THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 357/2020

In the matter between

SAMANCOR HOLDINGS (PTY) LTD	**FIRST APPELLANT**
BHP BILLITON SA LTD	**SECOND APPELLANT**
ANGLO SOUTH AFRICA CAPITAL (PTY) LTD	**THIRD APPELLANT**

and

SAMANCOR CHROME HOLDINGS (PTY) LTD	**FIRST RESPONDENT**
SAMANCOR CHROME LTD	**SECOND RESPONDENT**

Neutral citation: *Samancor Holdings (Pty) Ltd and Others v Samancor Chrome Holdings (Pty) Ltd and Another* (357/2020) [2021] ZASCA 60 (24 May 2021)

Coram: NAVSA, SALDULKER and MBATHA JJA and LEDWABA and ROGERS AJJA

Heard: 6 May 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be have been at 10:00 on Monday 24 May 2021.

Summary: Arbitration – extension of time in terms of s 8 of Arbitration Act – – proper approach and relevant considerations – delay in bringing s 8 application.

ORDER

On appeal from: The High Court, Gauteng Division, Johannesburg (Meyer J sitting as court of first instance): judgment reported *sub nom Samancor Chrome Holdings (Pty) Ltd and Another v Samancor Holdings (Pty) Ltd and Others* [2019] 4 All SA 906 (GJ).

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Rogers AJA (Navsa, Saldulker and Mbatha JJA and Ledwaba AJA concurring)

[1] With the leave of this court, the appellants appeal against a decision of the Gauteng Division of the High Court (Meyer J) granting the respondents an extension of time, in terms of s 8 of the Arbitration Act 42 of 1965, to initiate arbitration proceedings against the appellants in order to enforce a tax indemnity contained in the agreement mentioned hereunder. Section 8 provides:

'Where an arbitration agreement to refer future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitration proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the court, if it is of the opinion that in the circumstances of the case undue hardship would otherwise be caused, may extend the time for such period as it considers proper, whether the time so fixed has expired or not, on such terms and conditions as it may consider just but subject to the provisions of any law limiting the time for commencing arbitration proceedings.'

[2] For convenience I shall, where appropriate, refer to the present respondents as the claimants, and the present appellants as the defendants, as they were in the arbitration proceedings giving rise to this appeal.

The sale agreement

[3] The arbitration agreement is contained in a sale of shares agreement which the parties concluded in February 2005. Although some of the companies then had different names, I shall use their current names. Before the implementation of the agreement, the second respondent, Samancor Chrome Ltd (Samancor Chrome), was a wholly-owned subsidiary of the first appellant, Samancor Holdings (Pty) Ltd (Samancor Holdings). The second and third appellants, BHP Billiton SA Ltd (BHP) and Anglo South Africa Capital (Pty) Ltd (ASAC), were Samancor Holdings' shareholders. Samancor Chrome conducted manganese and chrome mining businesses and held certain steel investments.

[4] In terms of the sale agreement, the first respondent, Samancor Chrome Holdings (Pty) Ltd (SCH), acquired the chrome business by buying the shares in Samancor Chrome from Samancor Holdings. This required restructuring so as to leave Samancor Chrome as a company owning only the chrome business. The restructuring steps (defined in the agreement as the Restructure) were: a disposal by Samancor Chrome of its manganese business and related immovable properties to a subsidiary of Samancor Chrome and a distribution by the latter of the shares in the subsidiary to Samancor Holdings; a distribution by Samancor Chrome to Samancor Holdings of the stainless steel investments and a defined amount in cash; and a disposal by Samancor Chrome of any non-chrome assets remaining after implementation of the foregoing steps. The agreement defined the chrome business as the Chrome Operations while the non-chrome assets (including the manganese business) were defined as the Excluded Assets.

[5] The defined Effective Date of the agreement was 1 June 2005. In terms of the agreement, this was the date on which the parties implemented their agreement economically. It was not possible, however, for the restructuring and transfer of shares to SCH to be completed by this time. Among other things, approval was needed from the competition authorities, and various conversions of mining rights and approvals had to be sought in terms of the Mineral and Petroleum Resources Development Act 28 of 2002. The defined Closing Date would only occur once all conditions precedent were fulfilled and once the restructuring (including the mining conversions and approvals) were obtained. In the event, the Closing Date was 3 April 2006.

[6] I shall refer to the period between the Effective Date and Closing Date as the interim period. During the interim period, Samancor Chrome continued in law as the owner of the chrome and manganese businesses and the steel investments, with Samancor Holdings (the seller) as its shareholder. The agreement contained provisions to give SCH (the buyer) *de facto* control of the chrome business during the interim period. Legal control only occurred on 3 April 2006 when SCH became the owner of the shares in Samancor Chrome with the chrome operations as the latter's only remaining business.

[7] Samancor Chrome was at all material times a registered taxpayer with 30 June as its financial and tax year-end. Until 3 April 2006, its income tax was determined by the combined results of its manganese and chrome businesses and its steel investments. Since economically the parties wanted to achieve a separation from the Effective Date (1 June 2005), the agreement contained the following indemnity in clause 24.1.5 (I quote clause 24.1.1 as well, for reasons that shall appear presently):

'24.1 Subject to the provisions of clauses 23.3 to 23.9 inclusive, the Seller *[Samancor Holdings]* indemnifies the Purchaser *[SCH]* and the Company *[Samancor Chrome]*, with effect

from the Effective Date, against all loss, liability, damage or expense which the Purchaser and/or the Company, as the case may be, may suffer as a result of or which may be attributable to:

24.1.1 the conduct of the business and/or the affairs of the Company, other than the Chrome Operations. Without limiting the generality of the foregoing, the business and/or affairs of the Company, other than the Chrome Operations, for the purposes of this clause 24.1.1 shall include (without limitation) the Excluded Assets, or any of them, and the indemnity given by the Seller to respectively the Purchaser and the Company in terms of this clause 24.1 shall include (but not be limited to) all loss, liability, damage or expense which may result from, relate to and/or in any way be associated with the Excluded Assets, or any of them, and/or the condition and/or use by any person for whatsoever purpose of any such asset;

. . .

