

**In the High Court of South Africa
South Gauteng High Court
Johannesburg**

Case No: 08/38415

In the matter between:

David Cunningham King

Plaintiff

and

Commissioner for the South African Revenue Service

Defendant

Judgment

Malan J:

[1] The plaintiff instituted action against the defendant for an order declaring that a settlement agreement allegedly concluded between the plaintiff personally and a person purporting to act on behalf of the defendant is 'valid and binding upon the defendant'. The defendant excepted to the plaintiff's particulars of claim on the basis that the claim is bad in law and does not disclose a cause of action. The defendant has raised eight separate grounds of exception.

[2] After the delivery of the defendant's exception the plaintiff gave notice of its intention to amend its particulars of claim. An analysis of the plaintiff's proposed amendments demonstrates that the plaintiff has effectively conceded the validity of the first six grounds of exception raised by the defendant. Despite having been invited by letter to concede the defendant's exception and to pursue its proposed amendment, the

plaintiff has not accepted the proposal. The defendant objected in terms of Rule 28(3) to the plaintiff's proposed amendment. The notice of objection was delivered on 12 February 2009. The plaintiff on 25 February 2009 delivered an application for amendment. The defendant persists in its exception to the plaintiff's particulars of claim in their unamended form.

[3] The plaintiff alleges that the plaintiff and the defendant concluded a written settlement agreement in terms whereof certain disputes arising from certain notices of assessment issued by SARS were resolved (paragraphs 3.1 - 5). Clause 5.1 of the settlement agreement read with clause 2.1.1 records that the parties have agreed to settle the dispute in terms of the Income Tax Act 58 of 1962. The 'dispute' which is allegedly settled in terms of the settlement agreement is defined in clause 2.1.5 of the agreement to mean

'all the tax disputes in relation to the issuance of the assessments and thereafter which are and have been the subject-matter of various [c]ourt actions between the taxpayers and SARS and specifically includes the dispute with Hawker Air Services (Pty) Ltd regarding the Falcon Aircraft reg. ZS-DAV.'

'The taxpayers' are defined in clause 2.1.11 of the agreement read with clauses 1.1.2 and clause 2.1.9 to mean the plaintiff and Ben Nevis Holdings Ltd. 'The assessments' are defined in clause 2.1.3 to mean the notices of assessment issued by SARS to the taxpayers dated the 15th of February 2002.

[4] As is apparent from these provisions, as well as the provisions of clause 5.3, the settlement agreement purports to constitute a settlement relating to a tax assessment issued by SARS to the plaintiff, a tax assessment issued by SARS to Ben Nevis Holdings Ltd, and a dispute of an undisclosed nature between SARS and Hawker Air Services (Pty) Ltd regarding a Falcon Aircraft. The plaintiff does not allege that Ben Nevis Holdings Ltd and Hawker Air Services (Pty) Ltd are parties to the

settlement agreement, and it is apparent from the agreement that they are not.

[5] The only provisions relating to settlement of tax disputes contained in the Income Tax Act are those contained in Part IIIA (ss 88A to 88H). These sections read as follows:

88A. Definitions.—For the purposes of this Part—

“dispute” means a disagreement on the interpretation of either the relevant facts involved or the law applicable thereto, or of both the facts and the law;

“settle” means to resolve a dispute by compromising any disputed liability, otherwise than by way of either the Commissioner or the person concerned accepting the other party’s interpretation of the facts or the law applicable to those facts, or of both the facts and the law, and “settlement” shall be construed accordingly.

88B. Purpose of Part.—(1) The basic principle in law is that it is the duty of the Commissioner to assess and collect taxes, duties, levies, charges and other amounts according to the laws enacted by Parliament and not to forgo any such taxes, duties, levies, charges or other amounts properly chargeable and payable.

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

(3) The purpose of this Part is to prescribe the circumstances whereunder it would be inappropriate and whereunder it would be appropriate that the basic rule be tempered and for a decision to be taken to settle a dispute.

