REPUBLIC OF SOUTH AFRICA

NORTH GAUTENG HIGH COURT, PRETORIA

Case No: 24997/2011

(1) REPORTABLE: Electronic Reporting.
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED. Yes.

20-07-2012 P.A. Meyer

DATE SIGNATURE

In the matter between:

METLIKA TRADING LIMITED	First Applicant
BEN NEVIS HOLDINGS LIMITED	Second Applicant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES	First Respondent
DAVID CUNNINGHAM KING	Second Respondent
LADINA JEAN WYLDE KING	Third Respondent
TALACAR HOLDINGS (PTY) LIMITED	Fourth Respondent
GAUIS ATTICUS (PTY) LIMITED	Fifth Respondent
QUOIN ROCK WINERY (PTY) LIMITED	Sixth Respondent
QUOIN ROCK VINEYARDS (PTY) LIMITED	Seventh Respondent
BOTHMASBURG FARMING (PTY) LIMITED	Eighth Respondent
SJ BOTHMA BOERDERY (PTY) LIMITED	Ninth Respondent

JUDGMENT

MEYER, J

[1] This is an application for an interim interdict to prevent the first respondent ('SARS') from executing against certain assets of the first applicant ('Metlika') for the tax debt of about R2,7 billion of the second applicant ('Ben Nevis') pending the

resolution by trial and arbitration of the disputes between the parties relating to a guarantee agreement entered into on 30 April 2002.

[2] Metlika and Ben Nevis are companies incorporated in the British Virgin Islands and they are solely owned by a Guernsey based discretionary trust, named the Glencoe Investment Trust ('the trust'), the beneficiaries of which are the second respondent ('King') and members of his immediate family. The trustee of the trust permitted King free reign as far as the affairs and assets of Ben Nevis and Metlika in South Africa were concerned. King was at all material times said to be the South African representative of Metlika and of Ben Nevis.

[3] King used Ben Nevis to acquire assets in South Africa, particularly shares in Specialised Outsourcing Limited ('SOL'). SOL was listed on the Johannesburg Stock Exchange in October 1997. At that time, Ben Nevis was the registered shareholder of approximately 70% of the shares in SOL. It sold virtually all these shares over a two year period at a profit in excess of R1 billion. Ben Nevis acquired various assets in South Africa, amongst others those that form the subject-matter of this application. King, however, caused most of the sales proceeds to be remitted to the trustee and to banks in the United Kingdom. King refrained from registering Ben Nevis as a taxpayer in South Africa and its income as a result of the sale of its shares in SOL were not declared to SARS. During the year 2000, SARS directed enquiries to King, *inter alia* in respect of the profits which Ben Nevis had made in South Africa. SARS also required the submission of returns by Ben Nevis for the tax years 1998, 1999, and 2000. During January 2002, an enquiry was held in terms of s 74C of the Income Tax Act 58 of 1962. It then came to light that, as a result of the

earlier enquiries made by an official of SARS, all the South African assets owned by Ben Nevis had been transferred to Metlika during January 2001.

[4] On 15 February 2002, SARS raised income tax assessments against Ben Nevis in respect of the 1998, 1999 and 2000 tax years in a total amount of R1 467 844 333.39. Incidentally, King personally was assessed in an amount of about R913 million, of which amount he only paid the sum of about R4,4 million to SARS. After unsuccessfully objecting to the assessments, Ben Nevis noted an appeal to the Tax Court of this Court.

[5] As a result of the transfer of all the assets of Ben Nevis to Metlika, SARS, during July 2002, instituted what has been referred to as 'the piercing action' against Metlika, Ben Nevis and King in this Court under case number 20827/02 for an order declaring that various assets previously held in the name of Ben Nevis were in fact owned by Ben Nevis or King and for alternative relief. I return to the piercing action later on in this judgment. Prior to its institution, this Court granted urgent relief to SARS on 18 February 2002, which relief included interim orders authorising the attachment of certain assets to confirm jurisdiction in the case of Ben Nevis and to found jurisdiction in the case of Metlika. Interdicts aimed at preserving their South African assets were also granted against Ben Nevis and Metlika preventing them from disposing of any of their South African assets consisting of shares and loan accounts in various local companies as well as interdicts against such companies from disposing of their own assets pending the finalisation of the piercing action that was, at that stage, to be instituted by SARS. The interim orders were subsequently confirmed subject to certain amendments and are referred to as the 'preservation order'.

[6] It is common cause that the relevant local assets pursued by SARS for attachment and sale in execution in satisfaction of the tax liability of Ben Nevis were 100% of the issued shares and the shareholders loan account in Talacar Holdings (Pty) Ltd ('Talacar'), 95% of the issued shares and the shareholders loan account in the company then named Glenhurst Wine Farm (Pty) Ltd and now Quoin Rock Winery (Pty) Ltd ('Quoin Rock Winery'), 100% of the issued shares and the shareholders loan account in Hawker Air Services (Pty) Ltd ('Hawker Air Service'), 90% of the issued shares and the shareholders loan account in Bothmasburg Farming (Pty) Ltd ('Bothmasburg Farming'), the shareholders loan account in SJ Bothma Boerdery (Edms) Bpk ('SJ Bothma Boerdery'), and 50% of the issued shares and shareholders loan account in Blair Atholl Farm (Pty) Ltd ('Blair Atholl Farm').

[7] Agreement was reached to replace some of the assets interdicted under the preservation order with a suitable guarantee ('the guarantee agreement'). King represented all the parties, including Metlika and Ben Nevis, in entering into the guarantee agreement. It was signed and made an order of this court on 30 April 2002 in the proceedings in which the preservation order was granted. It facilitated the release of certain assets from the operation of the preservation order against the furnishing of guarantees.

[8] Clauses 3 and 4 of the guarantee agreement provide that Metlika will arrange a bank guarantee in the amount of R70 million to be issued in favour of SARS. All the attached shareholdings and loan accounts in Quoin Rock Winery and Quoin Rock Vineyards (the latter being a company owned by Talacar) and all the interdicted assets of Quoin Rock Winery and Quoin Rock Vineyards as well as a

cash amount of R2.75 million ('the released assets') will be released from the provisions of the preservation order upon the delivery of the initial guarantee. I interpolate to mention that Metlika caused the initial guarantee in the sum of R70 million envisaged in these clauses of the guarantee agreement to be issued by Rand Merchant Bank, a division of First Rand Bank Ltd, on 6 June 2002. The amount of R70 million did not represent the value of the released assets, but was an arbitrary amount agreed upon when the parties failed to reach agreement on an amount that represents the value of the released assets.