24.1.5 any proved liability of the Company and/or any Subsidiary and/or Associate Company for Taxation in respect of the Excluded Assets, or any of them; and/or in respect of the Chrome Operations, if such liability in respect of the Chrome Operations shall not have been provided for in the Effective Date Financial Statements or disclosed in writing by the Seller to the Purchaser in the Disclosure Letter for all periods prior to the Effective Date . . .'

The clause defined Taxation as including, among other charges, income tax, any taxation arising from new assessments or the reopening of assessments, and any penalties or interest as a result thereof.

[8] As appears from the opening words of clause 24.1, its provisions were subject to clauses 23.3 to 23.9. Clause 23.4, which I shall call the threshold clause, provided as follows:

'Save in respect of any claim, damage, loss or expense which arises from and/or is attributable directly or indirectly to the Restructure and/or the implementation of the Restructure, no liability shall attach to the Seller in respect of any breach of representation, undertaking warranty contained in this Agreement or indemnity contained in clause 24, other than clause 24.1.1, in relation to any established claim for loss sustained by the Company or the Purchaser which is less than US$2 000 000 … and when aggregated with other such claims or losses such aggregate amount is less than US$20 000 000 …'

[9] Clause 23.6 was a time-bar clause reading in relevant part as follows:

'23.6 Any claim made upon the Seller in respect of any representations, undertakings or warranties contained in this Agreement or indemnities contained in clause 24, other than clause 24.1.1 and 24.1.2, shall be wholly barred and unenforceable unless:

…

23.6.3 in respect of any Income Tax payable by or levied on the Company, proceedings in respect thereof shall have been issued and served prior to the sixth anniversary of the Effective Date.'

[10] It follows that a claim for an indemnity concerning income tax made in terms of clause 24.1.5 became barred and unenforceable unless proceedings were issued and served before 1 June 2011. Since clause 43 provided for arbitration, the relevant initiating process was determined by the arbitration rules specified in clause 43.

[11] By contrast, a claim for an indemnity in terms of clause 24.1.1 was excluded from the time-bars contained in clause 23.6, so the ordinary rules of prescription applied. The same is true of the indemnities in clauses 25.2 and 25.3 which SHP and Samancor Holdings respectively gave to Samancor Chrome in respect of any claims, damage, loss, expense or costs suffered or incurred during the interim period in respect of the chrome and non-chrome businesses respectively. Samancor Holdings' indemnity in clause 25.3.1 was as follows:

'The Seller hereby, *mutatis mutandis* on the basis described in clause 25.2.1, indemnifies and holds harmless the Company against any claims, damage, loss, expense and/or costs brought against and/or suffered and/or incurred by the Company during the Interim Period, arising from and/or in any way associated with and/or connected to the conduct of the business and/or the affairs of the Company other than the Chrome Operations …'

[12] I shall in due course deal more fully with the appellants' submissions regarding the interrelationship between clauses 23.6.3 and 24.1.5. At this stage,

however, I should mention that the appellants' argument, in its most extreme form, was that the two clauses read together constituted a temporally limited indemnity in the nature of a *voetstoots* clause, ie that the indemnity only applied to claims initiated by arbitration proceedings within six years from the Effective Date, and that s 8 was thus wholly inapplicable.

[13] I reject that argument. I quoted s 8 in the opening paragraph of this judgment. Clause 23.6.3 is squarely covered by its terms. That clause read with clause 43 of the sale agreement provides that a claim shall be barred unless (in the language of s 8) 'some step to commence arbitration proceedings is taken within a time fixed by the agreement', viz the issuing and serving of the initiating arbitral process before the sixth anniversary of the Effective Date. Furthermore, the argument that s 8 does not apply to clause 23.6.3 is diametrically at odds with the appellants' submissions in the arbitration proceedings, where they contended that the availability of s 8 to ameliorate undue hardship meant that clause 23.6.3 was not contrary to public policy. It was on this very basis that the appellants succeeded before the arbitration appeal panel, as I shall in due course explain.

The tax claim

[14] The claim at issue in this case arose from an additional assessment raised by the South African Revenue Service (SARS) in September 2012 in respect of Samancor Chrome's tax year ended 30 June 2005. The assessment was for income tax relating to 'Excluded Assets'. SARS subsequently levied penalty tax and interest as well.

[15] Samancor Chrome, whose tax affairs in respect of its 2005 year were still being administered by Samancor Holdings (the seller), submitted its 2005 tax return on 30 June 2008. Without having raised any intervening queries, SARS on 7 February 2011 issued an original assessment. Although not so stated in the

papers, it can be assumed that Samancor Chrome paid the assessed tax of R559 784 349 and that Samancor Holdings reimbursed Samancor Chrome any amounts attributable to the Excluded Assets.

[16] The six-year time-bar expired on 1 June 2011. On 16 August 2011 SARS began an investigation into Samancor Chrome's tax affairs, including its 2005 tax year. Having received requested documentation, SARS on 7 October 2011 drew attention to a note in the company's 2005 financial statements indicating that an amount of R220 million, representing an impairment on investment, was said to have been included in profit from operations, whereas only R167 million was added back in the tax computation. A note in the tax computation stated that the balance of R53 million 'went through retained earnings'. The company was asked to show where this figure appeared and why the full amount of R220 million should not be added back in the tax computation.

[17] Samancor Chrome (now under the buyer's control) referred SARS' queries, to the extent that they related to Excluded Assets, to the seller, Samancor Holdings. The latter's representatives replied on 14 December 2011. In regard to the 2005 impairment query, they said that they were still investigating the matter. On 15 February 2012 they reverted, stating that the non-inclusion of R53 million in the tax calculation 'was an oversight and there was no intention to evade the payment of income tax'. Samancor Chrome passed this information on to SARS.

[18] On 25 July 2012 SARS issued a letter of audit findings in respect of the tax years 2005 – 2008. Regarding the 2005 impairment issue, SARS stated that impairment on investments is not allowed as a deduction in terms of s 11*(a)* of the Income Tax Act 58 of 1962 and they would thus be adding back the impairment of R52 575 171. SARS invited Samancor Chrome to advance mitigating circumstances as to why additional tax (which I shall call penalty tax) should not

be levied in terms of s 76(1)*(c)* of the Income Tax Act in respect of this and other tax adjustments.