88C. Circumstances where inappropriate to settle.—It will be inappropriate and not to the best advantage of the state to settle a dispute, where, in the opinion of the Commissioner,—

(a) the action on the part of the person concerned which relates to the dispute, constitutes intentional tax evasion or fraud and no circumstances contemplated in section 88D exist;

(b) the settlement would be contrary to the law or a clearly established practice of the Commissioner on the matter, and no exceptional circumstances exist to justify a departure from the law or practice;

(c) it is in the public interest to have judicial clarification of the issue and the case is appropriate for this purpose;

(d) the pursuit of the matter through the courts will significantly promote compliance of the tax laws and the case is suitable for this purpose; or

(e) the person concerned has not complied with the provisions of any Act administered by the Commissioner and the Commissioner is of the opinion that the non-compliance is of a serious nature.

88D. Circumstances where appropriate to settle.—The Commissioner may, where it will be to the best advantage of the state, settle a dispute, in whole or in part, on a basis that is fair and equitable to both the person concerned and the Commissioner, having regard to inter alia—

- (a) whether that settlement would be in the interest of good management of the tax system, overall fairness and the best use of the Commissioner's resources;
- (b) the cost of litigation in comparison to the possible benefits with reference to—
 - (i) the prospects of success in a court;
 - (ii) the prospects of the collection of the amounts due; and
 - (iii) the costs associated with collection;
- (c) whether there are any—
 - (i) complex factual or quantum issues in contention; or
 - (ii) evidentiary difficulties,
 which are sufficient to make the case problematic in outcome or unsuitable for resolution through the alternative dispute resolution procedures or the courts;
- (d) a situation where a participant or a group of participants in a tax avoidance arrangement has accepted the Commissioner's position in the dispute, in which case the settlement may be negotiated in an appropriate manner required to unwind existing structures and arrangements; or
- (e) whether the settlement of the dispute will promote compliance of the tax laws by the person concerned or a group of taxpayers or a section of the public in a cost-effective way.

88E. Power to settle and disclosure.—(1) A dispute may be settled, as contemplated in section 88D, by the Commissioner personally or any official delegated by the Commissioner for that purpose.

(2) The Commissioner or the relevant delegated official must ensure that he or she does not have, or did not at any stage have, a personal, family, social, business, professional, employment or financial relationship with the person concerned.

88F. Procedure for settlement.—(1) The person concerned should at all times disclose all relevant facts in discussions during the process of settling a dispute.

(2) Any settlement will be conditional upon full disclosure of material facts known to the person concerned at the time of settlement.

(3) All disputes settled in whole or in part, as contemplated in section 88D, must be evidenced by a written agreement between the parties in the format as may be prescribed by the Commissioner and must include details on—

- (a) how each particular issue was settled;
- (b) relevant undertakings by the parties;
- (c) treatment of that issue in future years;
- (d) withdrawal of objections and appeals; and
- (e) arrangements for payment.

(4) The written agreement will represent the final agreed position between the parties and will be in full and final settlement of all or the specified aspects of the dispute in question between the parties.

(5) The Commissioner must, where the dispute is not ultimately settled, explain the further rights of objection and appeal to the person concerned.

(6) Subject to section 88G, the Commissioner and delegated official must adhere to the secrecy provisions with regard to the information relating to the person concerned and may not disclose the terms of any agreement to third parties unless authorised by law or by the person concerned.

(7) The Commissioner must adhere to the terms of the agreement, unless it emerges that material facts were not disclosed to it or there was fraud or misrepresentation of the facts.

(8) The Commissioner has the right to recover any outstanding amounts involved in the settlement in full where the person concerned fails to adhere to any agreed payment arrangement.

88G. Register of settlements and reporting.—(1) The Commissioner must—

(a) maintain a register of all disputes settled in the circumstances contained in this Part; and

(b) fully document the process in terms of which each dispute was settled, which document must be signed on behalf of the Commissioner and the person concerned.

(2) The Commissioner must on an annual basis provide to the Auditor-General and to the Minister of Finance a summary of all disputes which were settled in whole or in part during the period of 12 months covered by that summary, which must—

(a) be in such format which, subject to section 4(1) (b), does not disclose the identity of the person concerned, and be submitted at such time as may be agreed between the Commissioner and the Auditor-General or Minister of Finance, as the case may be; and

(b) contain details of the number of disputes settled or part settled, the amount of revenue forgone and estimated amount of savings in costs of litigation, which must be reflected in respect of main classes of taxpayers or sections of the public.

