



DEGREE WHICHEVER IS NOT APPLICABLE  
(1) REPORTABLE: YES/NO.  
(2) OF INTEREST TO OTHER JUDGES: YES/NO.  
(3) REVISED.  
DATE 4 August 2010 SIGNATURE 

**IN THE HIGH COURT OF SOUTH AFRICA  
(NORTH GAUTENG HIGH COURT, PRETORIA)**

**CASE NO: 20827/2002**

In the matter between:

*5/8/2010*

**THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE  
SERVICE**

Plaintiff

And

|                                                  |                  |
|--------------------------------------------------|------------------|
| <b>METLIKA TRADING LIMITED</b>                   | First Defendant  |
| <b>BEN NEVIS HOLDINGS LIMITED</b>                | Second Defendant |
| <b>TALACAR HOLDINGS (PROPRIETARY) LIMITED</b>    | Third Defendant  |
| <b>DAVID CUNNINGHAM KING</b>                     | Fourth Defendant |
| <b>HAWKER AIR SERVICES (PROPRIETARY) LIMITED</b> | Fifth Defendant  |
| <b>CARMEL TRADING COMPANY LIMITED</b>            | Sixth Defendant  |

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**JUDGMENT**

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**LEDWABA, J**

[1] This judgment is in respect of the issues which will be dealt with hereunder which involve the plaintiff (SARS) and the first and second defendants (Metlika and Ben Nevis). The remaining defendants in this action are not parties to the

issues to be decided which involve SARS, Metlika and Ben Nevis.

[2] In the action against proceedings the third defendant who was represented by Mr. Slomowitz SC, who also represented Metlika and Ben Nevis, the parties agreed that proceedings would be stayed and separated from the issues to be decided.

[3] Regarding the fourth defendant, on 28 May 2000 the court made the following order:

*"1. The proceedings in relation to the issues arising from paragraphs 3, 7, 8, 9, 13.1 and 13.3 in so far as this refers to the 4<sup>th</sup> defendant of the particulars of claim read with prayers 2 to 4 of the particulars of claim and the corresponding paragraphs of the defendants plea be stayed and postponed sine die until the proceedings relating to the remaining issues arising from the pleadings have been disposed of."*

[4] Regarding the action proceedings against the fifth and sixth defendants a draft order which the other parties did not object to the contents thereof was made an order of the court, on 2 June 2008. The contents of the said order read as follows:

*"1. The separate corporate personality of the sixth defendant be disregarded and that it be decided that the partnership interest held by the sixth defendant in the Hawker Aviation Services Partnership, and all*

*claims of the sixth defendant against the said partnership, should be regarded to be assets of the fifth defendant;*

2. *There exists a loan claim against the Hawker Aviation Services Partnership in the amount of r167, 843, 024;*
3. *The aforesaid loan account belongs to the fifth defendant."*

[6] The sixth defendant was not represented in court and was not a party in the issues involving SARS, Metlika and Ben Nevis to be decided herein.

[7] Before the trial could start the court had to first deal with some interlocutory applications. When the trial commenced, 12 files containing about 5200 pages were handed to the court, by agreement as the trial bundles. Mr. Van der Meerwe SC representing the plaintiff and Mr. Slomowitz SC agreed that the contents of the documents in the files are to be regarded as:

- (i) authentic and that they are what they purport to be,
- (ii) insofar as they bear dates, such dates were brought into being on the said dates,
- (iii) insofar as they are correspondence or file notes, they were written by the persons who purported to write them,

- (iv) insofar as they are correspondence were sent on the dates that they purport to bear and were received in the ordinary course,
- (v) Insofar as they purport to be agreements or resolutions, were entered into or taken on the dates, which they purport to bear.
- (vi) insofar as they purport to be the minutes of meetings they are of the meetings which were held on the dates which they purport to bear, and
- (vii) they are not proof of the truth of the contents.