[19] Samancor Chrome forwarded the audit findings to Samancor Holdings so that the latter could address matters pertaining to Excluded Assets. On 10 August 2012 Samancor Holdings' representatives responded. They agreed that the impairment on investment should be added back but urged that Samancor Chrome request SARS to waive penalty tax and interest 'on the basis that the omission was not made with the intention to evade taxation'. Samancor Chrome made this request to SARS.

[20] On 27 September 2012 SARS raised an additional 2005 assessment which increased the original assessment by taxable income of R52 575 171, and levied tax on this amount of R15 246 800 (I shall refer to the latter as the additional tax). On 11 October 2012 SARS raised penalty tax of R7 623 400 (ie at a rate of 50% of the additional tax) together with interest, in terms of s 89*quat*(2) of the Income Tax Act, of R17 267 001.

[21] As requested by Samancor Holdings, Samancor Chrome in December 2012 lodged an objection against the penalty tax and interest. In January 2013 SARS agreed to reduce the rate of penalty tax from 50% to 20%. Again as requested by Samancor Holdings, Samancor Chrome in February 2013 noted an appeal against the penalty tax and interest. Some months later the matter was settled with SARS on the basis that the rate of penalty tax would be reduced to 15%. No interest was waived. In all, Samancor Chrome, as it was legally obliged to do, ended up paying SARS R27 420 297, comprising the additional tax of R15 246 800 plus R12 173,497 in penalty tax and interest.

[22] In the meanwhile, on 24 November 2012 the claimants' attorneys wrote to Samancor Holdings calling on the latter to pay or admit liability for the additional

tax, penalty tax and interest. They also made demand on BHP and ASAC which had provided suretyships for Samancor Holdings' obligations. These letters did not refer to any particular indemnities. The defendants' attorneys replied by stating that it did not appear to their clients that they had any liability in respect of the claims and that the claimants' attorneys had failed to set out the legal basis for the claims. The claimants' attorneys made further demands on 1 March 2013, placing particular reliance on the indemnity in clause 24.1.1. Once again they were met with a denial of liability.

The litigation history

[23] The claimants initiated arbitration proceedings in August 2013. In seeking to recover the amount of R27 420 297, they relied on clauses 24.1.1, 24.1.5 and 25.3. The defendants served their statement of defence on 3 February 2014. They disputed the applicability of clauses 24.1.1 and 25.3. In relation to clause 24.1.5, they relied on the threshold clause, contending that the claims did not meet the $2 million threshold. They also pleaded that a claim under that clause was time-barred.

[24] In their replication the claimants alleged that enforcement of the time-bar would be contrary to public policy. In the alternative, and if the arbitrator were to find the time-bar enforceable, they prayed that the arbitration be stayed to allow them to seek an extension of time from the high court in terms of s 8. In a rejoinder the defendants denied that enforcing the time-bar was contrary to public policy. They also denied that clause 23.6.3 was a clause falling within the ambit of s 8 or that the claimants would suffer undue hardship if the time-bar were enforced.

[25] The arbitrator heard the matter in December 2017. The only evidence was that contained in affidavits submitted on behalf of the claimants by Mr Wessel

Erasmus, SCH's Chief Financial Officer, and Mr Antonie van der Loo, Samancor Chrome's financial manager. In argument before the arbitrator it was common cause that the claim fell within the scope of clause 24.1.5, the defences to the claim under that clause being confined to the threshold issue and the time-bar. Although on the pleadings the defendants had denied that s 8 was applicable to clause 23.6.3, in argument they accepted that it was applicable. They deployed its applicability by arguing (a) that the existence of s 8 as an antidote to undue hardship meant that enforcement of the time-bar clause was not contrary to public policy; and (b) that the claimants, by having not hitherto brought a s 8 application, had by now foregone the opportunity to do so.

[26] The arbitrator issued his award on 5 February 2018. He held (a) that the claim did not fall within the scope of clause 25.3; (b) that although the claim was covered by the language of clause 24.1.1, that clause's operation as a general provision was excluded by clause 24.5 which was a special provision concerning tax; (c) that the three components of the tax claim (additional tax, penalty tax and interest) constituted a single claim or item of loss for purposes of the threshold clause and that the value thereof exceeded $2 million; and (d) that the enforcement of the time-bar clause would be contrary to public policy. He added that if he had found the time-bar clause to be enforceable, he would have stayed the arbitration to allow the claimants to bring a s 8 application. He thus made an award in favour of the claimants as prayed.

[27] The defendants pursued an appeal, which was heard by an appeal panel in July 2018. The defendants abandoned reliance on the threshold clause. The panel issued a preliminary award on 18 October 2018. The panel (a) agreed with the arbitrator that clauses 24.1.1 and 25.3 were inapplicable; (b) found that in view of s 8, enforcement of the time-bar clause was not contrary to public policy; (c) held that the claimants should be afforded an opportunity to apply to the high court for

a s 8 extension. The panel thus stayed the appeal proceedings pending the outcome of such an application. In acceding to the claimants' request for a stay, the panel said:

'We do however not express any view on the merits of such an application or on the question whether the High Court might, in the exercise of its discretion, deny them relief on the grounds of their delay or on some other basis.'

[28] The claimants launched their s 8 application in November 2018. In October 2019 the high court delivered judgment, granting the claimants an extension 'until after the applicants' claim in the arbitration proceedings was initiated on or about 20 August 2013' and ordering the respondents in the application to pay the applicants' costs including the costs of two counsel.

The nature of the s 8 power

[29] Both sides argued the case on the basis that the power exercised by a court in terms of s 8 of the Arbitration Act is a discretion in the strict (true or narrow) sense. Their view accords with the decisions of the English courts on s 27 of the now repealed English Arbitration Act 1950, which served as the model for our s 8 (see, eg, *Irish Agricultural Wholesale Society Ltd v Partenreederei MS (The 'Eurotrader')* [1987] 1 Lloyds Rep 418 (CA) at 421).