88H. Alteration of assessment on settlement.—(1) Where any dispute between the Commissioner and the person aggrieved by an assessment has been settled in terms of this

Part, the Commissioner may, notwithstanding anything to the contrary contained in this Act, alter that assessment for purposes of giving effect to that settlement.

(2) Any altered assessment contemplated in subsection (1) shall not be subject to objection and appeal.

[6] A settlement of 'the dispute in terms of the Act' as referred to in clause 5.1 of the agreement can accordingly only be a settlement of a dispute in terms of the provisions contained in Part IIIA. In s 88A 'dispute' is defined to mean 'a disagreement on the interpretation of either the relevant facts involved or the law applicable thereto, or of both the facts and the law'. The dispute as defined in clause 2.1.5 of the agreement falls within the ambit of a 'dispute' as defined in s 88A. In s 88A 'settle' is defined to mean 'to resolve a dispute by compromising any disputed liability, otherwise than by way of either the Commissioner or the person concerned accepting the other party's interpretation of the facts or the law applicable to those facts, or of both the facts and the law'. The word 'settle' is defined in clause 2.1.8 of the agreement in the same terms. The 'Commissioner' as referred to in Part IIIA is defined in s 1 to mean 'the Commissioner for the South African Revenue Service'. The Commissioner is distinct from the 'South African Revenue Service' which is defined in s 1 to mean 'the South African Revenue Service established by section 2 of the South African Revenue Service Act, 1997'.

[7] Section 88B deals with the purpose of Part IIIA. It records that the basic principle in law is that it is the duty of the Commissioner to assess and collect taxes and not to forego any such taxes which are properly chargeable and payable. It further records that circumstances may require that the strictness and rigidity of the basic principle be tempered where it would 'to the best advantage of the State'. It states the purpose of Part IIIA to be 'to prescribe the circumstances whereunder it would be inappropriate and whereunder it would be appropriate that the basic rule be tempered and for a decision to be taken to settle a dispute'. Section 88 is intended to enable SARS to waive its rights to payment under

certain circumstances, a power they did not have before the enactment of s 88 in 2003 (see Dennis Davis and Lynette Olivier (founding authors) *Juta's Income Tax* (1999 first publication) at 88A-1). Van Heerden JA in *Namex (Edms) Bpk v Kommissaris van Binnelandse Inkomste* 1994 (2) SA 265 (A) 284 D remarked that

'in die lig van die gesag aangehaal deur die Verhoorhof toegegee word dat 'n belastinggaarder in die reël nie bevoeg is om belasting kwyd te skeld, dit deur skikking te verminder, of sy vorderingsreg daarop te sedeer nie. Maar, tensy die gemene reg of wetgewing dit magtig, is geen amptenaar bevoeg om sulke resultate ten opsigte van enige Staatsvordering te bereik nie.' (The judgment of the court a quo is reported in 1992 (1) SA 761 (C), note pp 772 ff).

Section 88D deals with the circumstances where it would be appropriate to settle a dispute. The section provides that, having regard to certain specified matters 'the Commissioner may, where it will be to the best advantage of the State, settle a dispute, in whole or in part, on a basis that is fair and equitable to both the person concerned and the Commissioner'.

[8] Section 88E deals with the power to settle a dispute and ss (1) provides that '[a] dispute may be settled, as contemplated in section 88D, by the Commissioner personally or any official delegated by the Commissioner for that purpose.' It is clear from this provision that the persons empowered to act on behalf of the State in settling the dispute are either the Commissioner personally, or an official delegated by the Commissioner for the purpose of settling the dispute. The word 'official' is not defined in the Income Tax Act, but can only mean an official of SARS. In *Webster's New Collegiate Dictionary* the primary meaning given to the word 'official' is 'one who holds or is invested with an office: government official'. The *Oxford Universal Dictionary* refers to 'official' as 'one who holds a public office; as a government, municipal, or railway official' or to persons 'employed in some public capacity'. In *Juta's Income Tax* at 88E-1 it is stated that '[s]ince the authority to settle disputes has to be delegated specifically it cannot be assumed that all SARS' staff have the

authority to settle disputes.’ This observation makes it clear that the person delegated must be an ‘official’, ie an employee of SARS. But not only must he or she be an employee of SARS: the Commissioner or the ‘relevant delegated official’ must also ensure ‘that he or she does not have, or did not at any stage have, a personal, family, social, business, professional, employment or financial relationship with the person concerned’ (s 88E(2)).