[9] Clause 5 provides that a valuation will be done, as at 30 April 2002, in respect of the 'released assets' and what is referred to as the 'additional assets', which are all further shares and loan accounts attached in terms of the preservation order, save for certain excluded assets. Clause 11 prescribes the method of valuation. The value of the released assets and of the additional assets will be determined on the basis of the value of the shareholding and loan accounts thereof. The 'going concern' and the 'asset realisation' methods of valuation will be applied and the parties will be bound by the greater. Clause 12 prescribes the procedure to establish the valuation. Metlika and SARS will each nominate an independent expert within 7 days of signature of the guarantee agreement, in the absence of which the party who has not nominated its expert will be bound by the valuations of the sole expert, being the expert of the other party. Any dispute between the two sets of valuers that they or the parties cannot resolve within two days of deadlock shall be resolved by an umpire who is an independent expert whose identity will be determined by the chairman of the Cape Bar Council. The experts will be required to make their valuations within 30 days of being appointed. I again interpolate to mention that on 6 May 2002 SARS appointed Mr Jan Strydom as independent expert

and Metlika appointed Rand Merchant Bank on 7 May 2002. Notwithstanding the strict time periods prescribed in terms of the guarantee agreement the respective valuations have at present, which is a decade later, not been made by the appointed independent experts.

[10] Clauses 6 and 7 provide that once a value for the released assets and the additional assets have been established, the additional assets and underlying assets included in the valuation will be released from the provisions of the preservation order against the provision of a 'substitute guarantee' for the amount of the value so established. The substitute guarantee will make provision for an escalation at a rate of 10% per annum to be compounded monthly in arrears from the day on which the valuations are finalised until date of payment in terms of the guarantee. Clause 10 provides that all the assets 'presently' - in other words at the time of the conclusion of the guarantee agreement - subject to the preservation order, will again automatically become subject thereto should Metlika fail to cause the final guarantee to be issued within 14 business days of the value of the assets being established. The value (plus an escalation at 10% per annum annually compounded) of any asset which is no longer available will continue to be covered by the initial guarantee and Metlika, Ben Nevis and King undertook, jointly and severally, to take all steps to restore SARS to a position equivalent to the position which SARS would have occupied had such assets remained subject to the preservation order. It is common cause that a final guarantee has not been issued.

[11] Clause 8 provides that '[t]he guarantees will be payable 10 court days after a certificate of the State Attorney has been delivered to the attorneys of record of Metlika and the banking institution concerned to the effect that: 8.1 a court has

declared that the assets substituted as above by the guarantees, are executable in respect of the tax liability for years of assessment up to and including 28 February 2002 ('the tax debt') of either or both of Ben Nevis Holdings Ltd and Mr DC King; and 8.2 the tax debt is payable by either Ben Nevis Holdings Ltd and/or Mr DC King and that payment is not suspended; unless the declaration in paragraph 8.1 or the obligation to pay in paragraph 8.2 is suspended by law or unless a court on application launched within the 10 court day period suspends the payment of the tax debt, or suspends the declaration that the assets are executable, or unless a court orders otherwise on the application of either party.' Clause 9 provides that the 'final guarantee' will be the full and only extent to which SARS may at any time claim against and execute upon the assets, the additional assets and all other underlying assets attached and/or interdicted in the preservation order, save for the excluded assets, in so far as SARS succeeds in establishing the conditions of clauses 8.1 and 8.2.

[12] During July 2002, SARS instituted the piercing action contemplated in the preservation order. The only claim presently relevant is the claim with which SARS succeeded. The assets which, in terms of paragraph 5 of the particulars of claim, formed the subject-matter of this claim are: 100% of the issued shares and the shareholders loan account in Talacar; 95% of the issued shares and the shareholders loan account in Quoin Rock Winery; 100% of the issued shares and the shareholders loan account in Hawker Air Services; 90% of the issued shares and the shareholders loan account in Bothmasburg Farming; the shareholders loan account in SJ Bothma Boerdery; and 50% of the issued shares and shareholders loan account in Blair Atholl Farm. Other relevant paragraphs of the particulars of claim and the relief prayed for By SARS, read as follows:

'11.1 Ben Nevis was the beneficial owner of the assets referred to in paragraph 5 above.

11.2 On a date or dates unknown to the Plaintiff the assets referred to in paragraph 5 above were transferred to, or put into the name of Metlika.

11.3 The transfers of the said assets to, and/or placing them into the name of Metlika, were carried out in order to prevent the Plaintiff from ascertaining that Ben Nevis was the owner of such assets, *alternatively* in order to prevent the said assets from being attached and sold in execution to satisfy in whole, or in part, the liability of Ben Nevis to the Plaintiff and thereby to enable Ben Nevis to evade the payment of income tax for which it was or would become liable.

11.4 In the premises, Metlika and Ben Nevis were misused in order to achieve the improper purpose referred to in paragraph 11.3 above.

11.5 In the premises, the Plaintiff is entitled to an order that the separate corporate personalities of Ben Nevis and Metlika should be disregarded to the extent of the transfers referred to in paragraph 5 above and an order declaring that insofar as the liability of Ben Nevis for income tax is recoverable, or as it becomes recoverable, that the assets referred to in paragraph 5 above are to be regarded as assets owned by Ben Nevis and that they may be attached and sold in execution to satisfy in whole, or in part, the liability of Ben Nevis to the Plaintiff.

13.1 ...

13.2 The liability of Ben Nevis to the plaintiff exceeds the value of all its known assets and more in particular the value of the assets referred to in paragraph 5 above ...

13.3 In the result, neither Mr King nor Ben Nevis has sufficient assets available against which the plaintiff can execute in order to be paid in full what is due by any of them in terms of the Income Tax Act.

14.1 In terms of the preservation order referred to in paragraph 1.2.2 above, Metlika, Ben Nevis, Talacar, Mr King and ten other entities were interdicted from disposing of the assets referred to in paragraphs 5 and/or 7.1 above, pending the finalisation of this action.

14.2 On 30 April 2002 the Plaintiff on the one hand and Metlika as Grantor on the other hand (as well as certain other parties, who did not incur any rights/liabilities in terms of the guarantee referred to in the agreement), entered into an agreement, which agreement was made an order of Court on 30 April 2002 under case number 4745/02 (hereinafter referred to as "the Agreement"). A copy of the Agreement is annexed hereto as "SARS 16".