[30] In order to succeed the appellants must thus satisfy us that the high court (as it has variously been said) exercised its discretion capriciously or unjudicially, or did not bring an unbiased judgment to bear, or acted on a wrong appreciation of the facts or applicable legal principles, or did not act for substantial reasons (*Shepstone & Wylie and Others v Geyser NO* 1998 (3) SA 1036 (SCA) at 1044J-1045B; *Giddey NO v JC Barnard and Partners* [2006] ZACC 13; 2007 (5) SA 525 (CC) para 17). The appellants contended that the trial court had misapprehended the relevant legal principles and misconstrued the facts. Thus it is the reasoning of the high court that calls for particular scrutiny.

The applicable legal principles

[31] In order to assess whether the high court misapprehended the legal principles, it is necessary to state what they are. Section 8 of our Arbitration Act is, as I have said, modelled on s 27 of the repealed English Arbitration Act 1950, which in turn re-enacted s 16(6) of the English Arbitration Act 1934. In England, the power of extension is currently to be found in s 12 of the Arbitration Act 1996, the provisions of which are materially different to s 27 of the repealed Act. In terms of s 12(3), the court may only grant an extension of time in one of two circumstances: if 'the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question, and that it would be just to extend the time'; or if 'the conduct of one party makes it unjust to hold the other party to the terms of the provision in question'. South Africa has not followed suit, and it is unsurprising, in the circumstances, that courts in this country have had regard to English judgments dealing with s 27: see *Administrateur, Kaap v Asla Konstruksie (Edms) Bpk* 1989 (4) SA 458 (C); *Chevron South Africa (Pty) Ltd v Unical Calulo Bunker Services (Pty) Ltd* [2011] ZAWCHC 266. In the present case, both sides referred freely to English cases. This is not to say that the two considerations specified in s 12(3) of the current English Act are not relevant in the exercise of a court's discretion in terms of our s 8. The respondents' counsel accepted that they were. They are not, however, the only relevant considerations, and the weight to be given to them will depend on the particular circumstances of the case and on the court's discretionary assessment of all relevant considerations.

[32] The language of s 8 is straightforward. The power to extend arises if the court is of the opinion that 'in the circumstances of the case *undue* hardship would otherwise be caused' (my emphasis). The hardship which the section contemplates is hardship to the claimant because its claim is time-barred. Every claimant whose claim is time-barred can be said to suffer hardship through the

loss of its claim, but the section requires something more. The court must be of the opinion that the claimant's hardship will be 'undue'. The ordinary meaning of that word conveys a hardship which is unwarranted or inappropriate because it is excessive or disproportionate. Whether the hardship is 'undue' in this sense must, as the section tells us, be determined with reference to the circumstances of the particular case.

[33] There is nothing in s 8 to indicate that the power of extension should only be exercised rarely or in exceptional circumstances. There is no reason to add a gloss to the plain language of the section. A restrictive interpretation would be antithetical to s 34 of the Constitution which guarantees access to courts or other independent and impartial tribunals in order to have justiciable disputes adjudicated.

[34] This is the view which the English courts took of s 27 of the 1950 Act following the landmark judgment of the English Court of Appeal in *Liberian Shipping Corporation v A King and & Sons Ltd (The 'Pegasus')* [1967] 1 All ER 934 (CA). In *Comdel Commodities Ltd v Siporex Trade SA* [1990] 2 All ER 552 (HL) the House of Lords declined to read restrictions into the ordinary meaning of s 27. Lord Bridge of Harwich said the following (557f-h):

'The mischief which the section sets out to remedy, in my opinion, is simply the undue or unreasonable hardship suffered by a party to an arbitration agreement who is deprived of the opportunity to pursue a contractual claim by the operation of a restrictive contractual time limit in circumstances in which he ought reasonably to be excused for his failure to comply with it.'

[35] Any circumstance rationally bearing on the 'undue' question may be taken into account by the court. Those that occur readily to mind are: (a) the terms of the time-bar clause and the broader contractual setting; (b) the extent of the claimant's delay; (c) the explanation for the claimant's failure to bring the claim timeously; (d) the extent of the claimant's fault, if any, in relation to the delay;

(e) whether the defendant caused or contributed to the non-compliance and, if so, the extent of the defendant's fault in that regard; (f) the nature and importance of the claim; (g) the extent of the prejudice, if any, suffered by the defendant in consequence of the delay. Unsurprisingly, considerations of this kind feature in the English cases. In *Moscow V/O Exportkhleb v Helmville Ltd ('The Jocelyne')* [1977] 2 Lloyds Rep 121 (CA) Brandon LJ summarised the guidelines laid down in the majority judgments in *The Pegasus* thus (at 129):

'(1) The words "undue hardship" in s 27 should not be construed too narrowly. (2) "Undue hardship" means excessive hardship and, where the hardship is due to the fault of the claimant, it means hardship the consequences of which are out of proportion to such fault. (3) In deciding whether to extend time or not, the Court should look at all the relevant circumstances of the particular case. (4) In particular, the following matters should be considered: (a) the length of the delay; (b) the amount at stake; (c) whether the delay was due to the fault of the claimant or to circumstances outside his control; (d) if it was due to the fault of the claimant, the degree of such fault; (e) whether the claimant was misled by the other party; (f) whether the other party has been prejudiced by the delay, and, if so, the degree of such prejudice.'

[36] In *Comdel Commodities supra* the House of Lords endorsed these principles (558d-f), and they were applied in this country in *Asla Konstruksie* and *Chevron supra*. See also M J Mustill and S C Boyd *The Law and Practice of Commercial Arbitration in England* 2 ed (1989) at 212-214, setting out a somewhat fuller list of factors which have been taken into account by English courts. *Libra Shipping and Trading Corporation Limited v Northern Sales Ltd (The 'Aspen Trader')* [1981] 1 Lloyds Rep 273 (CA) is a good illustration of their application. The Court of Appeal held that the trial court had failed to have regard to relevant considerations, so that the court on appeal was entitled to assess the matter afresh. The delay was two and a half months in relation to a clause which required claims to be brought within three months of final discharge of cargo. The delay was entirely the fault of the claimant. The defendant was in no way responsible for misleading the claimant. As against this, the claim was large and

its forfeiture would involve a great degree of hardship. There was no prejudice to the defendant, a factor which Brandon LJ regarded as 'of the utmost importance in weighing the case as a whole' (at 280). The Court of Appeal concluded that without an extension of time undue hardship would be caused to the claimant, and the extension was granted.