[9] Section 88E(1) is the provision empowering the Commissioner to either settle a dispute personally or to delegate to an official the power to settle the dispute. It follows that the official delegated is empowered to settle the dispute only and that he is not empowered to sub-delegate that power to some other person or to authorise some other person to settle the dispute. In *Shidiack v Union Government* 1912 AD 642 648-9 it was said:

‘No doubt a public officer may for ordinary Ministerial purposes act through a deputy ... But where the Legislature places upon any official the responsibility of exercising a discretion which the nature of the subject matter and the language of the section show can only be properly exercised in a judicial spirit, then that responsibility cannot be vicariously discharged. The persons concerned have a right to demand the judgment of the specially selected officer. The exclusion of intending immigrants on the ground of defective education is a matter needing careful discrimination and is of vital moment to the applicants. Hence the Legislature has prescribed a test which is to be discharged "to the satisfaction of the Minister," and that cannot mean to the satisfaction of anybody else. The exercise of the personal discretion and judgment of the Minister is required by other subheads of the same section.’ [Cited by SIE van Tonder in medewerking met NP Badenhorst, CH Volschenk and JN Wepener *LC Steyn Die Uitleg van Wette* (1981) 5ed 222 who add: ‘Waar die wetgewer iemand met ‘n mag beklee by die uitoefening waarvan ‘n gesonde oordeel of ‘n mate van oordeelkundigheid van belang is, of deur die wetgewer, blykens die betrokke wetgewing, van belang geag word, kan die person wat deur die wetgewer vir die taak aangewys is, nie daardie mag deur iemand anders laat uitoefen nie.’]

In *Chairman, Board on Tariffs and Trade and Others v Teltron (Pty) Ltd* 1997 (2) SA 25 (A) the court was concerned with s 9(4) of the Board on Tariffs and Trade Act 107 of 1986 which provides that ‘the Board may, subject to such directions as it may issue from time to time, delegate any

power granted to it by or under section 4 to such committee.’ The court stated at 34 CG:

‘In our common law there is a presumption against delegation which is embodied in the maxim *delegatus delegare non potest*. The powers of administrative bodies, such as the Board in this case, are conferred on them, or delegated to them by the Legislature, and they cannot delegate the powers so conferred to some other person or body except insofar as they have expressly or by necessary implication been empowered to do so. In *Attorney General, OFS v Cyril Anderson Investments (Pty) Ltd* 1965 (2) SA 628 (A) at 639 C-D Botha JA put it as follows:

“The maxim *delegatus delegare non potest* is based upon the assumption that, where the Legislature has delegated powers and functions to a subordinate authority, it intended that authority itself to exercise those powers and to perform those functions, and not to delegate them to someone else, and that the power delegated does not therefore include the power to delegate. It is not every delegation of delegated powers that is hit by the maxim, but only such delegations as are not, either expressly or by necessary implication, authorised by the delegated powers.”

‘In the present case the Board has, in terms of s 9 of the Act, been authorised to delegate any of the powers or duties granted or assigned to it “in terms of section 4” to a committee subject to such directions as the Board may issue from time to time. The power to delegate is therefore circumscribed and limited to those powers and duties granted or assigned to it under section 4.’

Finally, in *Nkalweni and Others v Chairman, White Commission and Others* [1998] 2 All SA 225 (E) CD the court referred to the presumption against delegation and cited the following passage from *Veldsman and Others v Overberg Regional Services Council and Another* 1991 (2) SA 651 (C) 656 G: ‘This is more particularly so where the power involves or provides for the exercise of a discretion by the delegee, and even more so when that delegee is an authority such as second respondent, which is “on the spot” and which no doubt has special knowledge of the needs, requirements, financial and other difficulties of the inhabitants...’. The court in *Nkalweni* added at 233-4:

‘It appears that in a case where power involved has a significant discretionary component, required skill and decision-making, and possibly even decisions of policy, it is unlikely that the power is delegable. That power is usually classified as “quasi-judicial”, “judicial” or “legislative”, depending on the circumstances and having acquired one of those labels, it is

stamped as non-delegable. If, however, strong implication to the contrary can be ascertained, that presumption may be negated.'

