HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

(1) REPORTABLE: Yes.
(2) OF INTEREST TO OTHER JUDGES: Yes.
(3) REVISED.

24-10-2019 P.A. Meyer
DATE JUDGE P.A. MEYER

Case No: 42659/18

In the matter between:

SAMANCOR CHROME HOLDINGS (PTY) LIMITED	First Applicant
SAMANCOR CHROME LIMITED	Second Applicant

and

SAMANCOR HOLDINGS (PTY) LIMITED	First Respondent
BHP BILLITON SA LIMITED	Second Respondent
ANGLO SOUTH AFRICA CAPITAL (PTY) LIMITED	Third Respondent

***Case Summary*: Arbitration – Arbitration Act, 42 of 1965 – section 8 – discretionary power of court to extend the time stipulated in a time-bar clause for commencing arbitration proceedings if the court 'is of the opinion that in the circumstances of the case undue hardship would otherwise be caused' – interpretation of the words 'undue hardship' and application of the provision – factors to be taken into account in considering whether or not to exercise the discretionary power.**

JUDGMENT

MEYER, J

[1] This application concerns the enforceability of a time-bar provision for commencing arbitration proceedings contained in an agreement, and particularly whether the enforcement of the time-bar period would cause 'undue hardship' within the meaning of s 8 of the Arbitration Act, 42 of 1965. The material facts are essentially uncontentious.

[2] A sale of shares agreement was concluded on 15 February 2005 between the first applicant, Samancor Chrome Holdings (Pty) Ltd (SCH) and the second applicant, Samancor Chrome Limited (the company), on the one hand, and the first respondent, Samancor Holdings (Pty) Ltd (SH), the second respondent, BHP Billiton SA Limited (BHP), and the third respondent, Anglo South Africa Capital (Pty) Limited (ASAC), on the other (the agreement). The shareholders of the company before the agreement was implemented, were BHP and ASAC, and they bound themselves as sureties for the obligations of SH arising from the agreement. The company principally consisted of a chrome business division, a manganese business division and a stainless-steel business division.

[3] In terms of the agreement the entire issued share capital of the company (with the chrome division remaining with the company) was sold to SCH. The effective date of the agreement was 1 June 2005, and the closing date 3 April 2006. From 1 June 2005, the company conducted the business of the chrome division for its own account and profit and loss, and BHP and ASAC, through SH, the business of the manganese division for its own account and profit and loss, which divisions had historically also been conducted separately by the company. The company remained the only taxpaying entity for any income tax liability to the South African Revenue Service (SARS) in respect of both the chrome and manganese divisions during the interim period from 1 June 2005 until 3 April 2006. This means that although the company only operated the chrome division for its benefit, it was liable to pay income tax in respect of both divisions. As from 1 April 2006, the manganese division became a taxpaying entity and from then its income tax no longer affected the company.

[4] SH, in terms of the agreement, furnished indemnities to SCH and the company in respect of, *inter alia*, income tax (together with penalties and interest) that was attributable to the manganese operations of SH, but which was paid to SARS by the company. In this regard clause 24.1.5 of the agreement provides:

'24.1 Subject to the provisions of clauses 23.3 to 23.9 inclusive, the Seller indemnifies the Purchaser and the Company, 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 which may be attributable to:

. . .

24.1.5 any proved liability of the Company and/or any Subsidiary and/or Associated 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, for which purpose the term "Taxation" shall include, without limiting the generality of the term-

24.1.5.1 Income Tax;

24.1.5.2 value-added tax and/or imposts of a similar nature;

24.1.5.3 levies payable;

24.1.5.4 all other forms of taxation;

24.1.5.5 any employee taxes;

24.1.5.6 any taxation arising from new assessments of taxation and/or the reopening of any Income Tax assessments of the Company and any Subsidiary; and

24.1.5.7 any penalties or interest as a result thereof;'

[5] The agreement contemplated that it may take an extended period of time to obtain ministerial approval to be able to effect the transfer of the mineral rights and to obtain the outstanding tax assessments and render the outstanding tax returns, including those that relate to the interim period. At the time when the agreement was concluded the last income tax assessment issued to the company was in respect of the 1998 year of assessment and the last income tax return submitted by the company was in respect of the 2003 year of assessment. Clause 16.1 made provision for the transfer of mineral rights to be completed by 1 May 2009, or such other date as may be allowed by the Mineral and Petroleum Resources Development Act, 28 of 2002, and clause 23.6.3 (the time-bar clause) made provision for the indemnity in favour of SCH and the company in respect of income tax payable by or levied on the company to be operative until the sixth anniversary of the effective date, i.e. until 1 June 2011. A claim that falls within the ambit of clause 24.1.5 is subject to the time-bar clause, which reads thus:

'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.'

[6] The time-bar clause thus afforded SCH and the company a six-year period from the effective date, 1 June 2005, to make any claim in respect of any income tax payable by or levied on the company (the time-bar). It limits the period of time, after the agreement becomes effective, for any income tax related claims (whether or not such claim might have arisen by that date).

[7] SH, BHP and ASAC, but especially SH, was responsible for the preparation and submission of the company's income tax returns, because it related to a period in respect of which their tax department was responsible for the tax affairs of the company. The tax return for the year ended 30 June 2005 should, in terms of the applicable tax legislation, have been submitted by no later than the end of February 2006. SH, on behalf of the company, only submitted the 2005 income tax return on 30 June 2008, twenty-eight months late. (The income tax return for the year ended 30 June 2006 was completed and submitted on 27 May 2010.)