- [7] It was further agreed that any party may at any time, whether in the course of evidence or during argument, refer to any document contained in the trial bundles and not objected to as aforesaid even though it has not been identified or otherwise referred to by any witness.
- [8] SARS's case was based on the documentation in the trial bundles and it did not call on any witnesses to testify under oath. Plaintiff closed its case after addressing the court logically and in detail regarding the contents of the documents. The defendants called one witness, Mr. David John Mahoney, (Mahoney), to testify and thereafter they closed their case.
- [9] It is common cause that during December 2000 and January 2001 Ben Nevis transferred most of its assets to Metlika.

[10] SARS submitted that the alleged transfer was done with the intention common to Metlika and Ben Nevis of dissipating the assets of Ben Nevis to defraud SARS who is the creditor of Ben Nevis. The order sought by SARS is the lifting of the corporate veil of Metlika or alternatively the reversal of the transfers in terms of the *actio Pauliana*.

### **BACKGROUND**

[11] It is important to briefly set out the factual background in this matter which is common cause to the parties for the proper understanding of the issues and the adjudication of this matter. I will start with the *curriculum vitae* of the fourth defendant.

[12] David Cunningham King (King) was born in Scotland. He studied in Scotland and became a fellow of the Financial Management Institute. He came to South Africa in 1987 and thereafter started his own financial risk management consultancy business. His business was one of the top risk management consultancy in South Africa and it advised treasuries of big companies like Anglo America and parastatals like Telkom. In 1990 he created, Republic Rating (Pty) Ltd, a rating agency to report on credit worthiness of companies. The said company was one of the assets of Ben Nevis. Suffice to state that the manner in which King formed various companies, structured then and sold their shares is a clear indication that he had in-depth knowledge in the formation of companies and in risk management of companies.

- [13] On the advice of A & R Corporation Finance CC, King restructured his financial affairs and in 1993 created an offshore trust in Guernsey, viz Caledonian Trust. Ben Nevis was registered in the British Virgin Island in 1993, it was owned by Caledonian Trust and it was designed to have several subsidiary companies. It was incorporated by Bermuda Trust Company Limited at the request of Bermuda Trust. Ben Nevis was administered by Bermuda Trust which conducted trusteeship of Caledonian Trust.
- [14] The Trust Deed stated that the forum for the administration of Caledonian Trust is the Island of Guernsey. The person who established the trust who is referred to in the Trust Deed as a 'settlor' is King's mother. Mahoney in his testimony said trustees in performing their duties could consider what is said in a so-called 'Letter of Wishes' and could ask for guidance from the beneficiaries. The trust only held 100% shares and loan account in Ben Nevis. The discretionary beneficiaries of Caledonian Trust were King, his wife, his children and his mother. The trustees of Caledonian Trust were Bermuda Trust.
- [15] Another similar trust that was formed by King in September 1996 in Guernsey is Glenco Investments Trust. The company that owned all its assets was Rossenfield Holding Limited. The trustees of Glenco Investments Trust were Fairburn Reads Trust Company Limited, see Bundle 11 page 196 and Bundle 9 page 425.

- [16] King established various companies in South Africa as subsidiaries of Ben Nevis. One of the said subsidiaries was a company known as Specialised Outsourcing Limited (SOL) which was listed on the JSE on 29 October 1997, transactions and events thereof will be dealt with latter.
- [17] King was authorised by Ben Nevis in ± 1997 to list SOL on the JSE in South Africa on its behalf. Ben Nevis was a 71% shareholder. Share prices of SOL was listed at R1. 20 and within one year the share price increased to R80.
- [18] In February 1998 King requested a mandate from the directors of Ben Nevis to sell 1.8 million shares, part of SOL's shares, for R22 500 000 even though he had already signed the sale document which, according to him, would be acceptable in South Africa since the Ben Nevis was regarded as his company. See Bundle 11 page 236.
- [19] From March 1998 King marketed and sold the bulk of SOL shareholding of the Ben Nevis at a profit exceeding R1 billion. *Ex facie* the documents in the trial bundles, officials of Bermuda Trust knew or should have known that King was selling shares in SOL because they received some millions of rands from the share brokers in South Africa and King further instructed/indicated to them how the funds were to be invested. Interestingly, some of the proceeds of sale of SOL shares of the Ben Nevis were banked in a personal account of King's in South Africa. The money in King's account was