[10] Section 88F deals with the settlement procedure and requires that all disputes settled 'be evidenced by a written agreement between the parties in the format as may be prescribed by the Commissioner.' The agreement must also include details on how each particular issue was settled; relevant undertakings by the parties; treatment of that issue in future years; withdrawal of objections and appeals; and arrangements for payment.' Section 88F(4) provides that the written agreement will represent the 'final agreed position between the parties' and that it will be in full and final settlement of all of the specified aspects of the dispute in question. Section 88H deals with the alteration of an income tax assessment on settlement, and provides that where any dispute between the Commissioner and the person aggrieved by an assessment has been settled in terms of Part IIIA, the Commissioner may alter that assessment for purpose of giving effect to that settlement, and that an altered assessment shall not be subject to objection and appeal.

[11] For a valid and binding settlement agreement in terms of which an income tax dispute is settled, a written agreement is required to which the parties are the taxpayer ('the person concerned'/'the person aggrieved by an assessment'), on the one hand, and, on the other, the Commissioner personally or an official of SARS delegated by the Commissioner for the purposes of the settlement, and which agreement must be in the format prescribed by the Commissioner.

[12] In paragraph 3.4 of the particulars of claim the plaintiff alleges that the written agreement was entered into on behalf of the defendant

'by Delville Whatley & Associates who had been authorised to settle the disputes between the plaintiff and the South African Revenue Services by a written authority furnished by P Erasmus, an authorised representative of the defendant, alternatively by Leonard Radebe.'

The settlement agreement is incorporated into the particulars of claim by reference thereto in paragraph 3.5. The signatory to the settlement agreement purports to be Delville Whatley & Associates. It appears ex facie the written agreement relied upon by the plaintiff, and from the allegations in the particulars of claim, that the written agreement was not signed by the Commissioner personally. The signatory on the last page of the written agreement beneath the date 25 June 2008 purports to be 'Delville Whatley & Associates per mandated letter attached dated 13.06.08'. The letter attached to the written agreement and dated 13.06.2008 purports to be a letter signed by P Erasmus on a letterhead of SARS (and not purportedly on behalf of the defendant), appointing 'Whatley & Associates' to settle a dispute as referred to in that letter. In the letter that purports to be the letterhead of SARS, 'South African Revenue Services', P Erasmus states:

'We hereby appoint Whatley and Associates to settle the dispute between the South African Revenue services and Mr. David Cunningham King and Ben Nevis Holdings Ltd. The amount in settlement between the parties concerned is not to exceed R300000000.00 (Three Hundred million rand) per your mandate dated the 29 May 2008.'

[13] The particulars of claim also contain allegations concerning the alleged dispute between the parties which justify the order sought. In paragraph 5.1 the averment is made that on 22 October 2008 the plaintiff's attorneys addressed a letter to the defendant's attorneys seeking an undertaking from the South African Revenue Service 'that it would hold itself bound to the terms of the settlement agreement and comply with its obligations as recorded therein.' The letter states:

'8. Our client is aware of the fraud investigations against him, instituted by SARS relating to the agreement, and has completely cooperated with the authorities in this regard, and we are of the opinion that such investigations will not lead to any charges being brought against our client.

9. Our client does however believe that a valid and binding settlement agreement was entered into between the parties and intends carrying out all of his obligations in terms of the agreement.

10. Accordingly we require an undertaking from SARS that they will be bound by the agreement and the terms and obligations contained therein. Should we not receive the

aforementioned undertaking within seven days from receipt hereof we hold instructions to approach the above Court for an order compelling SARS to comply with the agreement.'