14.3 As appears from 'SARS 16' hereto, the parties *inter alia* agreed that:

14.3.1 Some of the assets referred to in paragraphs 5 and/or 7.1 above would be released from the preservation order, against the substitution thereof with suitable guarantees; and

14.3.2 To the extent that some of the assets referred to in paragraphs 5 and/or 7.1 above are substituted by the said bank guarantees, the Plaintiff would be entitled to execute the order moved for in this action, only against the guarantees; and

14.3.3 The guarantees will be payable 7 (seven) days after a certificate from the State Attorney has been delivered to the attorneys of record of Metlika and the banking institution concerned to the effect that a court has declared that the assets referred to

in paragraphs 5 and/or 7.1 above are executable in respect of the tax debts of either or both of Ben Nevis and Mr King.

14.4 Metlika has already procured the issuing of the initial guarantee provided for in clause 3 of the Agreement and is expected to procure the issuing of the substitute guarantee provided for in clauses 6 and 7 of the Agreement, in the near future.

14.5 In the premises, and insofar as the guarantees provided for in the Agreement are in place when this matter is heard, the Plaintif's entitlement to an order in respect of the assets referred to in paragraphs 5 and/or 7.1 above is subject to the provisions of the Agreement, to the extent as provided for in the Agreement.

WHEREFORE THE PLAINTIFF CLAIMS, SUBJECT TO THE PROVISIONS OF THE AGREEMENT (ANNEXURE 'SARS 16' TO THE PARTICULARS OF CLAIM) INSOFAR AS THE GUARANTEES PROVIDED FOR IN THE AGREEMENT ARE IN PLACE:

6.1 That the separate corporate personalities of Ben Nevis and Metlika should be disregarded to the extent of the transfers referred to in paragraph 5 above; and

6.2 That insofar as the liability of Ben Nevis for income tax is recoverable, or as it becomes recoverable, the assets referred to in paragraph 5 above are to be regarded as assets owned by Ben Nevis and that they may be attached and sold in execution to satisfy in whole, or in part, the liability of Ben Nevis to the Plaintiff.'

[13] The piercing action was tried in this court before my brother Ledwaba, J during the period May to October 2008. The trial judge found that SARS had succeeded in proving that the corporate veil between Metlika and Ben Nevis should be disregarded to the extent of the transfer of the South African assets, and the order granted, as subsequently rectified, in favour of SARS mirrors the applicable relief that SARS had claimed in terms of its particulars of claim. The order of Ledwaba, J reads:

'1. Subject to the provisions of the agreement, annexure "SARS16" to the particulars of claim, insofar as the guarantees provided for in the agreement are in place:

1.1 The separate corporate personalities of the second defendant [Ben Nevis] and the first defendant [Metlika] should be disregarded to the extent of the transfers referred to in paragraph 5 of the particulars of claim; and

1.2 That insofar as the liability of the second defendant for income tax is recoverable, or as it becomes recoverable, the assets referred to in paragraph 5 of the particulars of claim are to be regarded as assets owned by the second defendant and that they may be sold in execution to satisfy in whole, or in part, the liability of the second defendant to the plaintiff.

2. The first and second defendants are jointly and severally, ordered to pay the plaintiff's costs of suit, which costs include the services of two senior and two junior counsel.'

[14] Metlika and Ben Nevis sought leave to appeal against the judgment and order in the piercing action, but were unsuccessful, both in this court and in the Supreme Court of Appeal. On 18 February 2011, the Supreme Court of Appeal dismissed the application for leave to appeal. The order of Ledwaba, J is accordingly final and binding on the parties.

[15] The appeal against the tax assessments of Ben Nevis was heard by the Tax Court of this court during the period June 2010 to September 2010. The principal ground of appeal was that the profits earned by Ben Nevis on the sale of shares were not made with a revenue intent but came about as a result of the disposal by Ben Nevis of its capital assets. The appeal of Ben Nevis was dismissed on 6 October 2010. Ben Nevis then appealed to the Full Court of this court against the dismissal of its tax appeal. It, however, withdrew that appeal on 9 February 2011. On 4 March 2011, SARS filed a statement as contemplated in terms of s 91(1)(b) of the Income Tax Act with the registrar of this court. It is undisputed that the filing of that statement had the effect of a judgment in favour of SARS against Ben Nevis in the amount of R2 697 831 373.00.

[16] During March 2011, the attorneys acting for Metlika and Ben Nevis, Messrs Bell Dewar Inc., informed the attorneys acting for SARS, Messrs Mahlangu Inc., of the intention of Metlika and Ben Nevis to implement the guarantee agreement. SARS took issue with its validity and enforceability on the grounds that it had lapsed or had been cancelled. Metlika and Ben Nevis requested that the disputes regarding the guarantee agreement be referred to arbitration. SARS declined the request. Its attorneys notified the attorneys acting for Metlika and Ben Nevis that there no longer existed any impediment to SARS proceeding with execution steps and that it would

be proceeding to execute in terms of the judgment and order of Ledwaba, J, dated 5 August 2010.

[17] On 28 April 2011, the present application was launched on behalf of Metlika and Ben Nevis, wherein they seek interim interdictory relief against SARS. A Court's approach in a matter for an interim interdict pending the finalisation of an action or application for final relief and the requirements that need to be established by an applicant for the interim interdict, are to be found in *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton, and Another* 1973 (3) SA 685 (A), at p 691C-G, and the accepted test for *a prima facie* right in the context of an interim interdict, especially where there are disputes of fact, is formulated in *Simon NO v Air Operators of Europe AB and Others* 1999 (1) SA 217 (SCA), at p 228G – H.

[18] The relief which Metlika and Ben Nevis presently seek is for the dispute that has arisen between them and SARS about the validity of the guarantee agreement to be determined by action proceedings and for their disputes concerning its interpretation and implementation by arbitration in accordance with its arbitration provisions. In the meantime, pending the final determination of such disputes, they seek for SARS to be interdicted from taking any further steps to execute upon Metlika's assets, namely 100% of the issued shares and shareholders loan accounts in Talacar, 95% of the issued shares and shareholders loan accounts in Quoin Rock Winery, 90% of the issued shares and shareholders loan accounts in Bothmasburg Farming, and its shareholders loan account in SJ Bothma Boerdery. The initial relief which Metlika and Ben Nevis seek by way of action, if granted, will have the result that the guarantee agreement is declared valid. The ultimate relief which they seek on arbitration is for Metlika to be permitted to still cause a final guarantee to be

issued and to have the additional assets released from the ambit of the preservation order. It is stated in the founding affidavit that '[i]n that event SARS will be entitled to be paid the proceeds of the final guarantee but will not be entitled to execute upon the assets themselves.'