also used to buy personal assets like cars, paintings and immovable properties. Two of the stands were registered in the name of a company known as Talacor (Pty) Ltd (the third defendant) a subsidiary of Ben Nevis.

- [20] In February 2000, Mahoney received information regarding the transactions made by King with the proceeds of the sale of the shares. According to the affidavit of Mahoney in the application to the Tax court, King was not satisfied with the services rendered by Bermuda Trustees and he instructed Bermuda Trustees to transfer assets of Caledonian Trust to Glenco Trust Investments. Bermuda Trust resolved to act upon the said request. See Bundle 9 pages 242-245.
- [21] In February 2000, the trustees of Glenco Trust, Fairburn Read Trust Company Limited, took over assets of Caledonian Trust which included shareholding in Ben Nevis. On instructions of King, Caledonian Trust was liquidated and the liquidation thereof was finalised by the end of February 2000.
- [22] Bermuda Trust managed to convince and persuade King to instruct them again for the management of Glenco Trust which now owned Ben Nevis concomitantly the control of Rossenfeld Holding Limited was also under Bermuda Trust.
- [23] The structure in a document, viz The DK Structure, discovered by the defendant on page 1 of Bundle 11 shows

the structure of the Glenco Trust and other subsidiary companies related to it.

- [24] In November 2000, SARS official directed some enquiries to King in respect of the profits made by Ben Nevis on the sale of SOL's shares and also in respect of King's assets purchased with the funds originating from the sale of Ben Nevis's shares in SOL which assets were registered in King's name and in the names of companies which were subsidiaries of Ben Nevis. Some letters were exchanged between SARS and King on the aforesaid issues. SARS was not content with the responses and information furnished by King.
- [25] In September 2000, SARS informed King that Ben Nevis was registered as a taxpayer and it should submit its returns for the years 1998, 1999 and 2000. At the same time King was informed by SARS that he was appointed as the representative taxpayer for Ben Nevis.
- [26] On the 18 October 2000 when King enquired from the officials of Bermuda Trust if Caledonian trust was 'dead' he was told that it was 'dead'. He further wanted to know exactly what each entity held as the South African tax man was looking into his holdings in Ben Nevis. It is clear from the trial bundle his intention was to get rid of Ben Nevis and have all the assets transferred to Rossenfeld, see file note of Bermuda Trust in Bundle 12 page 401.

- [27] Bermuda Trust on about 6<sup>th</sup> November 2000 informed King that they are prepared and willing to comply with his request to transfer the assets of Ben Nevis into another entity however, an independent tax advice was required (See: Bundle 12 page 409).
- [28] Two senior officials of Bermuda Trust came to visit King in South Africa on 21 November 2000, in order to discuss with him the restructuring of the Glencoe trust. King, at that occasion, was advised by these officials rather to transfer the Ben Nevis assets into a new entity and not into the other existing subsidiary company of the Glencoe Trust, being Rossenfeld (which was by then the owner of a large quantity of shares in a company listed on the JSE by now, known as Specialised Insourcing, previously known as Legacy Ventures – being the new company of which King became the CEO after resigning from SOL).
- [29] On or about 7 December 2000 Bermuda Trust purchased a shelf company registered in the British Virgin Islands for Glencoe Trust, for the purpose of being the new entity into which the Ben Nevis subsidiaries in South Africa should be transferred. The shelf company was ultimately registered as Metlika Trading Limited, the first defendant herein.
- [30] King insisted that the assets of Ben Nevis should be transferred to the new entity before the end of December 2000 as a delay in doing this would cause it to be a pointless exercise.