The attorneys acting for the defendant responded by stating that any action based on the alleged settlement would be defended and denying that

'Whatley and Associates were authorized to represent SARS in any way at all. More specifically, our client denies that Whatley & Associates were authorized to conclude or sign any agreement on its behalf' (letter of 24 October 2008).

[14] The *first ground of exception* is really dispositive of all the grounds of exception relied upon. The defendant excepts to the particulars of claim on the basis that, since it appears *ex facie* the written agreement relied upon that the Commissioner did not personally enter into the agreement, they do not contain the allegation that Delville Whatley & Associates was an 'official delegated by the Commisioner' for the purposes of settlement of the dispute, as contemplated by s 88E(1). For the reasons set out above this ground of exception must be upheld. A settlement agreement concluded in the manner alleged in the particulars of claim and relating to a dispute as defined in s 88A is not valid and binding. The allegations in paragraph 3.4 of the particulars of claim that Delville Whatley and Associates had been authorised by written authority furnished by P Erasmus, an authorised representative if the defendant, alternatively by Leonard Radebe is insufficient to sustain a cause of action. It is clear from paragraph 6 of the plaintiff's notice of intention to amend that the plaintiff concedes that the provisions of s 88E(1) are applicable, and that it is necessary to allege that the dispute was settled by an official delegated by the Commissioner for the purposes of settlement of the dispute.

[15] The *second ground of exception* refers to paragraph 3.4 of the particulars of claim where it is alleged that the agreement was entered into on behalf of the defendant by Delville Whatley & Associates, who had been authorised to conclude the settlement agreement by written

authority furnished by P Erasmus, an authorised representative of the defendant. The signatory on the last page of the written agreement beneath the date 25 June 2008 purports to be 'Delville Whatley & Associates per mandated letter attached dated 13.06.08'. The letter attached to the written agreement and dated 13.06.2008 purports to be a letter signed by P Erasmus on a letterhead of SARS (and not purportedly on behalf of the defendant), appointing 'Whatley & Associates' to settle a dispute as referred to in that letter. The written authority on which the plaintiff relies in paragraph 3.4 of the particulars of claim read with the letter attached to the written agreement, annexure 'A' to the particulars of claim, does not authorise 'Delville Whatley & Associates' to conclude any settlement agreement. There is furthermore no allegation made that 'Whatley & Associates' referred to in the letter is the same person or entity as 'Delville Whatley & Associates'. Accordingly, the written document (the letter annexed to the agreement) on which the plaintiff relies as constituting the authorisation given to Delville Whatley & Associates, does not support the allegation that Delville Whatley & Associates had been authorised, or that Delville Whatley & Associates was authorised to act on behalf of the defendant (the Commissioner). In any event, in paragraph 3.4 of the particulars of claim read with paragraph 3.3 thereof, the alternative allegation is made that Delville Whatley & Associates had been authorised to conclude the settlement agreement on behalf of the defendant by Leonard Radebe, the (then) Chief Deputy Operating Officer of the South African Revenue Service. The signatory on the last page of the written agreement purports to be 'Delville Whatley & Associates acting per mandated letter attached dated 14.06.08'. That letter purports to be signed by P Erasmus on behalf of SARS, and not by Leonard Radebe. In paragraph 5 of the plaintiff's notice of intention to amend the reference to Radebe in paragraph 3.4 is deleted.

[16] The *third ground of exception* concerns the failure of the plaintiff to allege that the settlement agreement is in the format as may be prescribed by the Commissioner as s 88F(3). Clause 5 of the written

agreement which is annexed to the particulars of claim as annexure 'A', records that the parties have agreed to settle the dispute in terms of the Income Tax Act. The provisions relating to the settlement of income tax disputes are contained in Part IIIA (ss 88A to 88H). Section 88F(3) provides that all disputes settled in whole or in part, as contemplated in s 88D, must be evidenced by a written agreement between the parties in the format as may be prescribed by the Commissioner. It follows that compliance with any format prescribed by the Commissioner is a condition of the validity of any settlement agreement. The plaintiff does not allege that the written agreement was in the format as prescribed by the Commissioner. In the absence of such allegation, the written agreement relied upon by the plaintiff is not a valid and binding agreement. In paragraph 7 of the plaintiff's notice of intention to amend the plaintiff seeks to add in paragraph 3.5 the addition of a new sentence: 'It is in a format prescribed by the defendant.' On this ground, as well, the plaintiff's particulars of claim should be struck out.