[8] On 7 February 2011, more than thirty months later, SARS raised the original assessment in respect of the taxable income of the company for the tax year ended 30 June 2005, in an amount of R1 930 290 858.00, and accordingly for income tax payable in the amount of R559 784 348.82. During August 2011, SARS initiated a tax audit in relation to the income tax payable by the company for the tax year ended 30 June 2005, which audit continued until about July 2012. On 27 September 2012, over four years after the return was submitted on 30 June 2008, SARS raised an additional assessment in respect of the taxable income of the company for the tax year ended 30 June 2005, in an amount of R1 982 866 029.00, and accordingly for income tax payable in the amount of R575 031 148.41. This represented an increase of R52 575 171 in the taxable income of the company, and an increased income tax liability of R15 246 800. SARS also imposed additional tax penalties in the sum of R7 623 600.00, in terms of s 76(1) of the Income Tax Act, 58 of 1962 (the Income Tax Act), and interest in the sum of R17 267 001.00, in terms of s 89 *quat* (2) of the Income Tax Act, in respect of that under-declaration of taxable income and underpayment of income tax (an additional total amount of R40 137 401).

[9] The increase of R52 575 171.00 in the assessed taxable income of the company for the 2005 year of assessment, and accordingly the assessed increased income tax of R15 246 800.00, it is common cause, was attributable to the failure by SH to have correctly calculated the company's taxable income for the tax year ended 2005, and more particularly its failure to add back to its taxable income a disallowable impairment on investments relating to the 'excluded assets' as defined in the agreement (all of the assets of the company which do not form part of the chrome operations). The explanation proffered on behalf of SH is this:

'It seems that the impairment on the investment amounting to R53 million has been written off in the income statement and not taken through equity as disclosed on schedule 46 of the income tax return. The initial accounting treatment was through equity but with the finalisation of the Annual Financial Statements the amount was taken to the Income Statement instead and the tax calculation was never adjusted accordingly.

The 53 million error was an oversight and there was no intention to evade the payment of income tax.'

It is also undisputed that there was no manner in which SCH and the company could have detected such an error as they did not have access to the necessary information for purposes of completing of the return, especially in relation to what was ultimately a tax liability in respect of an excluded asset. It is thus common cause that SH was to blame for the error and that SCH and the company did not know, and could not have known, of it until after the time-bar had expired.

[10] Ultimately, after the company had objected to and lodged an appeal against the penalties and interest raised by SARS and an alternate dispute process had been entered into between SARS and the company in terms of the Tax Administration Act, 2011, the dispute was resolved and the company's liability to SARS was reduced in terms of a settlement agreement concluded in October 2013 to R27 420 297, comprised of additional income tax in the amount of R15 246 800, penalties in the amount of R2 287 020 and interest in the amount of R9 886 477 (the SARS indebtedness). The company settled the SARS indebtedness in the total amount of R27 420 279, by paying to SARS an amount of R21 347 844 on 30 November 2012, and an amount of R6 072 453.00 on 19 March 2013.

[11] SH, BHP and ASAC refused to pay the SARS indebtedness or to acknowledge their liability. On 20 August 2013, SCH initiated arbitration proceedings at first

instance against them, claiming the SARS indebtedness of R27 420 297.00 plus interest under different indemnities contained in the agreement, including the indemnity contained in clause 24.1.5 for the additional income tax liability that they aver should have been discharged by SH, but in fact was discharged by the company. The statement of claim was issued and served more than eight years after the effective date, and, therefore, outside the six-year time-bar.

[12] SH, BHP and ASAC pleaded in their statement of defence, dated 3 February 2014, that the claim under clause 24.1.5 was wholly barred and unenforceable in terms of the time-bar clause. The response of SCH and the company was to plead in their replication that the enforcement of the time-bar clause would be contrary to public policy, alternatively, that the time-bar clause falls within the ambit of s 8 of the Arbitration Act, and they seek a stay of the arbitration to enable them to apply to court for an extension of the time-bar in terms of s 8, if their claims would otherwise be precluded in terms of the time-bar clause. (Section 8 of the Arbitration Act provides that a court may extend the time stipulated in a time-bar clause for commencing arbitration proceedings if the court 'is of the opinion that in the circumstances of the case undue hardship would otherwise be caused'.) In their rejoinder, SH, BHP and ASAC boldly denied that the time-bar clause was contrary to public policy, or that it constitutes a clause falling within the ambit of s 8 of the Arbitration Act, or that undue hardship would be caused if the time-bar is not extended. The further allegation by SCH and the company in their replication that-

'accordingly, and in the event that the Arbitrator finds that the claims would otherwise be precluded pursuant to clause 23.6, the claimants seek the arbitration to be stayed to enable the claimants to apply to court in terms of section 8 of the Arbitration Act 42 of 1965 for an extension of the periods in clause 23.6.2 and 23.6.3 of the agreement',

was also met by a mere denial in the rejoinder.

[13] On 5 February 2018, the arbitrator at first instance handed down an award in which he found that the claim of SCH and the company in respect of the SARS indebtedness fell within the ambit of the indemnity in clause 24.1.5 of the agreement and that, as such, it was subject to the time-bar clause. He applied the two-stage process enunciated by the Constitutional Court in *Barkhuizen v Napier* 2007 (5) SA 323 (CC), finding that the claim was not time-barred as, although the time-bar clause itself was not so unreasonable as to be unconstitutional, its enforcement would be

'unfair and unreasonable' to SCH and the company, and thus contrary to public policy, because 'the circumstances that prevented the claimants from instituting arbitration proceedings within the time allowed by the time-bar clauses are of such an exceptional nature'. He further found that even if the time-bar clause was enforceable, he would have stayed the proceedings to afford SCH and the company an opportunity to apply to court for relief under s 8 of the Arbitration Act to extend the time-bar. The arbitrator at first instance, therefore, upheld the claim under clause 24.1.5 of the agreement and an award was made in favour of SCH and the company.