[19] SARS instituted a conditional counter-application founded upon the provisions of s 3(2)(a) of the Arbitration Act 42 of 1965, in which it seeks that the arbitration agreement embodied in clause 13 of the guarantee agreement either be set aside or that it ceases to have effect on the disputes between the parties to the main application. Clause 13 of the guarantee agreement provides that

> '[s]hould there be any dispute regarding the interpretation or implementation of this agreement, then an aggrieved party will be entitled to formulate such dispute and to request the Chairman of the Cape Bar Council to nominate an arbitrator to make a written ruling, which ruling will be final and binding on all the parties. Each party shall bear half the costs of the arbitrator and its own costs in regard to any dispute.'

That 'good cause' exists for bypassing the arbitration clause of the guarantee agreement should Metlika and Ben Nevis succeed in the relief they seek in their application was, in my view, correctly conceded by counsel on behalf of Metlika and Ben Nevis and counsel on behalf of King. Various disputed questions of fact that are the same will require adjudication by the court and by an arbitrator. It is 'most undesirable' to have such disputed issues be decided in two proceedings in two separate tribunals. See: *Universiteit van Stellenbosch v JA Louw* 1983 (4) SA 321 (AD), at p 335H. I should add that the reason why King agreed that the entire matter requires adjudication by a court is so that the conduct of SARS, as an organ of state, be investigated by a court and not by an arbitrator.

[20] The contentions of SARS, which are pertinent to the disputes that have arisen between it on the one hand and Metlika, Ben Nevis and King on the other, are that

the guarantee agreement is invalid *ab initio* since it from the outset formed part of a strategy to fraudulently dissipate assets to make tax collection impossible or that it is no longer valid and enforceable, either because it has lapsed or because it has been cancelled. SARS contends that the guarantee agreement has lapsed either in accordance with its unexpressed provisions or because the valuation as at 30 April 2002 as contemplated in the guarantee agreement can no longer be undertaken since the valuators were unable to undertake such valuation. SARS contends that the guarantee agreement has been validly cancelled, either because its conclusion had been induced by the fraudulent representation of Metlika and Ben Nevis, represented by King, that the companies were essentially debt free in circumstances where King had created or was creating false loan account claims against both Talacar and Quoin Rock Winery in the name of Rossenfeld Holdings Limited, which company, it is common cause, also belongs to the trust, totalling about R145 million to which the Metlika loans had allegedly been subordinated and thereby ostensibly making the two companies valueless, or because the raising of such 'false claims' constituted a repudiation of the guarantee agreement or because Metlika and Ben Nevis have not made available accurate financial information and instead raised the R145 million claim in the name of Rossenfeld, which does not even accord with their own records, and which constitutes a material breach of the guarantee agreement.

[21] The assets which form the subject-matter of the present application were assets in respect of which the preservation order was granted. The only asset which was released from the operation of the preservation order against the delivery of the initial guarantee and which is included in the order of Ledwaba, J, is the shareholding and loan account of Metlika in Quoin Rock Winery. All the other assets

to which the order of Ledwaba, J relates are assets which were still subject to the preservation order.

[22] The assets represented by 100% of the issued shares and the shareholders loan account in Hawker Air Services and the 50% of the issued shares and shareholders loan account in Blair Atholl Farm were specifically excluded from the operation of the guarantee agreement and they remained subject to the preservation order. Both companies have been wound up. The liquidation dividends that were due to Metlika in the winding up of each company had been paid over to SARS. No dispute exists between Metlika and Ben Nevis on the one hand and SARS on the other about the entitlement of SARS to have received payment of those dividends in reduction of the tax liability of Ben Nevis. These assets are therefore not relevant for purposes of the present application and have also not been included in the relief which Metlika and Ben Nevis presently seek in terms of their notice of motion.

[23] It is common cause that the assets of Bothmasburg Farming and of SJ Bothma Boerdery have been converted into cash and are held in trust by attorney Dale Cohen. There are accordingly no businesses or assets of these companies which require to be preserved, and there appears to be no justifiable reason on the papers before me why the cash is not simply paid to SARS.

[24] Quoin Rock Winery and Quoin Rock Vineyard have during the past year been placed under liquidation. King states that it is unlikely that the loan account and shareholding of Metlika in Quoin Rock Winery would yield any value. In this regard he states that '[t]aking into account the other claims and the liquidators and auctioneers' fees, it is unlikely that there will be any liquidation dividend due to Metlika whose loan accounts rank after all third party creditors.' These averments of

King are undisputed. I am advised by counsel for SARS that there is no real prospect of SARS seeking to execute against the shares and loan account held by Metlika in Quoin Rock Winery.

[25] This application accordingly essentially concerns the execution against Metlika's shares and loan accounts in Talacar. This was conceded by counsel for Metlika and Ben Nevis. Control over these shares gives control of and access to the luxurious and valuable underlying assets of Talacar, which, amongst many others, include the shareholding and loan account in Quoin Rock Vineyards, a house in Coronation Road, Sandhurst, Johannesburg, in which King and his family reside (valued at R70 million by Strydom and at R33 million by North), and one in Plettenberg Bay (valued at R10 million by Strydom and by North).

[26] SARS resists the relief claimed by Metlika and Ben Nevis on the grounds that none of the requisites for the granting of interim interdictory relief have been established and that the balance of convenience favours SARS. The points raised on behalf of SARS *in initio*, which I ruled should not be argued separately in order to prevent a piecemeal adjudication of this application, are, firstly that the application is fatally defective since the order of Ledwaba, J in the piercing action permits SARS to execute against the assets included in that order when the tax debt of Ben Nevis is payable, which is the case, unless a final guarantee is in place, which is not the case, and, secondly, that Metlika and Ben Nevis failed to promptly institute the proposed proceedings pending the finalisation of which they now seek the present *interim* relief.

[27] Whether or not the attachment and sale in execution of the assets in respect of which Metlika and Ben Nevis presently seek interim interdictory relief have already

been authorised by an order of this Court requires an interpretation of the order made by Ledwaba, J in the piercing action.