[17] The *fourth ground of exception* concerns the parties to the settlement agreement. The plaintiff alleges that a written settlement agreement was concluded between the plaintiff and the defendant. The defendant is the Commissioner for the South African Revenue Service, as defined and contemplated in the Income Tax Act. The 'South African Revenue Service' is defined in s 1 to mean 'the South African Revenue Service established by s 2 of the South African Revenue Service Act, 1997', and is not the defendant in the action. The written agreement annexed to the particulars of claim defines the parties in clause 1 thereof as being the plaintiff and 'the South African Revenue Services'. The signatory to the agreement, Delville Whatley & Associates, in signing the agreement purported to act on behalf of the 'South African Revenue Services', and not on behalf of the defendant. The written agreement upon which the plaintiff relies, and which is annexed as annexure 'A' to the particulars of claim, is accordingly not a written agreement between the plaintiff and the defendant. It is apparent from paragraph 4 of the

plaintiff's notice of intention to amend that the plaintiff wishes to substitute all references to 'the defendant' with a reference to 'the South African Revenue Service'. Accordingly, the particulars of claim do not disclose a cause of action for the relief claimed, and should be struck out.

[18] The *fifth ground of exception* records that the written settlement agreement purports to be an agreement concluded between the plaintiff and Delville Whatley & Associates, acting on behalf of the South African Revenue Services, as the only parties thereto. On a proper interpretation of the written agreement it purports to constitute a settlement not only of a dispute between SARS and the plaintiff relating to a tax assessment issued against the plaintiff, but also of a dispute between SARS and Ben Nevis Holdings Ltd relating to a tax assessment issued against it, and also of a dispute of an undisclosed nature between SARS and Hawker Air Services (Pty) Ltd relating to a Falcon Aircraft. The plaintiff does not allege that Ben Nevis Holdings Ltd and Hawker Air Services (Pty) Ltd are parties to the written agreement or are bound by the terms thereof. The parties to the settlement agreement are indeed only SARS and the plaintiff (clause 1). If Ben Nevis Holdings Ltd and Hawker Air Services (Pty) Ltd are not parties to the written agreement or bound by the terms thereof, the defendant cannot be bound by the terms of the agreement insofar as it purports to settle in terms of the Income Tax Act between SARS on the one hand and Ben Nevis Holdings Ltd and Hawker Air Services (Pty) Ltd on the other hand (cf s 88F(3)).

In the *eighth ground of exception* a related matter is raised, viz that it is not alleged that Delville Whatley & Associates were authorised to settle disputes between Ben Nevis Holdings Ltd and SARS, or between Hawker Air Services (Pty) Ltd and SARS. In the absence of an allegation that Delville Whatley & Associates were authorised to act on behalf of the defendant to settle disputes which existed between Ben Nevis Holdings Ltd and SARS, and between Hawker Air Services (Pty) Ltd and SARS, the particulars of claim miss the allegations necessary to establish that a

valid and binding settlement agreement in regard to these disputes was concluded. There is also no allegation that Ben Nevis Holdings Ltd or Hawker Air Services (Pty) Ltd have bound themselves to the settlement. Moreover, it is stated that the terms of the agreement relating to the settlement of the dispute between Ben Nevis Holdings Ltd and SARS and relating to the settlement of the dispute between Hawker Air Services (Pty) Ltd and SARS are not severable, and are not alleged by the plaintiff to be capable of severance from the terms relating to the settlement of the dispute between the plaintiff and SARS. The section envisages a written settlement (s 88F(3)) and it follows that it should also reflect the taxpayers' consent whether by his or her signature or that of a representative.

It follows that on both the fifth and eighth grounds of exception the plaintiff's particulars of claim should be struck out.

