevant tax authorities and therefore could have been a result of some sort of manipulation or 'engineering' by the first applicant.

[41] By way of elaboration on this score, the applicants make the point that the respondent did not 'offer up' to the tax authorities any relevant substantiating

[14] These requirements are set out in section 227 of the Tax Administration Act, 28 of 2011.

documentation in support of the opinions that were expressed by his attorneys and his tax advisors in his opposition to the tax relief application by the second applicant. On the material before me, there is not an iota of evidence to suggest that the tax relief application was based on any incorrect, biased, or misleading information or documentation.

[42] A further shield put up by the respondent is the contention that the second applicant is non-suited *vis a vis* the declaratory relief it seeks because it was not a party to the sale agreement. Further, in this regard, the first applicant is non-suited to request any declaratory relief concerning the respondent's fiduciary duties towards the second applicant.

[43] It is so that the fiduciary duties breached by the respondent (if any) were fiduciary duties he may have owed to the second applicant and not to the first applicant. Further, the respondent claims that he falls to be absolved from the second applicant's claims because these claims have (in any event) prescribed in that the proceedings (to recover damages arising from the breach of a director's fiduciary duties) may not be commenced more than (3) years after the act or omission that gave rise to that liability. This by legislative intervention.[15]

[44] To counter this argument, the applicants advance that the respondent gave a further and additional indemnity to the second applicant during the course of the arbitration proceedings.[16] While undoubtedly, the respondent accepts that (for each of the years that the tax authorities assessed the second applicant by the relief application), he had a fiduciary duty to ensure that the second applicant remained tax-compliant, this in my view, does not amount to a *racing certainty* that he would be held liable for the taxation amounts assessed under a 'fiduciary duty' damages claim.

[45] I say this because there have been legislative interventions in this connection that (in certain circumstances) impose limits on the amounts recoverable from the respondent under this type of cause of action. Again, in my view, the fiduciary duty

[15] In terms of section 77(7) of the Companies Act, 71 of 2007.
[16] The arbitration proceedings that were held before the launching of this application.

claim is in the strict sense by its very nature a damages claim. *Because of* the approach that I have adopted in this judgment, I don't need to make any findings in connection with the prescription shield that has been raised by the respondent. I say this because I hold the view that the fiduciary duty damages claim against the respondent by the second applicant finds no place, in the circumstances of this case, to be determined by way of motion proceedings.

[46] Similarly, the respondent's 'undertakings' in the arbitration proceedings (which are disputed) find no place (in the circumstances of this case) in motion proceedings. These undertakings are the subject of a *bona fide* dispute on these papers. By contrast, the breach of warranties and the subsequent 'indemnification' cause of action by the first applicant against the respondent is a completely discrete issue that lends itself to a claim for specific performance.

[47] This is because I hold the view that the particulars of the tax assessments in connection with the indemnity claim indeed amount to conclusive evidence that the respondent breached his contractual warranties and this, in turn, triggers his obligation to make good on his indemnity. Put simply, an indemnity is a contractual agreement between two parties, where one party agrees to pay for potential losses or damages claimed by a third party. The first applicant, in my view, has met the requirements for a claim of specific performance given the contractual obligations in the written sale agreement with the respondent.

[48] Legally this is so because; (a) the terms of the agreement are not in dispute; (b) the first applicant has demonstrated compliance with its reciprocal obligations in terms of the agreement of sale; (c) the first applicant has demonstrated non-performance by the respondent and, (d) the first applicant has accordingly elected to claim (as it is entitled to do) specific performance.

[49] A court placed in this position should (as far as possible) give effect to the first applicant's choice. It is so that I have judicial discretion in an appropriate case to refuse specific performance and to leave it to the first applicant to claim damages. The discretion which I have, must of course be exercised judicially and is not

circumscribed by any specific rules. Every exercise of such discretion is case-specific.

[50] Most importantly this discretion must be exercised concerning the facts as they existed when the performance is claimed and not as they were when the contract was concluded.[17] The factual matrix, in this case, demonstrates, in the main, that the applicants were obliged to seek the necessary and appropriate tax relief because the respondent understated the second applicant's tax liabilities. The respondent says this was out of spite and was done in bad faith.

[51] I disagree. This was done rather ensure that the second applicant was tax compliant which was (in any event) the position that was warranted by the respondent in the first place. The outstanding tax has now been paid and the respondent is obliged to make good on his indemnity. These facts overwhelmingly persuade me to exercise my discretion in favour of the first applicant. In my view, if there ever was a case for the exercise of judicial discretion in favour of the first applicant for specific performance, it is on the facts of this particular case. Significantly, the respondent has also not demonstrated any facts upon which I can exercise my discretion in his favour and not grant an order for specific performance.[18] I say this also because I do not find favour with the respondent's argument that the tax relief was applied for was so done *mala fide* and out of malice.