[14] SH, BHP and ASAC appealed against the award to an arbitration appeal panel. In a preliminary award that was delivered on 18 October 2018, the appeal panel upheld the arbitrator's finding that the claim in terms of clause 24.1.5 was well-founded but found that the time-bar clause was not contrary to public policy. In this regard the appeal panel, *inter alia*, stated:

'. . . The claimants' case is that the time-bar should not be enforced because it will inflict undue hardship on them. But, if they persuade the High Court that it would be so, the court may relieve them of the impact of the time-bar. It seems to purge the time-bar of the unfairness and unreasonableness that might otherwise have rendered it contrary to public policy. We are accordingly of the view that, in the light of the ameliorating effect of section 8, the operation of the time-bar in this case cannot be said to be unfair and unreasonable and thus contrary to public policy.'

[15] The appeal panel found reinforcement for its conclusion in, *inter alia*, the following features of the time-bar provision in this case:

'It was entirely foreseeable that the time-bar might defeat the claimants' claims arising from Samancor Chrome's unforeseen liability for income tax. Their witness, Mr Wessel Erasmus, testified that the six year time-bar under clause 23.6.3 was "highly optimistic" because it was clear that unforeseen income tax liabilities might only be discovered much later. The impact of the time-bar in this case was thus entirely foreseeable. It was an outcome the parties must have foreseen when they agreed on the time-bar'

and

'The parties to the agreement were big and powerful companies who had expert lawyers available to them when they negotiated and entered into the agreement. The time-bar was thus the product of an agreement between powerful and well-advised entities of comparable bargaining power.'

The appeal panel stayed the hearing of the appeal to afford SCH and the company the opportunity to apply to the high court for relief under s 8 of the Arbitration Act, and specifically recorded that it did-

'. . . 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'.

[16] Hence this application for relief under s 8 of the Arbitration Act, which section reads thus:

'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.'

[17] SCH and the company contend, in essence, that the enforcement of the six year time-bar would cause them to forfeit an otherwise good claim for about R52.3 million (inclusive of interest), which they, but for the claim being time-barred, have successfully established in arbitration proceedings and in arbitration appeal proceedings, and that their inability to pursue that claim would in all the circumstances of the case amount to 'undue hardship' being caused to them within the meaning of s 8: This is not an instance where they were at fault in not instituting their arbitration proceedings within the stipulated time-bar and therefore seeking an indulgence in respect of such default. On the contrary, so they contend, SH, BHP and ASAC are at fault; both in under-declaring the company's tax position for the 2005 year of assessment in the first place, and then unduly delaying in submitting the 2005 income tax return, and which resulted in SCH and the company only discovering the additional tax exposure and accordingly the claim to recover that loss under the indemnity after the time-bar had expired.

[18] SH, BHP and ASAC, on the other hand, contend that there is no basis for the relief sought by SCH and the company: They have delayed unduly in bringing this application and the enforcement of the time-bar clause does not constitute 'undue

hardship' within the meaning of s 8. As the appeal panel found, they argue, the parties are sophisticated commercial entities which, advised by specialist lawyers, willingly entered into the agreement containing the time-bar clause in circumstances where it was entirely foreseeable to SCH and the company at the time that such clause might preclude them from pursuing any income tax related claim against SH, BHP and ASAC in respect of the company's 2005 year of assessment. They argue that there is accordingly no basis for SCH and the company to be relieved of the consequences of the enforcement of the time-bar clause they previously agreed to now that that (clearly foreseeable) eventuality has come to pass.

[19] In *Administrateur, Kaap v Asla Konstruksie (Edms) Bpk* 1989 (4) SA 458 (C), Tebutt J points out that our 1965 Arbitration Act is modelled on the 1950 English Arbitration Act. The provisions of s 27 of the English Arbitration Act, 1950, were incorporated into s 8 of our Arbitration Act, 1965, with the apparent intention that our s 8 would have the same effect as the English s 27. Tebutt J adopted English law on the interpretation of the words 'undue hardship' and the application of s 27 of the English Arbitration Act, 1950, and the more benevolent approach adopted in English law since the decision of the Supreme Court in *Liberian Shipping Corporation ("The Pegasus") v A King & Sons Ltd* [1967] 1 All ER 934 (CA). In *Chevron South Africa (Pty) Limited v Unical Calulo Bunker Services (Pty) Limited and another* [2011] ZAWCHC 266 (15 June 2011) paras 54-58, Zondi J followed *Asla Konstruksie* and its adoption of the *Pegasus* principles as summarised in a later judgment of the Queen's Bench Division (Admiralty Court) in *V/O Exportkhleb v Helmville Limited ("The Jocelyne")* [1977] 2 Lloyd's Rep 121 at 129.

[20] Section 27 of the English Arbitration Act, 1950, reads as follows:

'Where the terms of an agreement to refer future disputes to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the High Court, if it is of the opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may, on such terms, if any, as the justice of the case may require, but without prejudice to the provisions of any enactment limiting the time for commencement of arbitration proceedings, extend the time for such period as it thinks proper.

[21] The predecessor to the English Arbitration Act, 1950, being s 16(6) of the English Arbitration Act, 1934, had already provided for the court to extend a contractual time-bar period, but courts did so only in exceptional cases and particularly where there was no fault at all on the part of the person seeking the extension. (See, for example, the discussion in *Asla Konstruksie* at 467F-H and in *Pegasus* at 937.) Section 27 of the English Arbitration Act, 1950, then followed, again providing for the court to extend the period in a time-bar provision where 'undue hardship' would otherwise be caused. But the English courts initially persisted in their restrictive interpretation and application of s 27, consistent with the judicial legacy of finding 'undue hardship' only in exceptional cases, and there had to be special circumstances for extending the time-bar period.

[22] The pivotal concurring majority judgments of Lords Denning and Salmon in the Court of Appeal in *Pegasus* in 1967, constituted a break from the narrow interpretation of the words 'undue hardship' in the past in applying a considerably more generous interpretation of what constituted 'undue hardship' under s 27 of the English Arbitration Act, 1950. Lord Salmon (at 941) described the approach of the courts until then: if the failure to appoint an arbitrator within the period was due to any fault on the part of the claimant, then whatever the circumstances of the case may be, the court had no power to extend the time. He then stated unequivocally that 'with very great respect, I profoundly disagree with that view'. He found (at 940-941) that there was to be a break from the past interpretation and application of s 27 of the English Arbitration Act, 1950, and that that section states-

'. . . quite plainly that if, having considered all the circumstances of the case, the court comes to the conclusion that the hardship imposed by the form of the arbitration clause on the claimant is greater than that which, in justice, he should be called upon to bear, the time within which to appoint an arbitrator may be extended by the court'.