[37] Delay features in two ways. First, there is the delay from when the time-bar expired until the initiation of the arbitration proceedings or the seeking of an extension of time. (This is the delay contemplated in consideration 4(a) mentioned in the passage from *The Jocelyne* which I quoted earlier.) Second, there is the delay from when the claimant becomes aware of the need to seek an extension until the bringing of proceedings to obtain the extension. In England, it has been said that because of the discretionary nature of the power conferred by provisions such as s 27 of the 1950 Act, a claimant should seek the extension without undue delay after becoming aware of the need for it.

[38] Delay in seeking discretionary remedies is likewise recognised in this country as a factor relevant in the exercise of the discretion, in the sense that unreasonable delay may result in the discretionary remedy being refused (see, eg, *Beweging vir Christelik-Volkseie Onderwys and Others v Minister of Education and Others* [2012] ZASCA 45; [2012] 2 All SA 462 (SCA) para 34; *Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Limited and Others* [2017] ZACC 15; 2017 (5) SA 9 (CC) para 35). However, to the extent that the appellants argued that delay in seeking the s 8 remedy is a threshold requirement which could result in a claimant being non-suited without regard to other factors, I reject the argument. In my view, delay of this kind is simply another factor which the court will take into account in deciding whether or not non-extension will cause the claimant undue hardship. An unreasonable delay may be outweighed by the importance of the claim, the absence of prejudice to the

defendant and other relevant circumstances of the case. This is a matter for the trial judge's opinion.

The high court's decision

[39] The high court dealt with the general principles in paras 19-29 of its judgment, referring to the two South African cases (*Asla Konstruksie* and *Chevron*) and the leading English authorities. These led the high court to direct itself, on the law, in a manner consistent with the approach I have set out above. The appellants do not say that the high court misdirected itself in regard to these general principles.

[40] The factors which led the high court to conclude that undue hardship would be suffered by the claimants if an extension of time were not granted were in summary the following:

(a) Although a court exercising its discretion in terms of s 8 is not required to investigate the merits of the claim, the court may take the merits into account where they are manifest. In the present case, and but for the time-bar, the claimants' claim for a tax indemnity was good, indeed undisputed.

(b) The claimants were not at fault in regard to the expiry of the time-bar. They did not know of, and could not have discovered, the existence of the claim on or before 1 June 2011. The time-bar lapsed through circumstances beyond their control. (That this is so will be apparent from my earlier setting out of the facts.)

(c) The defendants were at fault because they failed to include the amount of R53 million in Samancor Chrome's tax return.

(d) The defendants were also at fault because they only submitted the tax return at the end of June 2008, whereas by law they should have done so by the end of February 2006 and whereas historically extensions beyond that eight-month window had not exceeded a further 12 months.

(e) If an extension were not granted, Samancor Holdings would, by virtue of its own conduct and fault, benefit by being saved a substantial amount of tax properly attributable to it.

(f) The claim involved a substantial amount. With mora interest, the claim totalled about R52 million at the time of the proceedings in the high court.

(g) The defendants would not be prejudiced by an extension. The only prejudice they advanced was losing the bargain of their time-bar, which was not relevant prejudice. No trial prejudice was claimed. (Indeed, since the claim on its merits was undisputed, no such prejudice was conceivable.)

(h) In regard to the claimants' delay in bringing the s 8 application, this was a relevant factor, indeed one of great importance, in the exercise of the court's discretion. In the present case, the claimants had promptly raised s 8 in their replication as soon as the defendants pleaded the time-bar. The claimants' reasons for not applying to the high court at that time were, in the high court's view, readily apparent from the history of the litigation. Abitral determinations on other issues might have rendered a s 8 application moot. Although the high court considered that the claimants should nevertheless have launched their s 8 application as soon as the defendants placed reliance on the time-bar, the defendants had suffered no prejudice by virtue of the delay, and such delay should not in the circumstances 'tip the balance' in favour of the defendants.

(i) In regard to the defendants' reliance on party autonomy and their argument that it appeared from the time-bar clause that the parties appreciated the risk that a tax claim might only arise after expiry of the bar, the high court recognised the importance attached by our law to the maxim *pacta servanda sunt*. The high court did not consider, however, that there was a logical and principled distinction between a time-bar such as clause 23.6.3, where time runs from a fixed date unrelated to the coming into existence of the claim and a time-bar where time runs from the coming into existence of the claim (the type of contractual time-bar

assessed, on public policy grounds, in *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC)). Party autonomy notionally applied to both forms of time-bar, but s 8 of the Arbitration Act is a statutory inroad on contractual autonomy, and to hold that contractual autonomy should prevail is inconsistent with the liberal approach mandated in the application of s 8. The historical pattern of delay in submitting tax returns did not justify the conclusion that the parties in the present case foresaw that the defendants might delay submitting the 2005 tax return as long as they did and that in such tax return they would fail to include the amount subsequently assessed to additional tax.

[41] Of the above factors, the only matters with which the appellants take issue are (d), (h) and (i). It is convenient to deal with (h) first.

Delay in launching application (factor (h) *supra*)

[42] The appellants invoked authorities to the effect that once a defendant takes the time-bar point, a claimant should not linger in bringing its s 8 application. They cited, in argument to us, the same authorities that the high court mentioned in discussing this point, namely a passage from Mustill and Boyd *supra* at 214-15 and *Irish Agricultural Wholesale Society supra* at 423. The appellants submitted that the approach taken by the claimants in this matter was fundamentally inconsistent with the no-delay principle and that there is nothing in South African law to mandate a different approach. They cited *Chevron supra* as support for the proposition that a claimant may bring a s 8 application prior to completion of arbitration, even though the arbitrator's decision on other issues might render the extension of time unnecessary.