[28] The approach in interpreting a court's judgment or order was thus stated by Trollip JA in *Firestone South Africa (Pty) Ltd v Genticuro A. G.* 1977 (4) SA 298 (A.D.), at p 304 D-H:

> 'The basic principles applicable to construing documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules. See *Garlick v Smartt and Another*, 1928 A.D. 82 at p. 87; *West Rand Estates Ltd. v. New Zealand Insurance Co. Ltd.*, 1926 A.D. 173 at p. 188. Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, it was common cause that in such a case not even the court that gave the judgment or order can be asked to state what its subjective intention was in giving it (cf. *Postmasburg Motors (Edms.) Bpk.. v Peens en Andere*, 1970 (2) S.A. 35 (N.C.) at p. 39F-H). Of course, different considerations apply when, not the construction, but the correction of a judgment or order is sought by way of an appeal against it or otherwise – see *infra*. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court's granting the judgment or order may be investigated and regarded in order to clarify it; for example, if the meaning of a judgment or order granted on an appeal is uncertain, the judgment or order of the court *a quo* and its reasons therefor, can be used to elucidate it. If, despite that, the uncertainty still persists, other relevant extrinsic facts or evidence are admissible to resolve it. See *Garlick's* case, *supra*, 1928 A.D. at p. 87, read with *Delmas Milling Co. Ltd. v Du Plessis*, 1955 (3) S.A. 447 (A.D.) at pp 454F- 455A; *Thomson v. Belco (Pvt..) Ltd. and Another*, 1960 (3) S.A. 809 (D)."

[29] Ledwaba, J *inter alia* ordered that the assets referred to in the order are to be regarded as assets owned by Ben Nevis and that they may be attached and sold in execution to satisfy, in whole or in part, the tax liability of Ben Nevis to SARS. The precursor to this order is presently relevant. It reads:

> 'Subject to the provisions of the [guarantee] agreement ... in so far as the guarantees provided for in the agreement are in place ...'.

[30] Harms, JA, in *Pangbourne Properties Ltd v Gill & Ramsden (Pty) Ltd* 1996 (1) SA 1182 (AD), at p 1187 I – 1188B, said the following about the use of the phrase 'subject to':

> 'The phrase 'subject to' has no *a priori* meaning. Reference to any dictionary establishes that. In statutory contexts it is often used to establish what is dominant and what is subordinate (cf *Rennie NO v Gordon and Another NNO* 1988 (1) SA 1 (A) at 21D – 22D). In contractual settings, especially insurance contracts, it is usually used to create a suspensive condition, but also (always depending on the context) a resolutive condition *(SA Eagle Versekeringsmaatskappy Bpk v Steyn* 1991 (4) SA 841 (A) at 848 B – D). *Frumer v Maitland* 1954 (3) SA 840 (A) is an example of an instance where, in a contract, it simply introduced a condition of the contract, ie a material term (in contradistinction to a suspensive or resolutive condition).'

[31] The dictionary meaning of the phrase 'in so far as' is 'to the extent or degree that.' See: *The New Shorter Oxford English Dictionary on Historical Principles* Clarendon Press Oxford 1993 Ed Vol I, at p 1330. The guarantee agreement provides for two guarantees, namely the 'initial guarantee' and a 'substitute guarantee' or 'final guarantee'.

[32] The initial guarantee may, in terms of the guarantee agreement, be replaced by a substitute or final guarantee. If a final guarantee is issued, it will be the full and only extent to which SARS may claim against and execute upon the assets that were released on delivery of the initial guarantee and the additional assets and underlying assets in so far as SARS had succeeded in establishing the conditions of clauses 8.1 and 8.2 of the guarantee agreement, viz once the declaration in respect of the relevant assets are made and the tax debt becomes payable. If a final guarantee is not issued, all assets that were subject to the preservation order will again automatically become subject thereto. The value (plus an escalation at 10% per annum annually compounded) of any asset that is no longer available will 'continue' to be covered by the initial guarantee. This provision clearly pertains to the assets

that were provisionally released upon the delivery of the initial guarantee, viz the shareholdings and loan accounts in and the interdicted assets of Quoin Rock Winery and Quoin Rock Vineyard as well as a cash amount of R2, 75 million, since only such assets can 'continue' to be covered by the initial guarantee. The initial guarantee, in my view, accordingly serves as security for the full restoration of all the assets that were conditionally released upon the delivery of the initial guarantee. This provision also contains an undertaking by Metlika, Ben Nevis and King to jointly and severally take all steps to restore SARS to a position equivalent to the position which SARS would have occupied had such assets remained subject to the court order. The shareholdings and loan accounts in and the interdicted assets of Quoin Rock Winery and Quoin Rock Vineyard as well as a cash amount of R2, 75 million would, if a final guarantee is not issued, automatically become subject to the preservation order in so far as they are available, and SARS has the security of the initial guarantee and the undertakings of Metlika, Ben Nevis and King, insofar as the conditionally released assets are no longer available.

[33] Clause 8 of the guarantee agreement provides that the 'guarantees', which, in my view, must accordingly mean either the initial or the final guarantee, will be payable to SARS ten court days after a certificate of the State Attorney has been delivered to the attorneys of record of Metlika and 'the banking institution concerned'. The reference to 'the banking institution concerned' also supports the interpretation that the 'guarantees' referred to in this clause are either the initial or the final guarantee. Otherwise one would have expected the reference to be to the banking institution which issued the final guarantee.

[34] The limitation or qualification contained in the introductory part of the order 'in so far as the guarantees provided for in the agreement are in place' is, in my view, accordingly also a reference to either the final guarantee or the initial guarantee.

[35] The meaning of the order is, in my view, clear and unambiguous on a reading thereof and the trial court's reasons for the order or judgment do not in any way detract from such meaning. The 'subject to' phrase in the introductory part of the order is used to establish what is dominant and what is subordinate. The phrase in its context denotes and must be given the meaning that the order that deems Ben Nevis to own the applicable assets and that authorises their attachment and sale in execution was to be subservient to – '... or to use an Afrikaans equivalent ... 'onderworpe aan' ...' (*per* Harms JA in *Pangbourne (supra)* at p1188E – F) – the guarantee agreement to the extent that the initial or the substitute guarantee is in place.

[36] It is common cause that only the initial guarantee was in place at the time when the order was made and that a final guarantee has never been put in place. The order of Ledwaba, J that the assets referred to in the order are to be regarded as assets owned by Ben Nevis and that they may be attached and sold in execution to satisfy, in whole or in part, the tax liability of Ben Nevis to SARS, is accordingly only subordinate to the guarantee agreement to the extent of the initial guarantee having been in place. The order in its terms is also limited to the extent that the liability of Ben Nevis for income tax 'is' or 'becomes' recoverable. It is common cause that the liability of Ben Nevis for income tax has been established and is recoverable in the amount of approximately R2,7 billion, which amount by far exceeds the value of the assets to which the order applies.