And he found that-

'[t]he question whether those powers should or should not be exercised must turn exclusively on the particular facts of each case in which the question arose.

In considering this question, the court must take all the relevant factors of the case into account: the degree of blameworthiness of the claimants in failing to appoint an arbitrator within the time; the amount at stake; the length of the delay; whether the claimants had been misled, whether through some circumstances beyond their control it was impossible for them

to appoint an arbitrator in time. In the last two circumstances which I have mentioned, it is obvious that normally the power will be exercised.'

[23] Lord Denning in a concurring judgment (at 938) agreed that until then a too narrow interpretation had been placed on the requirement of 'undue hardship', finding that-

'. . . undue simply means excessive. It means greater hardship than the circumstances warrant. Even though a claimant has been at fault himself, it is undue hardship on him if the consequences are out of proportion to his fault.'

[24] In *Jocelyne* (at 129) Brandon, J applied the principles laid down in *Pegasus*, and summarised them as follows:

'The guide-lines laid down in the majority judgments in *The Pegasus* Case can, in my view, be summarized as follows:

(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 put 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 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.'

[25] A subsequent Court of Appeal decision which would feature prominently in the later English case law is that of *Libra Shipping and Trading Corporation Ltd. v Northern Sales Ltd. ("The Aspen Trader")* [1981] 1 Lloyd's Rep. 273 (CA). The Court of Appeal accepted *Pegasus* to be the key authority on the way to approach applications under s 27 of the English Arbitration Act, 1950. Brandon LJ said this (at 279):

'There is no doubt that the key authority on the way to approach applications under s. 27 of the Arbitration Act, 1950, is the case of *Liberian Shipping Corporation "Pegasus" v. A. King &*

Sons Ltd., [1967] 1 Lloyd's Rep. 303; [1967] 2 Q.B. 86. The case can clearly be described as an important milestone in the development of the law in relation to these matters. Before that case, it had been extremely difficult for parties who were out of time under arbitration clauses to obtain extensions of time if the delay was their fault, and the Divisional Court to which applications were made for a long time was inclined to give to the expression "undue hardship" a very narrow meaning indeed.
In that case the Court of Appeal said categorically that the approach adopted by the Divisional Courts in the past was wrong and that a very much more liberal view should be taken with regard to applications under s. 27.'

[26] The intention in *Pegasus* was not to catalogue an exhaustive list of circumstances that should be considered in deciding whether the discretionary power to extend the time-bar provision should or should not be exercised (see at 943). Indeed, it was stressed in *"Al Faiha"* [1981] 1 Lloyd's Rep. 283 at 103, which case was concerned with the application of s 27 of the English Arbitration Act, 1950, that all relevant factors, whatever they might be, were required to be taken into account in assessing 'undue hardship' under that section. In the words of Parker LJ:
'It is in my judgment clear that it is, in general, impossible to introduce any principles as to the relative weight to be attached to any particular circumstances or the order in which relevant circumstances should be considered, or what is or is not a relevant circumstance without contravening the decision in *"The Pegasus"* that each case must be decided on its own particular facts. The circumstances are infinitely variable and all the circumstances must be considered without preconceived rules in order to answer the question whether undue hardship would result.'

[27] Section 27 of the English Arbitration Act, 1950, has been replaced by s 12 of the English Arbitration Act, 1996, which section, as explained by Steel, J in *Thyssen Inc v Calypso Shipping Corporation S.A.* [2000] 2 Lloyd's Rep. 243 para 24, 'was introduced with a view to restricting the circumstances in which time might be extended as compared with the scope of s. 27 of the Arbitration Act, 1950'. Section 12 of the English Arbitration Act, 1996, reads as follows:

'(1) Where an arbitration agreement to refer future disputes through arbitration provides that a claim shall be barred, or the claimant's right extinguished, unless the claimant takes within a time fixed by the agreement some step-

(a) to begin arbitral proceedings, or

(b) . . . ,

the court may by order extend the time for taking the step.

(2) . . .

(3) The court shall make an order only if satisfied-

(a) 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

(b) the conduct of one party makes it unjust to hold the other party to the terms of the provision in question.'

[28] Subsection 12(3)*(a)* of the 1996 English Arbitration Act, as the Court of Appeal explained in *Harbour and General Works Ltd v Environment Agency* [2000] 1 Lloyd's Rep. 65 at 81, -

'. . . is concerned with party autonomy. Its aim seems to me to be to allow the Court to consider an extension in relation to circumstances where the parties would not reasonably have contemplated them as being ones where the time bar would apply, or to put it the other way round the section is concerned not to allow the court to interfere with a contractual bargain unless the circumstances are such that if they had been drawn to the attention of the parties when they agreed to the provision, the parties would at the very least have contemplated that the time bar might not apply; it then being for the court finally to rule whether justice required an extension of time to be given.'

And so far as s 12(3)*(b)* is concerned, it was held in *Thyssen* para 25, that that subsection is concerned with the question whether the claimant can attribute its failure to comply with the time-bar clause to conduct on the part of the respondent.

[29] Evidently s 12 is a very different provision from the previous s 27 of the English Arbitration Act, 1950, as well as s 8 of our Arbitration Act. Notably, our legislature has not adopted a provision similar to the more restrictive one now applicable in English law, also restricting the circumstances in which time might be extended as compared to the scope of s 8 of the Arbitration Act. South African courts are not required (as English courts now are) only to have regard to the two circumstances identified in s 12(3) of the English Arbitration Act, 1996.