[19] The *sixth ground of exception* suggests that the settlement agreement is subject to the following suspensive conditions: Clause 5.3 provides that the settlement amount will be paid out of the Glencoe Trust's overseas funds that are presently subject to preservation orders. In terms of clause 5.5 read with clause 2.1.10 the plaintiff undertook after signing of the agreement to procure from the trustees of the Caledonia Trust and the Glencoe Trust a confirmation that Ben Nevis Holdings Ltd will settle on the terms contained in the agreement and that the Glencoe Trust will pay the amount of R300 million within 7 days of the funds being released from the prevailing preservation order. In clause 5.5 it is recorded that confirmation from the Guernsey Court will be required for the release of the amount of R300 million from the prevailing preservation orders. In terms of clause 2.1.5 read with clause 5.3, in order for the dispute between SARS and Hawker Air Services (Pty) Ltd regarding the Falcon Aircraft to be settled, Hawker Air Services (Pty) Ltd would have to agree to the settlement of the dispute between SARS and itself on this basis. It was submitted that these provisions constitute suspensive

conditions, and that a party wishing to rely on a contract has to allege and prove the fulfilment of any suspensive condition (*Resisto Dairy (Pty) Ltd v Auto Protection Insurance Company Ltd* 1963 (1) SA 632 (A) 644 GH). Even if the 'conditions' referred to are indeed suspensive conditions there may nevertheless be pending their fulfilment a contractual relationship between the parties (*Palm 15 (Pty) Ltd v Cotton Tail Homes (Pty) Ltd* 1978 (2) SA 872 (A) 887 C). It was submitted that in the absence of an allegation that the suspensive conditions have been fulfilled, the particulars of claim fail to establish the existence of a valid, binding and enforceable settlement agreement between the parties.

[20] A similar argument was advanced in respect of the seventh *ground of exception*. Clause 5.5 of the settlement agreement provides:

'After signing of this agreement King will procure from the trustees a confirmation that Nevis will settle on the terms contained in this agreement and that the Glencoe Trust will pay the amount of R300 million to the account nominated by SARS in 5.3 above within 7 days of such funds being released from the prevailing preservation order. It is recorded that confirmation from the Guernsey Court will be required for this to take place and King will initiate this process immediately upon the signing of this agreement.'

It was submitted that if the provisions of this clause do not constitute a suspensive condition (as suggested in the sixth ground of exception) they constitute a resolute condition that should the plaintiff fail, immediately upon signing of the agreement, to initiate the process to obtain confirmation from the Guernsey Court that R300 million of the overseas funds of the Glencoe Trust are released from the prevailing preservation order, the agreement will lapse. In the absence of an allegation that the plaintiff initiated the process described, it was submitted that the written agreement had lapsed and is no longer binding or enforceable.

[21] I do not find it necessary to resolve whether the conditions referred to in the sixth and seventh grounds of exception are suspensive or resolute. They are certainly conditions the operation or termination of

the agreement is subject to. The plaintiff has not alleged their occurrence and thus not the 'validity' of the agreement qua settlement agreement. It is significant that in prayer 1 the plaintiff sought an order 'declaring that the settlement agreement ... is valid and binding upon the defendant'. In the notice of intention to amend the plaintiff deletes the words 'valid and' in prayer 1 and seeks to limit the dispute to the question whether Delville Whatney and Associates were authorised to represent SARS in the conclusion of the agreement (paragraphs 9 to 11). The dispute is wider and concerns the question whether the settlement agreement is 'valid and binding' entailing compliance by SARS with its terms (see the letter of the plaintiff quoted in paragraph 13 above). In any event, as I have said, my conclusion in regard to the first ground of exception disposes of the matter.

[22] The following order is made:

- 1 The defendant's exception is upheld and the plaintiff's particulars of claim are set aside;
- 2 The plaintiff is given leave, if so advised, to proceed with its application to amend in terms of Rule 28(4) and dated 25 February 2009;
- 3 The plaintiff is ordered to pay the costs of the exception, inclusive of the costs attendant upon the employment of two senior counsel.

Malan J

Judge of the High Court

Counsel for plaintiff: ARG Mundell

Plaintiff's attorneys: RE Harrison Attorneys

Counsel for defendant: JJ Gauntlett SC and NGD Maritz SC

Defendant's attorneys: Mahlangu Incorporated

Date of hearing: 3 March 2009

Date of judgment: 9 March 2009