[37] I am accordingly of the view that the order of Ledwaba, J, on a correct interpretation thereof, is presently operative and binding and the assets referred to therein – except, perhaps, the asset represented by the 95% shareholding and loan account of Metlika in Quoin Rock Winery, but I need not make any definitive finding in respect of this asset for the reasons that follow – are declared to be regarded as assets owned by Ben Nevis and the order authorises their attachment and sale in execution in order to satisfy, in whole or in part, the tax liability of Ben Nevis to SARS.

[38] Counsel for King submitted that SARS is constitutionally bound to observe the rule of law and duty bound to observe the conditions of the guarantee agreement, which was made an order of court, until set aside. The order of Ledwaba, J, however, has superseded the preservation order as amended by the order which made the guarantee agreement an order of court. Counsel for King unexpectedly raised further constitutional issues in connection with the interpretation of the order of Ledwaba, J from the Bar without such issues having been clearly raised on the papers nor in counsels' heads of argument that were filed before the hearing of this application. King, in his answering affidavit, made the submission '... that on an ordinary interpretation of the order, it does not have the meaning alleged by the Commissioner ...'. Counsel on behalf of King, nevertheless submitted that the order is ambiguous, not capable of literal interpretation, susceptible to three meanings, and that extrinsic facts or evidence should accordingly be resorted to in order to resolve its meaning. Counsel for King submitted that if I were to find on a proper interpretation of the order that the interpretation contended for by SARS is the correct one, but that there were other less convincing but nevertheless plausible meanings, then I would be enjoined to adopt the one that promotes the values set

out in s 165(1)(c) of the Constitution, if it is found that SARS possibly or probably acted improperly. The disputes relating to the correct interpretation of the order of Ledwaba, J are, however, possible to decide without reaching the constitutional issues raised by King, or by his counsel unexpectedly. See: *S v Mhlungu and Others* 1995 (3) SA 867 (CC), para [59]. The meaning of the order of Ledwaba, J is clear and unambiguous and effect must be given thereto. It is, in my judgment, not open to other plausible interpretations nor does it undermine the constitutional values and norms referred to by counsel for King. My interpretation of the order of Ledwaba, J, I should add, is in material respects at variance with the construction contended for by SARS.

[39] I have mentioned that the only asset of all the assets to which the order of Ledwaba, J apply that was provisionally released from the operation of the preservation order upon the delivery of the initial guarantee is the asset represented by the 95% shareholding and loan account of Metlika in Quoin Rock Winery (in liquidation). It is on King's own version unlikely that the loan account and shareholding of Metlika in Quoin Rock Winery would yield any value and it is accordingly similarly unlikely that SARS would execute twice against that asset in the sense of having received payment for that asset under the initial guarantee and then to also execute against the asset for which payment had been received. There is no conceivable apprehension - let alone a reasonable and well-grounded one - of irreparable harm to Metlika or to Ben Nevis in the unlikely event of SARS receiving payment of any liquidation dividend pursuant to Metlika's shareholding and loan account in Quoin Rock Winery nor would a suitable alternative remedy not be available to them nor is there any possibility of prejudice to them, particularly in the light of the undertaking of SARS to repay to Metlika with relatively substantial

interest, any amount which it is not entitled to retain, if the interim interdict they seek in respect of the Quoin Rock Winery asset is withheld.

[40] I now turn to the second preliminary point raised by SARS, which is that Metlika and Ben Nevis have forfeited any right to the temporary relief they seek, because of the long delay for which no satisfactory explanation is given in instituting the principal action pending the finalisation of which the present interim relief is sought.

[41] The attorneys acting for SARS notified the attorneys acting for Metlika and Ben Nevis during March 2011 that SARS would be proceeding to execute against the assets included in the order of Ledwaba, J. The present application for interim interdictory relief was issued on 28 April 2011. It thereafter took nearly a year before the principal action to which their claimed interim interdictory relief is ancillary was instituted. No satisfactory explanation is given for such long delay. Arbitration proceedings have not commenced since the end of 2005 when it became clear that the parties had irreconcilable differences. It was also SARS, which took the initiative of ultimately ensuring the finalisation of this application for interim relief by causing the required index to be prepared, by filing its heads of argument first and by arranging a case management meeting with the Deputy Judge President. The delays are highly prejudicial to SARS, which is in the public interest enjoined to obtain '... full and speedy settlement of tax debts...'. See: *Metcash Trading Ltd v Commissioner, SARS* 2001 (1) SA 1109 (CC), para [60].

[42] I agree with the submissions made by counsel for SARS that the following principle referred to in *Juta & Co Ltd v legal and Financial Publishing Co (Pty) Ltd* 1969 (4) SA 443 (C), at p 445C – F, and approved by the Supreme Court of Appeal

in *National Council of SPCA v Openshaw* 2008 (5) SA 337 (SCA), paras [16] and [18], finds application in the present matter and that the application of Metlika and Ben Nevis falls to be dismissed on account of the delay in instituting the principal action to which their claimed interdictory relief is ancillary:

> 'If one bears in mind the long delays for which no explanation has been given, that as far back as December the applicant had numerous clear cases of copying in its possession, according to the letter written by the applicant, and that up to now no action has been instituted, it seems that the applicant has erred in selecting this method, namely, an application for an interdict *pendent lite*, but even if it was the appropriate procedure at the time the applicant has, by reason of the facts stated above, forfeited its rights to this temporary relief. Had it issued summons at the time when the notice of motion proceedings were instituted, the trial could already have taken place.
> There is such a thing as the tyranny of litigation, and a Court of law should not allow a party to drag out proceedings unduly. In this case we are considering an application for an interdict *pendent lite*, which, from its very nature, requires the maximum expedition on the part of an applicant.'

[43] My findings thus far make it unnecessary to deal with the other grounds of opposition or the numerous factual disputes regarding the validity, enforceability, interpretation and implementation of the guarantee agreement or the many submissions made by counsel during the course of the week long hearing of this matter. I should, however, mention that counsel for Metlika and Ben Nevis conceded, correctly in my view, that the constitutional issues raised by King in connection with the calling up by SARS of the initial guarantee and the receipt by it of the guarantee amount in the sum of R70 million, do not assist in resolving the question that is relevant in this application, which is whether such conduct amounts to an approbation and reprobation of the guarantee agreement on the part of SARS.