[30] Having regard to the particular facts of this case and the relevant circumstances that should be considered, I am for the reasons that follow of the view that it has been established that 'undue hardship' would otherwise be caused if the time-bar is not extended as contemplated in s 8 of the Arbitration Act, and that this court's discretion under that section should be exercised to extend the time-bar. The hardship on SCH

and the company would otherwise be greater than the circumstances of this case warrant.

[31] But for the time-bar the claim of SCH and the company is good. Although a court should not attempt to evaluate the merits of the dispute unless they are manifest, the fact that a claim is almost certain to succeed, or is admitted, is a relevant factor to be taken into account. (See *Tradax Internacional S.A. v Cerrahogullari T.A.S (The "M. Eregli")* [1981] 2 Lloyd's Rep. 169 (QB) at 175; Mustill & Boyd *The Law and Practice of Commercial Arbitration in England* 2nd Ed (1989) at 214.) In *M. Eregli*, the facts that the defendant had no answer to a straightforward claim for the recovery of a debt and had the benefit of the monies for five years, weighed heavily on the Queen's Bench in finding that undue hardship would result if that claim was time-barred.

[32] Here, the loss that SCH and the company seek to be compensated for by SH, BHP and ASCA under the indemnity in clause 24.1.5 of the agreement, has been established and in fact been settled with SARS and paid. But for the time-bar the claim against SH, BHP and ASAC is not in dispute: SH admitted that it incorrectly calculated the company's taxable income for the 2005 year of assessment by failing to add back to its taxable income a disallowable impairment on investments amounting to R53 million; the appeal panel has upheld the arbitrator at first instance's award that the claim in terms of the indemnity in clause 24.1.5 is good, but for being time-barred. SH has had the benefit of not having paid the income tax it should have paid.

[33] There is also no fault on the part of SCH and the company that resulted in the time-bar expiring. They even satisfy the stringent pre-*Pegasus* era requirement that a claimant must not be at fault before undue hardship can be found to exist. They failed to bring their claim in circumstances where they did not know of, or could not reasonably have discovered, the existence of their claim before the time-bar had expired. It was only during the course of the tax audit by SARS, from August 2011 to July 2012, that SARS raised the query regarding the disallowable impairment which gave any indication of a possible under-declaration of the company's taxable income for the 2005 year of assessment, and so a possibility of an additional tax exposure that might form the subject-matter of an indemnity claim under clause 24.1.5 of the agreement. By then the time-bar had already expired, on 1 June 2011. The additional

assessment that was raised by SARS which reflected the additional income tax liability was much later still, on 27 September 2012, and well after the expiry of the time-bar.

[34] The time-bar lapsed through circumstances beyond the control of SCH and the company. This is a weighty factor; a circumstance which Lord Salmon in *Pegasus* found to be obviously one where the power of the court to extend the time-bar will normally be exercised (*supra* para 22). Self-evidently, where it was impossible for SCH and the company to know that SH had understated the company's taxable income for the 2005 year of assessment, before the time-bar had lapsed on 1 June 2011, it must follow that it was impossible for them to initiate arbitration proceedings in relation to a claim they did not even know existed.

[35] SH, BHP and ASAC were at fault in submitting the company's 2005 tax return late and in under-declaring its taxable income for that year of assessment to SARS. The degree to which a respondent is at fault or misled the claimant is a weighty factor. (See *Pegasus* at 943; *Jocelyne* at 127.) As I have mentioned, the consideration whether the claimant can attribute its failure to comply with the time-bar clause to conduct on the part of the respondent, is now one of the only two circumstances in which a court in England may extend the period of a time-bar clause in terms of the present more restrictive s 12 of the English Arbitration Act, 1996.

[36] It is common cause, as I have mentioned, that SH, BHP and ASAC, and especially SH, were responsible for preparing and submitting the company's income tax return for the 2005 year of assessment. First, it was SH that failed to properly calculate the company's taxable income for the 2005 year of assessment. Because SH incorrectly calculated the company's taxable income and submitted an incorrect return on its behalf, its correct tax position in respect of the 2005 year of assessment was only established once SARS had completed its tax audit in July 2012, and raised the additional assessment on 27 September 2012, well after the lapse of the time-bar on 1 June 2011.

[37] Second, SH was excessively late in submitting the company's income tax return for the 2005 year of assessment. It should, in terms of the applicable tax legislation, have been submitted by no later than the end of February 2006, but was only submitted on 30 June 2008, two years and four months late. Although to the parties' knowledge there had been a historical pattern of the company's income tax returns

being rendered late (and which was no doubt factored into the length of the time-bar agreed upon), those delays were twelve months after the financial year-end and not anything close to twenty-eight months. SH, based on the historical pattern, should have submitted the company's 2005 tax return by no later than the end of February 2007. SH, BHP and ASAC, therefore, are partly at fault in the claim of SCH and the company remaining undiscovered for as long as it was, taking into account the institutional delays on the part of SARS.

[38] In *ETS Soules & Cie v International Trade Development Co. Ltd.* [1979] 2 Lloyds Rep. 122 at 138, the Queen's Bench, in granting the extension, found that the claimants could not be faulted for not knowing of the claim timeously as they expected the defendants to properly carry out their contractual obligations. It was only because of the failure of the defendants to carry out their contractual obligations that the claimants found out about the claim too late, after expiry of the time-bar period. The same consideration, in my view, applies in the present matter: apart from the institutional delays on the part of SARS, it was the failure of SH to properly account for and declare the company's taxable income for the 2005 year of assessment and then to timeously render its income tax return that resulted in SCH and the company only discovering any potential claim under the indemnity after the expiry of the time-bar period.