[52] The respondent also contends that the claims by the first applicant are incapable of being determined by this court because they are subject to the arbitration agreement contained in the sale agreement. This may be dealt with swiftly because an agreement to arbitrate is not a mechanical jurisdictional bar to litigation in court.[19] It is trite that it is incumbent upon the party seeking to invoke an arbitration clause to request a stay of the court proceedings pending the outcome of an arbitration. This may be achieved (if invoked) by the filing of a special plea, or by making a formal application in terms of section 6(1) of the Arbitration Act. The latter option falls to be initiated after the filing of a notice of intention to oppose and before

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[17] *Santos Professional Football Club (Pty) Ltd v Ingesund* 2003 (5) SA 73 (C).
[18] *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd* 1982 (1) SA 398 (A).
[19] *Delfante and Another v Delta Electrical Industries Ltd and Another* 1992 (2) SA 221 (C) at 226 E-F.

taking any other steps in the proceedings.

[53] None of these options have been initiated by the respondent and accordingly, the respondent acquiesced to and with the process for the relief sought being determined by these court proceedings. In addition, the respondent also raises the shield that the tax assessments issued under the relief application do not give rise to a claim against him by the first applicant. He says this because he contends that if any claim was in existence, it was determined in the arbitration proceedings and is, therefore, *res judicata* and therefore precluded by way of the application of the doctrine of issue estoppel.

[54] These shields are hard to discern as the respondent was contractually bound to the first applicant in terms of the sale agreement to make good any undisclosed tax liability of the second applicant that arose before the sale agreement was concluded. This contractual position was further fortified in the arbitration award, which confirmed, *inter alia*, that the first applicant was entitled to bring any further new claims under and in terms of the indemnity provided by the respondent. In my view, this euthanizes the respondent's reliance on *res judicata* in the form of issue estoppel.

CONCLUSION AND ORDER

[55] In summary, I am persuaded that the first applicant is entitled to most of the relief that it seeks against the respondent in the notice of motion (with some modifications). However, I am not persuaded that the second applicant was entitled (in these circumstances), to pursue the respondent by way of motion proceedings under and in terms of the respondent's alleged breach of his fiduciary duties to the second applicant. In the result, the following orders are issued against the respondent, namely;

1. That the respondent breached his warranties under and in terms of the sale agreement (as at the effective date of the sale agreement) in that the second applicant had not timeously, fully, or accurately accounted for and paid to the South African Revenue Services all its lawfully imposed tax obligations.

2. That accordingly, the respondent is liable to indemnify the first applicant for all additional taxes, interest, penalties, and other charges assessed by the South African Revenue Services to be payable by the second applicant in respect of the period before the effective date of the sale agreement.

3. That the respondent is liable to indemnify the first applicant for all costs, charges, disbursements, expenses, and fees (including legal and other professional fees) incurred in investigating and remedying the second applicant's breaches of its obligations referred to above.

4. That the respondent is directed to pay to the first applicant the sum of R6 286 600, 55 being the amount assessed by and paid to the South African Revenue Services, in respect of the second applicant's unpaid tax, interest, and penalties in respect of the period before the effective date of the sale agreement.

5. That the respondent is directed to pay to the first applicant interest on the aforesaid sum of R6 286 600,55 at the Standard Bank Prime overdraft lending rate, compounded monthly in arrear, and calculated from the date of each constituent payment to the South African Revenue Services.

6. That the dispute concerning the *quantum* of the costs, charges, disbursements, expenses, liabilities, and fees that the respondent is liable to pay to the first applicant in terms of paragraph (3) above is referred to oral evidence, unless the parties agree to refer the dispute to arbitration or a referee in terms of section 38 of the Superior Courts Act, 10 of 2013.

7. That the parties are directed to inform the court within *one month* of this order being granted of the forum in which the remaining disputes will be resolved, and if these disputes are to be referred to oral evidence, to file a joint practice note dealing with the further conduct of the matter.

8. That the breach of the fiduciary duty claim brought by the second applicant against the respondent (on motion) is hereby dismissed.

9. That the respondent shall be liable for (50%) of the costs of and incidental to this application, including the costs of two counsel (where so employed and which are not already included in paragraph (3) above), on the scale as between party and party, as taxed or agreed.

10. Each party shall be responsible for their respective costs in connection with the application for condonation and the application to strike out.

E. D. WILLE
Judge of the High Court
Cape Town