- [31] During December 2000 instructions were given by Bermuda Trust to the auditor of the South African subsidiary companies of Ben Nevis to transfer its shareholdings in those companies to Metlika as a matter of urgency.
- [32] During December 2000 steps were also taken by Bermuda Trust to arrange for the transfer of other assets of Ben Nevis (not held in South Africa) to Metlika, including a house in Scotland registered in the name of Ben Nevis and in which house King's mother resided free of charge.
- [33] Officials of Bermuda Trust were instructed by their top management to report back to King (who was on holiday in Plettenberg Bay) during December 2000 as to the progress being made with the "very very" urgent transfer of the assets out of Ben Nevis. King was updated on 22 December 2000, by Mr Bourgourd.
- [34] On the 15 January 2001 the auditor appointed by Ben Nevis to transfer the assets of Ben Nevis to Metlika, Mr Jensen of RW Irish Alliot auditors, informed SARS that the South African subsidiaries of which he was the auditor were owned by Ben Nevis, despite him having had instructions for quite some time from Bermuda Trust to transfer the assets urgently into the name of Metlika.
- [35] The assets listed in paragraph 5 of the particulars of claim, excluding the asset in 5.6, were transferred to Metlika on 16

January 2001 when Jensen entered the transfers in the share registers. Blair Atholl Farm (Pty) Ltd had a different auditor and was not dealt with on that date.

- [36] During the beginning of 2001 further assets of Ben Nevis (held in foreign countries) were transferred from Ben Nevis to Metlika.
- [37] In some instances Bermuda Trust stated to third parties involved in the transfers, that the transfers are without compensation, that the beneficial owner remains the same and that it is a transfer of ownership "**only in name**". In one case, it was stated that the principal beneficiary of the trust which is the common shareholder, is King.
- [38] Various assets including those not held in South Africa and those in paragraph 5 of plaintiff's particular's of claim, except assets in paragraph 5.6 were transferred to Metlika by Bermuda Trust.
- [39] On 1<sup>st</sup> November 2001 SARS informed King that an enquiry in terms of **section 74(c) of the Income Tax Act 58 of 1962** to investigate his affairs had to be held. The enquiry took place on 28<sup>th</sup>, 29<sup>th</sup> and 30<sup>th</sup> January 2002.
- [40] At the aforesaid inquiry in terms of section 74C, which took place on 28, 29 and 30 January 2002, King testified about *inter alia*, the circumstances and intentions with which SOL shares were acquired and sold by Ben Nevis, as well as the

relationship between Ben Nevis, King and the Caledonia Trust. Kind did not give SARS a true picture of the other offshore structures.

- [41] SARS issued assessments against Ben Nevis in February 2002 and it could not use the opportunities available to it in law, it to recover monies due to it by Ben Nevis.

#### **EVALUATION OF THE MATTER**

- [42] Based on the trial bundles, evidence of Mahoney and submissions by the parties' counsel the court should now determine if the transfer of assets from Ben Nevis to Metlika was done with dishonesty or improper motive to frustrate SARS from getting tax monies due by Ben Nevis and to determine if the relief sought by SARS is justified.
- [43] During arguments, Mr. Slomowitz SC submitted that in December 2002 Ben Nevis had assets in excess of £96 million. It was therefore not necessary for SARS to pursue the relief sought.
- [44] Mahoney testified that the transfer was done in good faith and it was not gratuitous. In my view, whether the transfer was gratuitous or not should not detract the main issue being whether the transfer was made dishonestly and with the aim to hamper SARS from claiming tax from Ben Nevis.
- [45] SARS should prove on the balance of probabilities that it is entitled to the relief it seeks.