[39] SH, by its own conduct and fault, has benefitted in not having to pay a substantial amount in income tax that related to the manganese business it retained. Instead, the company bore that financial burden. This, in my view, echoes the factors that weighed on the Queen's Bench in *M Eregli* in granting the extension, especially where the claimant's claim against the defendant was straight-forward (*a fortiori* in the present matter where the claim of SCH and the company is good, but for the time-bar) and the defendant had had the benefit of the monies for five years.

[40] As to the nature of the claim and amount at stake, the company had to settle a liability to SARS, which falls within the ambit, so it was decided in the arbitration proceedings, of the indemnity in clause 24.1.5 of the agreement. There is a substantial sum at stake: unless the period of the time-bar clause is extended, the claim of SCH and the company for some R52 million will be forfeit. That the amount at stake is an

important factor is recognised by both English and South African authorities: *Pegasus* at 943; *Jocelyne* at 129; *Asla Konstruksie* at 473; and *Chevron* para 64.

[41] SH, BHP and ASAC are not prejudiced by the delay in instituting the arbitration proceedings. The lack of prejudice on the part of a respondent in an application to extend the time limit in a time-bar provision is a weighty factor in deciding whether the hardship is undue or excessive as contemplated in s 27 of the English Arbitration Act, 1950, and in s 8 of our Arbitration Act; in the words of Brandon LJ in *Aspen Trader* (at 280), 'a factor of utmost importance'. Referring to *Pegasus*, Brandon LJ (at 279) said that that-

'. . . Court did not go so far as to say that, if there was no prejudice to the respondent, and however wrong and irresponsible the claimants had been with regard to delay, that in every such case an extension of time should be granted; but they did say – the majority of the Court – that the question of prejudice of the respondents to the application was a matter of great importance.

And in *Al Faiha* at 104, Parker J said that prejudice-

'. . . is one of the factors and a most important one to be weighed up when the Court is considering whether a refusal of the application would cause excessive hardship to the plaintiff. Hardship may be excessive if no harm would result to the defendant, but plainly not excessive if the hardship to the defendant would be substantial.'

(These judgments are but a few examples of the many decided cases in English case law dealing with the importance that is attached to the absence of substantial prejudice to a defendant by the delay in instituting the arbitration proceedings.)

[42] In their founding affidavit, SCH and the company expressly assert that SH, BHP and ASAC have suffered no prejudice. They state:

'119 The prejudice that the applicants will suffer in the event that the period is not extended, namely the unenforceability of their claim exceeding R52.3 million, far exceeds any prejudice the respondents will suffer if the relief is granted.

120 It is difficult to conceive of any legally cognisable prejudice that the respondents will suffer if the period is extended. There was no complaint by the respondents that any delay in the making of the claim prejudiced them in the conduct of the arbitration. The applicants' evidence went uncontested, without any complaint by the respondents that they could not lead any countervailing evidence because of the passage of time. This is because the dispute could be and was decided on common cause facts. The result

of an extension sought in this application will simply be the determination of the claim that would otherwise be time-barred.'

[43] In answer, SH, BHP and ASAC are unable to assert prejudice, other than to insist on their contractual bargain. They start off with a bare denial of the averments in paras 119 and 120 of the founding affidavit, and continue to state:

'88.2 The only "prejudice" at issue in this application is liability in respect of the SARS indebtedness. For the reasons set out above, the applicants' claim in respect of that indebtedness is time-barred in terms of the Agreement, and that was a clearly foreseeable consequence at the time the applicants agreed to conclude the Agreement. There is accordingly no reason why the applicants should be relieved of the consequences of their agreement by way of the relief sought in the present application.'

[44] Prejudice to a respondent, of course, must be established with evidence and not mere speculation. As was said by Parker J in *Al Faiha* (at 104),

'. . . bare possibilities are not sufficient in my judgment to amount to a material circumstance. If prejudice is to be weighed in the scales it must in almost all cases be established by evidence that there is a real likelihood of that it will occur and that it will be significant in extent. I say in almost all cases for there are inevitably exceptions; it may be for instance that the matters in issue turn entirely upon oral evidence and that the delay is so long that it is inevitable that there will have been a substantial fading of memories'.

[45] The relevant kind of prejudice includes the inability of a defendant to properly conduct its case in an arbitration (see *Aspen Trader* at 281), because witnesses are no longer around, evidence had gone missing, or, as was mentioned in *Al Faiha*, where the delay had been so long that it is inevitable that there will have been a substantial fading of memories. Nothing of the sort is even suggested *in casu*. The fact that a claim that would otherwise be time-barred is no longer time-barred in the event the court grants an extension is not the kind of prejudice of which the court takes legal cognisance. (See *Chevron* paras 82-83; *Aspen Trader* at 281-2.)

[46] SH, BHP and ASAC argue that SCH and the company delayed unduly in bringing this application for relief under s 8 of the Arbitration Act, and the court's discretionary power to extend a time-bar provision should in such event not be exercised. They argue that insofar as SCH and the company wished to seek relief in terms of s 8, it was incumbent upon them to institute such proceedings without delay

as soon as it was evident to them that SH, BHP and ASAC relied on the time-bar clause as a defence to their claim under clause 24.1.5, which reliance they pertinently raised in their statement of defence, dated 3 February 2014, and in any event before insisting on a determination of the merits of their claims in the arbitration proceedings. Instead, SCH and the company only launched this application after the appeal panel had afforded them an opportunity to do so.

[47] In support of this argument they refer to the following summary of English law in respect of applications under s 27 of the English Arbitration Act, 1950, as stated by Mustill & Boyd *The Law and Practice of Commercial Arbitration in England* 2nd Ed. at 214-215:

'The fact that the remedy is discretionary has one important consequence, namely that the Court will expect a claimant who wishes to apply for an extension of time, to bring his application before the Court with the minimum of delay. Accordingly, if the defendant informs the claimant that he is taking a time-bar point, the claimant should not linger over attempts to persuade the defendant to change his mind, but should at once issue his summons under section 27.

For the same reason, if the claimant disputes that the claimant is time-barred he should start proceedings for a declaration that it is not, issue his summons under section 27 and have both matters brought on for hearing at the same time, in case his case for a declaration fails.'