[43] The appellants argued that undesirable consequences would flow from allowing a claimant first to run an arbitration to completion before bringing its s 8 application. A defendant might incur all the time and expense of defending an

arbitration on its merits, only to find that a s 8 application is refused, thus rendering the arbitration proceedings irrelevant. A claimant is required, so it was contended, to make an election at the outset whether to approach the high court for an extension or to place its faith in a favourable decision from the arbitrator on other points. Having chosen the latter, the claimant cannot fall back on the former. The fact that a defendant has not suffered prejudice in consequence of the delay is not in principle germane.

[44] As I observed earlier, delay in launching proceedings is a relevant factor, but it is not a threshold requirement. It is part of the global assessment of all relevant circumstances influencing the exercise of the court's discretion. This is the way in which the high court approached the matter in the present case, and it was right to do so.

[45] I reject the argument that prejudice is irrelevant. Because one is dealing with the global assessment, the absence of prejudice is a relevant consideration, and indeed a court exercising its discretion might properly afford it great weight. I refer here to both forms of delay previously mentioned, viz delay after the lapsing of the time-bar and delay after becoming aware of the need for a s 8 extension. In assessing whether unreasonable delay should be overlooked in the context of other discretionary remedies (*inter alia* in pre-constitutional common law review), our courts always had regard to whether the other party had been prejudiced by the delay. And the high court was correct to say that it is not relevant prejudice that a defendant will, if an extension is granted, be faced with a claim which would otherwise be barred; such 'prejudice' is inherent in every case of extension. Relevant prejudice is prejudice to the defendant's ability to resist the claim by virtue of the passage of time.

[46] The appellants' submissions about the undesirable consequences which might flow if a claimant could follow the approach which the claimants did in the present case are hypothetical. It is the facts of the particular case to which regard must be had. Naturally one can suppose cases in which the delay inherent in the approach which the present claimants followed could cause substantial prejudice to a defendant, and such prejudice would then be relevant. In the present case, however, the defendants in the event suffered no relevant prejudice. They did not dispute the clause 24.1.5 claim on its merits. Their threshold argument in relation to clause 24.1 5, and their applicability arguments in relation to clauses 24.1.1 and 25.3, were matters of interpretation, not disputed fact, and there was only a single day of argument before the arbitrator and before the appeal panel. To the extent that any part of the proceedings before the arbitrator or the panel are thought to have been rendered unnecessary by the granting of an extension of time, the panel will be entitled to take this into account in making its final costs award.

[47] As I understand the high court's decision, it did not find that the claimants were right to wait until the panel's decision before bringing their s 8 application. The high court considered that they should have brought their application promptly after the defendants filed their statement of defence in February 2014, and *Chevron* indicates that such an application would have been permissible despite the fact that an arbitral decision on other issues might in due course render the extension of time irrelevant.

[48] It is unnecessary to decide whether the high court was correct in finding, on the particular facts of this case, that the claimants were at fault in not bringing their s 8 application as soon as the defendants pleaded the time-bar. The high court's legal approach was one which favoured the appellants and accorded with their submissions on the correct legal position. The high court was nevertheless entitled to have regard to the claimants' explanation for having adopted the course

they did, even if it was misguided. The claimants delayed because both they and the defendants were pursuing contentions before the arbitrator which might render a s 8 application academic: (a) the claimants might succeed on clause 24.1.1 or clause 25.3, neither of which was subject to a time-bar; or (b) the claimants might succeed on clause 24.1.5 by persuading the arbitrator that enforcement of the time-bar was contrary to public policy; or (c) the defendants might persuade the arbitrator that the claim based on clause 24.1.5 should fail on the threshold issue.

[49] The claimants succeeded before the arbitrator on issues (b) and (c), hence the award in their favour. If the defendants had not pursued an arbitration appeal, that would have been the end of the matter without the need for a s 8 application. Having obtained success on issues (b) and (c), the claimants understandably defended their success on appeal, but the panel reversed the arbitrator on issue (b), which is when the claimants found it necessary to pursue a s 8 application. The absence of litigation prejudice to the defendants was even more clear-cut by that stage, because all the issues other than an extension of time had already been determined in the arbitration.

[50] Counsel for the appellants did not suggest in argument that the appellants had suffered any trial prejudice by virtue of the delay. As I have said, any unnecessary costs incurred in the arbitration by virtue of the failure to bring the s 8 application earlier is a matter which can be addressed by the panel in its costs award.

[51] Counsel's remaining argument as to prejudice was that if the claimants had brought their s 8 application shortly after February 2014 (when the defendants pleaded the time-bar), they would not have been able to tell the court that their claim was undisputed, since the defence based on the threshold clause would not yet have been determined in arbitration proceedings. By only bringing their

application after the appeal panel had issued its interim award, the claimants could argue that their claim was uncontested save for the time-bar clause. The fact that their claim was practically undisputed was a factor which the high court took into account.

[52] Prejudice in this attenuated form was not alleged in the appellants' opposing papers nor is there any indication that they relied on it in argument before the high court. It was not even mentioned in the appellants' heads of argument in this court. On the contrary, the written argument criticised the high court for finding that the absence of prejudice was a relevant factor. It has rightly not been suggested that the claimants deliberately held back their s 8 application in order to secure this supposed advantage. In stating that the claim was practically undisputed, the high court appears to have been making the point that it was undisputed that the additional tax, penalties and interest had been imposed in the amounts alleged, that the levied amounts related to Excluded Assets, and that they fell within the ambit of clause 24.1.5. The high court's exercise of its discretion would not have been in the least affected if the threshold defence, which turned on a narrow question of interpretation, had still been a live issue.

[53] Counsel for the appellants raised the 'floodgates' spectre if claimants were permitted to run time-barred arbitrations before bringing s 8 applications. Our decision in the present case does not signal the permissibility of such an approach; it turns on the specific and in some respects peculiar circumstances of this case. The floodgates argument is, moreover, exaggerated. A claimant could only run an arbitration on its merits by alleging and satisfying the arbitrator that the time-bar clause is unenforceable. Absent such a finding, the arbitrator would simply uphold the time-bar defence and dismiss the claim without entering upon the merits.