[44] In terms of a notice of motion dated 17 March 2012, the second respondent, King, sought leave to intervene as the third applicant in the application of Metlika and Ben Nevis at the commencement of the hearing. King wished to seek the same

relief as that which Metlika and Ben Nevis seek and he also wished to introduce a 'new cause of action' that is essentially 'based on the conduct of SARS in taking payment of the interim guarantee' while avoiding the guarantee agreement and attempting to execute against the South African assets of Metlika despite the court order that made the guarantee agreement an order of court not having been set aside. King contends that such conduct on the part of SARS is unlawful and unconstitutional since it is offensive to the rule of law and therefore inconsistent with s 1(c) of the Constitution; in breach of the duties of SARS to ensure the dignity and effectiveness of the courts and to respect the binding nature of court orders and therefore inconsistent with the duties of SARS in terms of s 165(4) and s 165(5); of the Constitution; and in breach of its constitutional duty of good faith and its obligation under s 25(1) of the Constitution not to deprive persons of property arbitrarily. King contends that his new cause of action supports the interim relief sought by Metlika and Ben Nevis and also the granting of independent appropriate, just and equitable relief to Melika, Ben Nevis, and to himself against SARS in terms of s 38 or s 172 of the Constitution in the form of final or interim interdictory relief that is aimed at preventing SARS from proceeding to execute directly against the shares and loan accounts of Metlika in violation of the guarantee agreement unless and until it repays the R70 million initial guarantee payment it took on 17 November 2011. What follows are my reasons for having refused King's application to intervene with a costs order in favour of SARS, which order included the costs of two counsel.

[45] King avers that he has an interest in a declaration of validity and enforceability of the guarantee agreement. The outcome of the application by Metlika and Ben Nevis might result in him and his family being removed from their family home since it might be sold and the proceeds used to pay part of the outstanding income tax

liability of Ben Nevis. The contention of King is that if SARS is allowed to execute against Metlika's South African assets, it is likely to lead (at least indirectly) to the liquidation of Talacar as a result of its loan indebtedness to Metlika, and the resultant sale of the home in Sandhurst, Johannesburg in which King and his family reside as well as one in Plettenberg Bay, which properties are owned by Talacar. It is contended by King that he, as a party to the guarantee agreement and the court order embodying it and as the occupant with his family of these properties, has an interest in the enforcement of the court order and in preventing SARS from acting in a manner inconsistent with the Constitution to secure the sale in execution of his family home.

[46] Even though Rule 12 of the Uniform Rules governs the intervention of persons as plaintiffs or defendants, which Rule is made *mutatis mutandis* applicable to applications by Rule 6(14), an application to intervene as an applicant has to meet the test for joinder under Rule 10(1). See: *Vitorakis v Wolf* 1973 (3) SA 928 (W), at p 930D - H; *Shapiro v SA Recording Rights Association Ltd* 2008 (4) SA 145 (W), paras [12] – [18].

[47] In my view King's direct and substantial interest in the relief sought and his *locus standi* to sue, either in a separate action or application or in the present one of Metlika and Ben Nevis, have not been established nor has it been established that the additional relief that he wished to introduce '... depends upon the determination of substantially the same question of law or fact which, if separate actions were instituted, would arise in such action ...'.

[48] King had responded at length to the second SARS affidavit and he had instituted the action, which he had undertaken to institute, whether or not he was

permitted to intervene as an applicant. King's interest in the relief claimed by Metlika and Ben Nevis and an opportunity to be heard are sufficiently protected by King having been cited as a respondent in that application, by him having filed extensive affidavits, and by him being represented in that application by senior and junior counsel. This was conceded by King's counsel insofar as the relief which King wished to claim is the same as that claimed by Metlika and Ben Nevis.

[49] King is one of the discretionary beneficiaries of the trust which owns all the shares in Metlika. The trustee of the trust appoints the directors of Metlika and exercise control over it. The assets against which SARS wishes to execute and in respect of which the interim interdict is sought, are assets of Metlika. King only has a mere indirect financial interest in the assets in respect of which the interim interdictory relief is sought. If the assets of Metlika were to be sold by SARS in execution of the tax debt of Ben Nevis it will result in a diminishing of the assets of the trust and accordingly the aggregate value of the assets available to the trust to distribute in the discretion of the trustee to the beneficiaries, including King, would be less.

[50] King is not the bearer of any right nor of any obligation arising from the guarantee agreement. Assets belonging to King and his wife are expressly excluded from the provisions of the guarantee agreement and remained subject to the preservation order. The only contingent right which SARS could enforce directly against King in terms of the guarantee agreement and the only concomitant contingent obligation upon King arose from the provisions of clause 10 of the agreement in terms whereof Metlika, Ben Nevis and King undertook, jointly and severally, in the event of a final guarantee not being issued, to take all steps to

restore SARS to a position equivalent to the position which SARS would have occupied had the released assets remained subject to the preservation order. SARS, however, had expressly released King of this contingent obligation. The assets that had been provisionally substituted by the initial guarantee and those that could be substituted by a final guarantee in terms of the guarantee agreement had also not been declared executable for the tax liability of King. The claims against King in the piercing action were postponed *sine die* at the time of the hearing of that action and expressly abandoned on behalf of SARS at the hearing of this application. The assets conditionally released or those that could be released upon the issuing of a final guarantee pursuant to the terms of the guarantee agreement accordingly no longer serve, to use the words of counsel for King, as a 'pool for King's tax liablity'.

[51] The shareholdings and loan accounts in and the interdicted assets of Quoin Rock Winery and Quoin Rock Vineyard as well as a cash amount of R2, 75 million were provisionally released from the provisions of the preservation order on delivery of the initial guarantee. Quoin Rock Winery and Quoin Rock Vineyard have during the past year been placed under final liquidation. The State attorney then issued a certificate contemplated in the guarantee agreement and the attorneys for SARS notified the attorneys for Metlika and Ben Nevis on 12 October 2011 that SARS would be presenting the certificate to Rand Merchant Bank Ltd ('RMB') and claim payment of the R70 million initial guarantee. On 17 October 2011, Metlika launched an urgent application against SARS and RMB in the South Gauteng High Court, Johannesburg under case no 39479/2011 to interdict payment of the initial guarantee amount to SARS. On 16 November 2011, Tshabalala, J dismissed Metlika's application with costs on the basis of Metlika's own assertion of validity of the guarantee agreement.

[52] The shareholding and loan account of Metlika in Talacar and the Sandhurst and Plettenberg homes occupied by King and his family did not form part of the assets released upon the delivery of the initial guarantee. The R70 million that SARS received under the initial guarantee, which is central to the new cause of action which King wished to raise, does not concern the shareholding and loan account of Metlika in Talacar nor Talacar's assets other than its shareholding and loan accounts in Quoin Rock Vineyards. King is not the right bearing entity to demand and to claim repayment of the R70 million which SARS had received under the initial guarantee.