- [46] Mr. Slomowitz SC further submitted in the defendants heads of argument that Bermuda Trust and its employees had no idea whatsoever in December 2000 that in February 2002 SARS would seek to raise tax assessment against Ben Nevis. He further argued that Ben Nevis was incorporated in the British Virgin Islands which is a tax-free jurisdiction, there was therefore no reason for the trustees to think that Ben Nevis was to pay SARS any tax. However, he conceded that the officials of Bermuda Trust should have investigated if Ben Nevis was a tax payer in South Africa. He further argued that because of their failure or negligence, the officials should not be regarded as being knave. However, Mr. Mahoney testified that Bermuda Trust appreciated that Ben Nevis's subsidiary companies which operated businesses in South Africa would be liable to pay tax in South Africa.
- [47] I think the officials of Bermuda trust knew or should have known that there were tax liabilities for the assets of Ben Nevis situated in other countries. They were informed by King about the issue of tax on Ben Nevis before Ben Nevis assets were transferred to Metlika.
- [48] The defendants used the contents of the letter of Mr. Charles Steward to support their submission that they did not know that Ben Nevis was liable to pay tax in South Africa see bundle 12 page 478. However, in my view, the letter of Charle's Steward does not assist the defendants because he

clearly stated that: "...it will enable us to identify more precisely the tax liability of those assets in the jurisdiction where they are situated." own underlining. Of importance is also that the letter was typed after the transfer of assets from Ben Nevis to Metlika had commenced.

- [49] On careful analysis of the trial bundles compared to the evidence of Mahoney, officials of Bermuda Trust allowed King to be involved in matters involving Ben Nevis and to a great extent complied with his instructions on activities of Ben Nevis. Furthermore, there was no proper financial accounting on Ben Nevis, see Bundle 11, page 40.
- [50] During the arguments, it was submitted on behalf of Ben Nevis that Bermuda Trust did not have full control over Ben Nevis. However, it is, in my view, clear from the documents in the trial bundle that Bermuda Trust agreed and condoned that King could act as a director of Ben Nevis, see Bundle 11, pages 188-190.
- [51] The transfer of assets of Ben Nevis to Metlika, on King's instruction, on urgent basis was in my view, to create a 'blind alley'. King knew SARS was investigating Ben Nevis for tax. Mahoney's testimony that one of the reasons why Ben Nevis assets were transferred was to reduce a risk that SARS could attract assets on Ben Nevis for King's debts is, in my view, not convincing and on the contrary it is an indication that Bermuda Trust knew that SARS was investigating Ben

Nevis for tax. Bermuda Trust allowed King to meddle with the affairs of Ben Nevis so that taxation could be evaded.

[52] Of importance, in Bundle 12 on page 522 in the email from Mr. Steve Bougard to Mr. Adrian Fairbourn dated 9 March 2001 it is recorded:

*"... we are re-structuring Ben Nevis, to stop the South African taxman in his tracks. To "kill two birds with one stone", we are also liquidating all investments, as he wishes to take stock, consolidate his position and think thru' his strategy going forward. What are we doing is selling all investments in the name Ben Nevis,...*

*As investments are sold, they are transferred back up to the Glencoe Trust and transferred back down to a subsidiary company Metlika, this making a clean break in Ben Nevis. The other assets namely a property and shares Murray Sport are being re-registered in the name of Metlika. Once the process is complete, Ben Nevis will be allowed lapse."*

[53] The aforesaid in my view, clearly show that the transfer of assets was to stop SARS from tracing and attaching assets of Ben Nevis for tax purposes.

[54] Bermuda Trust knew that Ben Nevis sold its shares in South Africa and made a profit of about R1,2 billion. It is also trite that Ben Nevis further purchased numerous shares on the Johannesburg Stock Exchange and sold them for profits and this happened over a period of about two years. Bermuda

Trust knew that the aforesaid transactions were done in South Africa and Ben Nevis made huge profits. The evidence of Mahoney why Bermuda Trust thought was not liable to pay tax is not convincing.