(Footnotes omitted.)

[48] Reliance is also placed on *Irish Agricultural Wholesale Society Ltd. V. Partenreederei: M.S. "Eurotrader"* [1987] 1 Lloyd's Rep. 418 (CA) at 423, where Kerr, L.J. said:

'[W]hat is quite clear on the authorities cited . . . is that as soon as a time point is taken, alarm bells should be heard to ring for those on the side of the cargo, and they must then act accordingly. If they still fail to do so, then I see nothing wrong with the Judge's conclusion that the delay becomes "culpable to a high degree", in the sense that it is likely to have very serious consequences in the context of s. 27. It does not follow, of course, that further delay thereafter will always tip the balance, because everything must be looked at in the round. But it is bound to be regarded a point of great importance.'

[49] The failure by a claimant to bring its application in terms of s 8 of the Arbitration Act for an extension of the time-bar period before the court with the minimum delay once the defendant had raised its reliance on a time-bar provision, is thus a factor, and one of great importance, that the court will take into account in the exercise of its

discretionary power whether or not to extend the time-bar period in a time-bar provision. I have referred to the presently relevant parts of the pleadings in the arbitration proceedings earlier on in this judgment: SH, BHP and ASAC pertinently raised their reliance on the time-bar clause in their statement of defence. The response of SCH and the company was to plead in their replication that the enforcement of the time-bar provisions would be contrary to public policy, alternatively, that the time-bar clause falls within the ambit of s 8 of the Arbitration Act and that the arbitration should be stayed to enable them to apply to court for an extension of the time period if their claim would otherwise be precluded in terms of the time-bar clause. The rejoinder of SH, BHP and ASAC is a mere denial of these allegations, without any substantive elaboration. They did not admit that s 8 applies and plead that SCH and the company must first apply to court for such relief.

[50] The reason for the delay in launching this application is readily apparent from the history of the litigation. It seems to me that the reasoning on the side of SCH and the company was that it would be prudent for them first to pursue the arbitration proceedings to finality, as the resolution of the time-bar point might have been rendered moot as a result. For example, if their claims based on the other indemnity clauses in the agreement were sustainable, the time-bar clause may not have find any application, and, if it did find application because their claim resorts under the indemnity provided in clause 24.1.5, as the arbitrator at first instance and ultimately also the appeal panel found, whether it is enforceable or not on public policy considerations. However, what is clear on the authorities is that SCH and the company should have launched this application for relief under s 8 of the Arbitration Act as soon as it was evident to them that SH, BHP and ASAC relied on the time-bar clause as a defence to their claim under clause 24.1.5 of the agreement.

[51] As I have mentioned, no grounds of legally cognizable prejudice that SH, BHP and ASAC have suffered as a result of the delay in initiating the arbitration proceedings have been advanced. There is no suggestion in the affidavits that, because of the delay, they were unable to properly conduct their case in the arbitration proceedings or in this application. The reason for the delay and the lack of prejudice on the part of SH, BHP and ASAC are important points bearing upon the consequence that should be attached to the delay in launching this application in the exercise of the discretionary power whether or not to extend the time-bar. In my view, the delay *per*

se should in all the circumstances of this case not 'tip the balance' or be dispositive of this application.

[52] SH, BHP and ASAC argue that the importance accorded to contractual autonomy (*pacta sunt servanda*) in our law requires that that consideration be accorded much weight in considering the question whether the court's discretionary power in terms of s 8 of the Arbitration Act should or should not be exercised. They argue that a time-bar provision that stipulates a time period within which a claim must be brought *after the effective date of the agreement* (as opposed to one that stipulates a specific period within which a claim must be brought *after the cause of action has arisen*) should be enforced. Relying on a dictum in *A/S Det Dansk-Franske Dampskibsselskab v Compagnie Financiere D'Investissements Transatlantiques S.A. (Compafina) ("The Himmerland")* [1965] 2 Lloyd's Rep. 353 (QB) at 360, they argue that the purpose of the time-bar clause *in casu* is self-evident: It ensures a definite end date for the bringing of any claims (whether or not such claim might have arisen by that date), and thus affords both parties commercial certainty and finality in respect of their liabilities under the agreement.

[53] It is thus evident from the wording of the time-bar clause, they argue, that the parties appreciated and contemplated, at the time they concluded the agreement, that the time-bar clause would have the effect of precluding any income tax related claims after the expiry of a six-year period stipulated therein, even if such claims had not arisen and were therefore not capable of being instituted within that period of time. They argue that the fact that SCH and the company agreed to the time-bar, notwithstanding that it was clearly foreseeable at the time of concluding the agreement that the time-bar clause might have the effect of barring any income tax related claim for the company's 2005 tax year, indicates that SCH and the company must have been aware of and willing to assume that risk at the time, as part of the commercial bargain reached with SH, BHP and ASAC. This, they further argue, is especially so given that the agreement was concluded between large and highly sophisticated commercial entities, all of which had the benefit of expert legal advice in the drafting and conclusion of the agreement. In these circumstances, they argue, no undue 'hardship' is caused to SCH and the company by holding them to this commercial bargain, which the parties concluded for wholly legitimate commercial reasons and with clear foresight of its potential consequences.

[54] SH, BHP and ASAC rely on the evidence of Mr Erasmus, an employee of the company at the time when the agreement was concluded, about the historical pattern of delay in the filing of income tax returns and issuance of income tax assessments in respect of the company, and as a result of which he expresses an opinion that it would have been 'highly optimistic' to expect that any claim in relation to the 2005 tax year would arise within the six year time-bar and that it was clear that unforeseen income tax liabilities might only be discovered much later. Based on his evidence the appeal panel found that the 'impact of the time-bar in this case was entirely foreseeable' and it 'was an outcome the parties must have foreseen when they agreed on the time-bar'. SH, BHP and ASAC argue that although the consideration whether the circumstances in which an arbitral time-bar clause is sought to be enforced 'were outside the reasonable contemplation of the parties when they agreed the provision in question' is one of the only two circumstances in which a court may extend the time-bar period in terms of s 12 of the English Arbitration Act, 1996, and the assessment under s 8 of the Arbitration Act not similarly limited, it is a dispositive factor on the facts of this case, especially in the light of the value accorded to contractual autonomy in South Africa.