[53] Constitutional issues relating to the conduct of SARS in attempting to obtain payment under the initial guarantee were raised on behalf of Metlika at the hearing to interdict payment of the initial guarantee to SARS. The only relevance, however, which the calling up of the initial guarantee and the receipt by SARS of its proceeds has to the determination of the questions in the Metlika and Ben Nevis application is whether SARS is precluded from raising the invalidity, lapsing or cancellation of the guarantee agreement on the grounds that it had approbated the guarantee agreement by calling up the initial guarantee, whilst at the same time, reprobating the guarantee agreement by contending that it is void, has lapsed or has been cancelled. The authorities on which counsel for Metlika and Ben Nevis rely in his heads of argument are *Merry Hill (Pty) Ltd v Engelbrecht* 2008 (2) SA 544 (SCA), at p 550A; *Mgogi v City of Cape Town and Another; City of Cape Town v Mgogi and Another* 2006 (4) SA 355 (C), at p 394; and Spencer, Bower & Turner: Estoppel by Representation, 3rd Ed at 359-60 in which reference is made to the case of *Smith v Baker* (1873) LR 8CP 350 at 357, where Honyman J said:

> 'A man cannot at the same time blow hot and cold. He cannot at one time say that the transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and at another time say it is void for the purpose of securing some further advantage.'

[54] I was accordingly of the view that the 'new cause of action' founded upon secs 1(c), 25(1), 165(4) and 165(5) of the Constitution and in respect of which King sought appropriate, just and equitable relief in terms of s 38 or s 172 of the Constitution did not depend upon the determination of substantially the same questions of law and fact which have arisen in the Metlika and Ben Nevis application in which King wished to join and that the constitutional issues substantially broaden the questions pertinent to the Metlika and Ben Nevis application.

[55] I now turn to an application that was launched on behalf of King after I had reserved judgment in this matter, in which an order is prayed for in terms of prayer I of the notice of motion to permit King to place further evidence before me for consideration prior to the handing down of judgment. SARS opposed the application and filed an answering affidavit whereafter a replying affidavit was filed by King. Metlika and Ben Nevis did not involve themselves in the issues raised in this interlocutory application. The relief prayed for in prayer 1 of the Notice of Motion is hereby granted.

[56] It appears from this application that after SARS had notified Ben Nevis and Metlika during March 2011 that it would proceed to execute against the assets declared executable in terms of the order of Ledwaba, J and after SARS had on 22 March 2011 refused to accede to undertakings requested from Metlika and Ben Nevis that it would desist from doing so, SARS, prior to the launching of the application by Metlika and Ben Nevis, had caused writs of execution to be issued

and had given instructions to the sheriff to attach the assets, including the shareholdings and loan accounts in respect of which Metlika and Ben Nevis presently seek interim interdictory relief. The sheriff executed the writs and rendered returns to SARS. Metlika and Ben Nevis thereafter launched the application for interim interdictory relief on 28 April 2011. In terms of their notice of motion they seek an interim order for SARS to 'be interdicted and restrained from taking any further steps to execute' upon the assets referred to therein. SARS, prior to the hearing of the matter, '...was concerned that Metlika and Ben Nevis could possibly raise certain technical issues in respect of the attachments which were done during 2011.' In order to ensure that there would be no further delays to have the assets sold in execution should SARS be successful in its opposition to the application of Metlika and Ben Nevis, it caused writs to be issued on or about 14 May 2012 and it requested the sheriff again to attach the assets. A letter was addressed to King's attorneys in which an undertaking was given that SARS will not proceed to arrange for a sale in execution prior to judgment in the matter being given.

[57] I am of the view that it can hardly be said that the conduct of SARS complained of in this interlocutory application constitutes an abuse of its position as an organ of state and that SARS took the law into its own hands. No plausible or reasonable inference can be drawn from the further evidence presented in this interlocutory application that SARS would not have abided an order in terms of which the relief prayed for by Ben Nevis and Metlika is granted.

[58] Finally, the matter of costs. Counsel for Metlika and Ben Nevis submitted that King and SARS should each bear their own costs in connection with all the affidavits filed by them subsequent to the filing of the replying affidavit on behalf of Metlika and

Ben Nevis on 28 June 2011. The proliferation in the papers, which now run to more than 3000 pages, in counsel's submission, cannot be attributed to Metlika and Ben Nevis. Counsel for King conceded that King should be treated as an applicant for the purpose of an appropriate costs order in the event of Metlika and Ben Nevis not succeeding in their application and that the three of them should in such event be ordered to pay the costs of SARS jointly and severally the one paying the others to be absolved, except for the costs occasioned by the proliferation of the papers, which counsel roughly estimated to be in the region of about 33% of the papers, because such proliferation, in counsel's submission, was caused by collateral attacks by SARS upon King. All the parties were, however, *ad idem* that I should permit all the affidavits that were filed out of the ordinary in these proceedings and such an order was accordingly made. There was no application to strike out any matter on the basis of irrelevancy. Much of the proliferation is caused by the numerous factual issues that arose once King had filed his answering affidavit and many of his allegations supplemented the founding papers of Metlika and Ben Nevis and were adopted by them. The veracity of the disputes raised by SARS can at face value not be questioned and the inherent credibility of King's factual averments on the disputed issues became relevant. King too has made serious allegations against SARS and its representatives and much of his counsel's address concerned alleged wrongful and unconstitutional conduct on their part. I am accordingly of the view that the costs of the main application and of the counter-application should follow the result of the main application. It was, in my view, prudent for SARS to engage the services of three counsel. They all participated in the proceedings, each addressing me on different aspects of the case. Counsel for Metlika and Ben Nevis also conceded this. The costs of the interlocutory application that was launched by King

after I had reserved judgment should be borne by King. I consider the opposition of SARS to that application to be reasonable.

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

1. The application dated 26 April 2011 is dismissed.

2. The first applicant, the second applicant and the second respondent, jointly and severally, the one paying the others to be absolved, are ordered to pay the first respondent's costs of the application referred to in paragraph 1 of this order and of the counter-application in those proceedings, including the costs attendant upon the engagement of three counsel.

3. The second respondent is ordered to pay the first respondent's costs of his interlocutory application dated 6 June 2012, including the costs attendant upon the engagement of two counsel.

P.A. MEYER
JUDGE OF THE HIGH COURT

20 July 2012

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