



SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

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STATUS Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Samancor Holdings (Pty) Ltd and Others v Samancor Chrome Holdings (Pty) Ltd and Another (357/2020) 2021 ZASCA 60 (24 May 2021)

The Supreme Court of Appeal (SCA) today dismissed an appeal against a judgment of the Gauteng Division of the High Court granting the respondents an extension of time to institute arbitration proceedings against the appellants.

In February 2005 the first respondent, Samancor Chrome Holdings (Pty) Ltd (SCH), bought the shares in the second respondent, Samancor Chrome Ltd (Samancor Chrome), from the first appellant, Samancor Holdings (Pty) Ltd (Samancor Holdings). In terms of the sale agreement, Samancor Holdings gave SCH and Samancor Chrome certain indemnities, including an indemnity in respect of Samancor Chrome's

income tax up to the Closing Date (3 April 2006). The sale agreement contained an arbitration clause. There was also a time-bar clause which required proceedings in respect of the income tax indemnity to be issued and served before the sixth anniversary of the Effective Date.

On a date subsequent to the sixth anniversary, the South African Revenue Service (SARS) conducted an audit of Samancor Chrome's tax affairs. This culminated in an additional assessment in respect of the period prior to the Closing Date. The amount of additional tax levied, together with penalties and interest, formed the subject of the claim which SCH and Samancor Chrome (the claimants) wished to pursue against Samancor Holdings and against the latter's sureties, the second and third appellants (the defendants).

In the arbitration proceedings, the claimants and the defendants advanced various contentions which, if resolved in their favour, would have rendered the time-bar clause inapplicable. Although the claimants succeeded before the arbitrator, this was reversed by an arbitration appeal panel. This meant that in order to succeed the claimants needed to have the period for initiating the arbitration proceedings extended in terms of s 8 of the Arbitration Act 42 of 1965. The appeal panel adjourned the proceedings in order to allow the claimants to launch an application in the high court for such an extension. The high court granted the extension.

In dismissing the appeal, the SCA found that there was no basis for interfering in the high court's exercise of its discretion. The high court had correctly identified the legal principles governing the exercise of the discretion. The question was whether 'undue hardship' would be caused to the claimants if an extension were not granted. Hardship was 'undue' if the time-barring of a claim was in all the circumstances a

disproportionate penalty for the claimant to suffer. Any circumstance rationally bearing on this question could be taken into account.

It was a relevant consideration, in the present case, that the claimants could not have been aware of the claim until after the time-bar expired. The trial court had not erred in finding (a) fault on Samancor Holdings' part in bringing about this state of affairs, given that the tax return was submitted late and that a significant item of income had been omitted due to an error on Samancor Holdings' part; and (b) that this was a relevant consideration which the court could take into account in exercising its discretion.

The trial court had likewise committed no material misdirection in finding that the claimants' delay in launching their s 8 application should not non-suit them on the particular facts of this case. Although ordinarily such relief should be sought as soon as a claimant becomes aware of the need for it, the fact that the arbitration might have been resolved without the need for a s 8 application had caused the claimants to defer seeking such relief. Even if this was misguided, the high court had been entitled to have regard to these reasons in weighing all relevant considerations. Because the delay had not caused the defendants any litigation prejudice, and in view of all the circumstances of the case, the high court had not misdirected itself in overlooking the delay.

Finally, the SCA rejected an argument that the high court had erred in treating the time-bar clause in the present case as a provision falling within the ambit of s 8. The clause fell squarely within the terms of the section. The SCA accepted, as the high court had done, that a court exercising its discretion in terms of s 8 may permissibly take into account the extent to which the parties, at the time of concluding their contract, could reasonably have foreseen that claims might only arise or become

known to a claimant after the expiry of the time-bar. In the present case, the parties may have foreseen that such claims might possibly only arise or become known after the expiry of the time-bar, but the evidence did not show that that this would have been foreseen as likely. The foreseeability of such a possibility did not, in the present case, compel the high court to refuse the extension.

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