[55] It is undoubtedly so that great importance is attached to contractual autonomy in South African law. The importance of contractual autonomy was repeatedly confirmed by our courts in various judgments. As was said by Ngcobo J in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 57:

'Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity.'

(Also see, for example, *Brisley v Drotsky* 2002 (4) SA 1 (SCA) paras 51-52; *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2018 (2) SA 314 (SCA) paras 21-27; *AB and another v Pridwin Preparatory School and others* 2019 (1) SA 327 (SCA).)

[56] The argument that party autonomy (*pacta sunt servanda*) requires the enforcement of one species of time-bar clause (one that stipulates a time period within which a claim must be brought after the effective date of the agreement) but not the other (one that stipulates a specific period within which a claim must be brought after the cause of action has arisen, which time-bar clause may, at common law, on public

policy grounds not be enforced, e.g. on the basis that non-compliance with the time-bar provision was caused by factors beyond a party's control, in which event, as was held by the Constitutional Court in *Barkhuizen* para 73, 'it is inconceivable that a court would hold the claimant to such clause'), is not sustainable in logic and principle. If party autonomy is to reign supreme, then both species of time-bar clauses should in all circumstances be enforced. Moreover, the argument loses sight of the fact that there are indeed common law inroads on contractual autonomy, and that, by enacting s 8 of the Arbitration Act, the Legislature has made a further inroad on contractual autonomy by allowing a party to escape the consequences of a consensual time-bar provision in a contract if the court is of the opinion that in the circumstances of the case undue hardship would be caused if the time-bar provision is enforced.

[57] The argument that the parties' contractual autonomy should prevail and that SCH and the company strictly be kept to the contractual bargain, may be consistent with the philosophy under the new s 12 of the English Arbitration Act, 1996, but it is out of sync with the more benevolent approach to be applied under s 27 of the English Arbitration Act, 1950, and also under our substantially identically worded s 8 of the Arbitration Act. Whilst the position in English law changed with the introduction of the more restrictive s 12 of the 1996 Arbitration Act, which placed a premium on the contracting parties' autonomy, our Legislature has not followed suit.

[58] It is also indeed so that the purpose of a time-bar provision such as clause 23.6.3 of the agreement is self-evident: It affords both parties commercial certainty and finality in respect of their liabilities under the agreement. As was stated by Mocatta J in the *dictum* in *Himmerland* on which reliance is placed, a clause like clause 23.6.3-

'. . . is mutual in its operation and may very well be accepted by businessman because of the advantages it affords in (a) providing some limit to the uncertainties and expense of arbitration and litigation and (b) facilitating the obtaining of material evidence.'

However, in the very next sentence following the above-quoted passage, Mocatta J adds this:

'Cases of undue hardship can be left to be dealt with under Sec. 27 of the Arbitration Act.'

[59] SH, BHP and ASAC will unjustifiably reap the windfall of not having to bear the consequences of having under-stated the company's taxable income for the 2005 year of assessment. They seek to rely upon the historical pattern of the late rendering of income tax returns to justify their assertion that it was entirely foreseeable that this

claim would be time-barred and that SCH and the company, therefore, should not be granted an extension. But the historical delays were limited to twelve months. An inference that it was foreseeable, at the time when the parties entered into the agreement, that SH would delay twenty-eight months in submitting the company's tax return for the 2005 year of assessment, can, therefore, on the facts presented in this application, not be drawn, nor can an inference be drawn that it was at the time foreseeable that SH would under-declare the company's taxable income for the 2005 year of assessment to SARS.

[60] In concluding an agreement that contains a time-bar provision, such as the time-bar clause *in casu*, commercial people must be presumed to appreciate and contemplate that such clause would have the effect that unforeseen liabilities, in this instance unforeseen income tax related liabilities, might only arise after the expiry of the period stipulated in the time-bar provision. They must also be presumed, however, to read such an agreement in the light of s 8 of the Arbitration Act. Equally apposite in this instance is the following *dictum* by Lord Denning in *Pegasus* at 943:

'It is said rightly that commercial men enter into contracts such as the present on the basis of the arbitration clause. They must be presumed, however, to read it in the light of s 27. I have no doubt at all that if two ordinary business men entering into this contract had been asked if it would cause undue hardship to refuse to extend the time should circumstances such as the present occur, they would both unhesitatingly have answered "Yes". I am not prepared to hold that the court's powers under the section should be very rarely exercised. Still less that they should be exercised freely. The question whether those powers should or should not be exercised must turn exclusively on the particular facts of each case in which the question arises.'

[61] For the reasons that I have given, I too have no doubt that if ordinary business people entering into the agreement *in casu* - although they may have foreseen that unforeseen income tax related liabilities might only arise after the expiry of the six-year period stipulated in time-bar clause, and thus be barred - had been asked if it would cause 'undue hardship' to refuse to extend the time-bar should circumstances such as the present occur, they would both unhesitatingly have answered 'Yes'.

[62] In the result the following order is made:

(a) The time period stipulated in clause 23.6.3 of the Sale of Shares Agreement, which is annexed marked 'FA2' to the founding affidavit, is extended until after

the applicants' claim in the arbitration proceedings was initiated on or about 20 August 2013.

(b) The respondents are to pay the costs of the application, jointly and severally, the one paying the others to be absolved, including those of two counsel.

P.A. MEYER
JUDGE OF THE HIGH COURT

Date of hearing:	9 May 2019
Date of judgment:	24 October 2019
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