[54] I thus do not consider that the high court was guilty of any legal or factual misdirection in assessing the claimants' delay in launching their s 8 application. The weight to be attached to this consideration in the globular assessment was a matter for the high court.

Appellants' lateness in submitting the 2005 return (factor (d) *supra*)

[55] The appellants submitted that the high court misdirected itself factually on the following two questions: (a) whether it was reasonably foreseeable, when the sale agreement was concluded in February 2005, that a tax claim might only become known to the buyer after the expiry of the six-year time-bar; (b) whether there was a culpable delay by the seller in submitting Samancor Chrome's 2005 tax return which caused or contributed to the buyer's inability to learn of the tax claim until after expiry of the time-bar. These two questions, it may be noted, raise issues which could conceptually be located within the first and second considerations respectively specified in s 12(3) of the current English legislation. As I said previously, considerations of this kind are relevant but not exhaustive when a South African court considers a s 8 application.

[56] Under the current heading of this judgment, I shall consider the second of the two criticisms identified in the preceding paragraph. Although the evidence bearing on the two criticisms overlaps to some extent, it is convenient to deal with the other criticism at a later stage, in the context of the appellants' submissions concerning the nature of the time-bar clause at issue in this case.

[57] The appellants contended that the high court misdirected itself factually when it criticised Samancor Holdings for being 'excessively late' in submitting the 2005 tax return and in finding that the historical pattern of delay had been 12 months after financial year-end rather than the 28 months which actually occurred. Our attention was drawn to a passage in Mr Erasmus' founding affidavit

where he stated that the due date for the submission of the 2005 tax return was the last day of February 2006 but that '[o]ver the subsequent years the timeline for submission of income tax returns has been extended to 12 months after financial year-end'. The appellants' argument was that the phrase 'over the subsequent years' referred to a time later than the conclusion of the sale agreement in February 2005. There was no evidence, they submitted, that the historical position, as at February 2005, was that the delay in submitting tax returns was only 12 months after financial year-end.

[58] The question of the historical pattern as at February 2005 is relevant to assessing what the contracting parties might reasonably have foreseen when they concluded the sale agreement in February 2005 (a matter I consider later, under a separate heading). However, the high court's factor (d) was not concerned with foreseeability but with the appellants' culpability in causing the claimants only to become aware of their claim after the time-bar expired. If, after February 2005, a 12-month extension became the norm, it would not be unreasonable to criticise the appellants for failing to meet this norm. On the evidence, the due date for the 2005 tax return was either the end of February 2006 or – if the 12-month extension applied – the end of June 2006 or perhaps the end of February 2007. (Mr Erasmus' replying affidavit suggests that the 12-month extension he had in mind may have been 12 months in addition to the initial eight-month extension, ie a total extension of 20 months, rather than 12 months after year-end, since he postulated that in accordance with the 12-month extension the 2005 return should have been submitted by the end of February 2007.)

[59] In regard to the historical pattern as at February 2005, one knows from the founding affidavit that by the time the agreement was concluded the 2003 tax return had been submitted. This means that the 2003 return had been submitted by not later than 20 months after year-end. Neither side provided information as to

the delay in submitting earlier tax returns. The appellants, to whom the information would have been known, did not say that their tax returns had routinely been submitted more than 20 months after financial year-end.

[60] In regard to culpability, giving the appellants the benefit of the 12-month extension, as the high court did, is to their advantage. Their position would only be worse if they should have submitted the tax return by the end of February 2006. The best case for the appellants is that the 2005 return should have been submitted by the end of February 2007, whereas it was in fact submitted at the end of June 2008, some 16 months later. If all subsequent events had occurred 16 months earlier than they did, the claimants would have known by October 2010 that Samancor Holdings had erroneously omitted R53 million from Samancor Chrome's 2005 tax return; by March 2011 they would have known of SARS' audit findings; and by April 2011 they would have known that Samancor Holdings agreed that the amount of R53 million had to be added to Samancor Chrome's taxable income. This would have left enough time to make the income tax claim before the time-bar expired on 1 June 2011.

[61] In my view, therefore, the high court did not misdirect itself by finding that Samancor Holdings was 'excessively late' in submitting the 2005 tax return. The appellants were culpable not only in regard to this delay but also in submitting a tax return which omitted the income of R53 million. Both of these matters could legitimately be taken into account by the high court in exercising its discretion.

Nature of clause 23.6.3 and foreseeability (factor (i) *supra*)

The nature of clause 23.6.3

[62] The appellants argued that the clause 23.6.3 time-bar is fundamentally different to the time-bar clauses considered in cases such as *Barkhuizen*, where time starts to run when a claim arises. A time-bar set with reference to a date such

as the effective date of an agreement necessarily holds the risk that the time-bar might expire before the claim arises or before it comes to the notice of the claimant.

[63] In *Barkhuizen* the question was whether enforcement of a contractual time-bar was contrary to public policy. In the present matter, that was a question for the arbitrator and the appeal panel. The high court, and we, are concerned with a different question, namely an extension of time in terms of s 8. In this context, it is not unusual for extensions of time to be sought in relation to time-bar clauses set with reference to dates unrelated to the arising of claims. Indeed, all the English cases to which we were referred are cases of this kind, where time typically ran from the discharge of cargo.

[64] In such cases it is possible, as occurred in the present matter, that a claimant will only become aware of the existence of a claim after the time-limit has expired, and indeed there are English cases where this was the position. The English courts did not say that s 27 did not apply in such situations or that party autonomy should make extensions of time in such cases rare or exceptional (see, eg, *Sparta Navigation Co v Transocean America Inc (The 'Stephanos')* [1989] 1 Lloyds Rep 506 (QB) at 509). On the contrary, the circumstance that time expired before the claimant could reasonably have become aware of the claim was regarded as a strong factor in favour of granting an extension. (See, eg, *Eastern Counties Farmers Ltd v J & J Cunningham Ltd; Grimsdale & Sons Ltd (Third Party); Holland Colombo Trading Society Ltd (Fourth Party)* [1962] 1 Lloyds Rep 261 (CA) at 263; *Atlantic Shipping Co Ltd v Tradax Internacional SA (The 'Bratislava')* [1977] 2 Lloyds Rep 269 (QB) at 271; *Establissments Soules & Cie v International Trade Development Co Ltd* [1979] 2 Lloyds Rep 122 at 137-138.)