- [55] Knowledge of Bermuda Trust about the reason for the transfer of Ben Nevis assets is clear from the contents of a Memorandum from Steve Bougourd to Dave Hewitson dated 15 November 2000 with the heading "David King-overview of structure (in preparation for meeting scheduled for 21 November in South Africa)." See bundle 12, page 422 paragraphs 1-3 thereof read as follows:

*"With Glencoe Investment Trust at the "head", the Trust wholly owns two underlying companies, Ben Nevis and Rossenfeld (BVI companies). The attached schedule and fax to DK summarises the assets held and the difficulties the company has faced in maintaining accurate records. In short, we believe that DK on behalf of Ben Nevis, and without authority has "purchased" assets, which include a vineyard, a plane, game ranches and probably more. Clearly, we need to establish what assets are held in the name of Ben Nevis, any other assets held within the structure procure supporting documentation. Depending on the nature of the documentation, we can on a case by case basis, prepare minutes authorising DK to sign on behalf of Ben Nevis, and/or provide Nominee Agreements (declaring that DK "purchased" for and on behalf of the Company). Where necessary we may need to seek legal advice.*

*Apparently DK wishes to “dismantle” current structure and transfer the assets of Ben Nevis into a new Company, as the “tax authorities are chasing him”. To do that, we obviously need to ascertain the assets held and to ensure that ownership is properly formalised. Secondly, we would require tax advice in support of the proposed structure.*

*DK is either reluctant or simply oblivious to the implications of relinquishing control over the assets. From his point of view maintaining the integrity of the structure should be paramount, keeping management and control at arms length will only safeguard his interests. From Bob’s perspective, we are not protecting the interests of the directors nor are we satisfying our fiduciary obligations as Trustees. The risks are clear and it should be strongly emphasised to DK that we have to put our house in order before we move forward.”*

[58] Furthermore, in page 427 of bundle 12 in the recorded ‘summary of the meeting’ with King, the following was also noted:

*“With regards to Ben Nevis, DK still wants this to be closed and the assets ‘transferred’ to a new company. At our suggestion he agreed that Rossenfeld Holdings Limited should be used purely as a vehicle for holding shares in Legacy Ventures (shortly to be re-named financial Insourcing). Rossenfeld owns 49,712,544 shares of Legacy through BOE in two accounts – Rossenfeld itself and a Rossenfeld ‘consortium’ account. Contact Vanessa Soal at BOE (27113776415) to get confirmation.*

*DK will provide statements on the Old mutual portfolios and asks that we have these held through the new underlying company rather than direct by the Trust.*

*DK advised that the various assets bought by Ben Nevis were funded by Ben Nevis bank accounts in S.A. which DK had signing powers on. Query: Do we know where these accounts were/are and have we got statements? If not DK should provide these, and they should be requested.*

*DK has no tax adviser but is happy there is no problem from his point of view in closing the Ben Nevis company. His intention is just to present a blind alley to any revenue investigation. HRC advised him Ben Nevis will probably need legal advice as to how best to 'transfer' its assets. DK is happy to pay for this work but needs a proposal from us as to what the cost will be prior to work being done. He would like to have this all done before 8/12/00 when he goes away on holiday (back on 15/1/01).*

*Overall the meeting was extremely useful. DK acknowledges that as directors and Trustees we have had inadequate control and knowledge of 'his' affairs but that this suited him at the time; He also commented that prior to Dave Mahoney no-one seemed interested. We assured him we are now very interested and are looking to establish a close working relationship with him. It was agreed we will meet again in*

*February. At this time the new structure will be in place together with new agreed fees.*

*Arrange incorporation of new company and 'transfer' of Ben Nevis assets. This must be at least underway by 8/12/00 or at best complete. Can Charles Stewart advise on how best to achieve this? Share/Asset swap?"*

[57] The aforesaid is another clear indication that Bermuda Trust did not do the transfer of assets of Ben Nevis in good faith.