[65] The appellants' argument comes close to postulating that a time-bar such as clause 23.6.3 does not fall within the scope of s 8 at all because the parties must be taken to have contemplated the very hardship which occurs when the 'guillotine falls' before the claimant could reasonably have been aware of the claim. The high court was correct to reject this argument as unprincipled. Clause 23.6 is plainly a time-bar clause falling squarely within the ambit of s 8.

[66] There is a distinction between a time-bar clause and a temporally limited indemnity. An insurer's obligation to indemnify is usually limited, temporally, to events occurring during a specified period. This temporal limit on the insurer's indemnity obligation is quite different from any time-limits which the policy may impose in regard to the institution of legal proceedings. Clauses 25.2 and 25.3 of the sale agreement were temporally limited indemnities. They covered events occurring between the Effective Date and the Closing Date. They were not time-bar clauses requiring arbitration to be initiated within a specified time, and s 8 could thus not have been invoked to extend the temporal span of those indemnities. Clause 24.1.5, by contrast, was formulated in a temporally unlimited way and made subject to a separate time-bar clause requiring the claimant to take a step to commence arbitration within a specified period of time. This inevitably brought s 8 into play.

[67] As with all time-bar clauses, the purpose of clause 23.6 was to give the parties finality. See *Sparta Navigation supra* at 509 where Saville J said the following in rejecting an argument that the well-known Centrocon time-bar clause did not apply to a claim which only arose after the time-bar expired:

'On this construction *[the one preferred by the judge]*, whether or not the claimant has a valid or sustainable claim (ie a cause of action) during the stipulated period and whether or not he knew or ought to have known during that period that he had or might have a claim of any nature are quite immaterial considerations. The commercial sense of such a construction is to my mind obvious – at the end of the stipulated period the parties will know where they stand in the sense

of knowing what claims (if any) are outstanding against each other: and the difficulties and uncertainties often inherent in trying to deal with claims only long after the event would be largely, if not wholly, averted.'

[68] But all time-bar clauses, where arbitration is concerned, are subject to s 8, so the contractual purpose of finality cannot override an assessment of undue hardship. In *Sparta Navigation* Saville J, despite having formulated the purpose of the time-bar clause as quoted in the preceding paragraph, granted an extension on an application brought about 20 months after the time-bar lapsed.

Foreseeability

[69] Earlier in this judgment I foreshadowed the appellants' criticism of the high court's treatment of the question whether it was reasonably foreseeable, when the sale agreement was concluded in February 2005, that a tax claim might only become known to the buyer after the expiry of the six-year time-bar Although clause 23.6.3 is subject to s 8, I accept that a court exercising its discretion under that section may take into account (a) the extent to which the parties could have foreseen that a claimant might only learn of claims after the expiry of the time-bar and (b) the likelihood of claims only arising or coming to the notice of a claimant after the expiry of the time-bar. This may bear upon the question whether enforcing the time-bar would cause 'undue hardship'.

[70] In the present case, the circumstances affecting the date on which the claimants could reasonably acquire knowledge of tax claims would be (a) the date of submission of the relevant tax return; (b) the date of the issuing of the original assessment; (c) the accuracy of the tax return and thus the risk of additional assessments.

[71] I have already dealt with the evidence bearing on the submission of tax returns. There is evidence as to the practice which came into existence at some

unspecified time after 2005, and evidence that the 2003 tax return was submitted by not later than February 2005. There is also evidence that the due date for the submission of tax returns as at February 2005 was eight months after year-end. There is no evidence of any historical pattern of the submission of tax returns later than 20 months after year-end.

[72] In regard to dates of assessments, when the agreement was concluded Samancor Chrome's most recent tax assessment was for its 1998 year. This means that if the company's 1999 tax return was submitted by February 2001 (20 months after year-end), there was still no assessment four years later. There is no evidence that those representing the claimant were aware of these facts when the agreement was concluded, but if they were, it might have suggested that a 2005 tax return submitted in February 2007 might only become the subject of an assessment during the course of 2011. If the assessment were issued after 1 June 2011, an income tax indemnity would be time-barred, but s 8 would still have been available in case of undue hardship. Mr Erasmus, with hindsight, thought that six years was optimistic. However, he was not involved in negotiating the agreement. The appellants in their opposing papers disputed the admissibility of his opinions on this score. They did not supply evidence of their own as to the information available to the contracting parties about the historical pattern of submission and assessment.

[73] Ultimately, I do not think that very much turns on these extrapolations. A lengthy time-bar was provided. In the event, it was not long enough to enable the claimants timeously to pursue a large claim for an otherwise undisputed tax indemnity. One does not need evidence to know that a time-bar clause of this kind holds the potential to bar a claim of which the claimant might only learn after the time-bar has expired. That is equally true of the time-bar clauses considered in the English cases. I do not think that the evidence justifies the conclusion that the

parties foresaw it as likely that the six-year time-bar would prove to be inadequate, though I accept that they could have foreseen this as a possibility. For that possibility, s 8 was available to ameliorate undue hardship.

[74] In the event, SARS' original assessment on the 2005 return was issued in February 2011, about two years and seven months after filing. But for Samancor Holdings' failure to include the sum of R53 million in the tax computation, matters would have been adjusted between the parties in terms of clause 24.1.5 before the time-bar expired. The claimants were not at fault. The defendants were at fault, both in submitting the tax return late and more importantly in failing to ensure that all income attributable to Excluded Assets was included in the return. They suffered no prejudice by virtue of the delay beyond 1 June 2011 or beyond the date on which the claimants became aware that an extension of time might be needed. The high court was clearly entitled to reach the conclusion which it did.

[75] I make the following order: The appeal is dismissed with costs, including the costs of two counsel.

O L ROGERS

ACTING JUDGE OF APPEAL

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