[58] In **Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd 1995 (4) SA 790 AD (Cape Pacific Ltd case)** on page 803G-804A the court said:

*"It is undoubtedly a salutary principle that our Courts should not lightly disregard a company's separate personality, but should strive to give effect to and uphold it. To do otherwise would negate or undermine the policy and principles that underpin the concept of separate corporate personality and the legal consequences that attach to it. But where fraud, dishonesty or the improper conduct (and I confine myself to such situations) is found to be present, other considerations will come into play. The need to preserve the separate corporate identity would in such circumstances have to be balanced against policy considerations which arise in favour of piercing the corporate veil (cf Domanski 'Piercing the corporate Veil-A New Direction' (1986) 103 SALJ 224). And a court would then be entitled to look to substance rather than form in order to arrive at the true facts, and if there has been a misuse of corporate personality, to disregard it and attribute liability where it should rightly lie. Each would obviously have to be considered on its own merits."*

- [59] Bermuda Trust allowed King for too long, about seven years, to have a say and to instruct them how to operate Ben Nevis. Their conduct of the affairs of Ben Nevis was undoubtedly improper, to say the least.
- [60] The trial bundle clearly show that Bermuda Trust was not concerned about how King meddled with the affairs of Ben Nevis. They wanted to satisfy King's demands and to earn fees, see Bundle 13, pages 522-527.
- [61] In my view, Metlika was based as a façade to hide the tax liability of Ben Nevis from SARS, see **Cape Pacific Ltd case** on page 804 paragraphs C-E.
- [62] Mr. Slomowitz further argued that Ben Nevis had assets worth about £96 million and it was not necessary for the court to pierce the corporate veil. The said submission cannot be correct. In the **Cape Pacific Ltd case** page 805 the court correctly said the following:
- “ In principle, I see no reason why piercing of the corporate veil should necessarily be precluded if another remedy exists. As a general rule, if a person has more than one legal remedy at his disposal, he can select any one of them; he is not obliged to pursue one rather than another (although there may be instances where once he has made an election he will be bound by it). If the facts of a particular case otherwise justify piercing of the corporate veil, the existence of another remedy, should not in principle serve as an absolute bar to a court granting consequential relief. The existence of another remedy, or the failure to pursue one that was available, may be a relevant factor when policy*

*considerations come into play, but it cannot be of overriding importance.”*

- [63] This court is aware that there is an appeal pending in the appeal tax court of the liability of Ben Nevis. In my view, the facts, of this case justify the piercing of the corporate veil of Metlika as far as tax liability of Ben Nevis to SARS is concerned.
- [64] The plaintiff did not call any witnesses to testify under oath. The defendant called on witness, Mr. Mahoney. The defendant at the commencement of the trial said they were not calling King as their witness. Mr. Maritz SC submitted that Mr. Stewart attended the trial however, he was not called as a witness.
- [65] The parties agreed that the contents of the trial bundle are what they purport to be. In my view, the evidence of Mahoney did not advance the defendants case. The case is therefore, decided mainly on the contents of the trial bundle. I find that the plaintiff proved its case against the defendants on the balance of probabilities.
- [66] This is a complex matter and it involves important legal issues. The duration of the trial and the number of documents involved, in my view, justifies the participation of two senior counsel.
- [67] **I therefore, make the following order:**

- (i) The transfer of assets referred to in paragraph 5 from Ben Nevis to Metlika is set aside.**
- (ii) It is declared that the assets in paragraph 5 are owned by Ben Nevis.**
- (iii) It is declared that the assets referred to in paragraph 5 above, insofar, as the liability of Ben Nevis for income tax is recoverable or as it becomes recoverable may be attached and be sold in execution to satisfy in whole, or in part, the liability of Ben Nevis to SARS.**
- (iv) The first and second defendants are jointly and severally liable to pay plaintiff's costs which costs include service of two senior counsel and two junior counsel.**



**A. P. LEDWABA  
JUDGE OF THE HIGH COURT**

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