IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)

Case Number: 1319/13

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

31/1/14
DATE

SIGNATURE

In the matter between:

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

And

MARK KROK **FIRST RESPONDENT**

JUCOOL ENTERPRISES INC. **SECOND RESPONDENT**

JUDGMENT

Fabricius J,

1.

On 18 February 2013, this Court granted a provisional Preservation Order in terms of the provisions of ***s. 163 of The Tax Administration Act, no. 28 of 2011 ("The Tax Administration Act")***, with all the provisions of the order having immediate effect. A return day was stipulated, which was extended on a number of occasions, and the application before me is to confirm this provisional order. In terms of the order a *curator bonis* was appointed in whom the rights, title and interest in all the assets of the Respondent would vest. This included certain specified assets whether or not they were registered or held in the name of the Respondent. These assets included a large portfolio of shares on the Johannesburg Stock Exchange, certain funds in a non-resident account at a bank, a current account, two erwen in the Cape and a motor vehicle. According to the Court Order no one, except with the prior written consent of the Applicant, which would not unreasonably refused, could deal with the assets except the *curator bonis.* It was also ordered that the Respondent disclose to the *curator bonis* all his assets held in South Africa and all of his sources of income in South Africa, and to identify where such assets could be found and to co-operate in order to ensure that all his assets were placed at the disposal of the *curator bonis.* The *curator bonis* would continue to function for as long as the Applicant was collecting taxes for the Australian Tax Office from the Respondent, or until the Applicant was satisfied that a proper arrangement had been made in order to secure such assets

belonging to the Respondent, and all the assets mentioned in the Court Order for purposes of such tax collection.

2.

On 15 March 2013, an opposing affidavit was filed on behalf of Respondent. This affidavit was deposed to by his Attorney, and deals in the main with legal argument setting out the Respondent's defences to the application. Only a few paragraphs contained in the founding affidavit, where answered directly. The affidavit contained a number of annexures as well.

3.

On 22 April 2013, Applicant filed a replying affidavit which also contains a number of annexures. Second Respondent herein was granted leave to intervene in these proceedings on 30 July 2013, and accordingly filed an answering affidavit; this affidavit in turn relies largely on what was stated in the affidavit in support of an application for leave to intervene. The Applicant then filed a replying affidavit to the second Respondent's answering affidavit.

4.

BACKGROUND:

The Applicant in this case is acting as a result of a request received from the Australian Tax Office ("ATO") in terms of art. 25 A of the agreement between the Government of Australia and the Government of the Republic of South Africa. The purpose of this agreement was for the avoidance of double taxation, and the prevention of fiscal evasion in respect of taxes. The

agreement was entered into on 1 July 1999, and amended by a Protocol signed on 31 March 2008 ("The Protocol"). The agreement and the Protocol were entered into by the South African Government in terms of ***s. 108 (2) of the Income Tax Act, no. 58 of 1962 ("The Income Tax Act")***, read with ***s. 231 (4) of the Constitution 108 of 1996***. The agreement and the Protocol became part of the South African Law in terms of the Constitution of the Republic, as they were approved by Parliament in terms of ***s. 231 (2) of the Constitution*** and the arrangements were duly published in the Government Gazette of 23 December 2008.

5.

The founding affidavit then states that during January 2012, SARS received a request from the Australian Commissioner for assistance with tax collection and conservancy of the assets of the Respondent in South Africa, pending collection of the amount alleged to be due by the Respondent under the tax laws of Australia. This request was renewed during February 2013. The request was accompanied by a formal certificate issued by the Australian Commissioner stating that:

5.1

Respondent was liable to the Commissioner for taxes in a total amount of Australian $25,361,875.799 plus interest (which, during April 2013, (according to Applicant's heads of argument) was R235, 705,169.19.

5.2

The liabilities arose as a result of the Australian Commissioner issuing a Notice of Assessment of Tax and Penalties under Australian Law;

5.3

The Respondent has lodged an objection to the Notices of Assessment of Tax and Penalties under the procedures provided for by the Australian Tax Law;

5.4

The objection has been disallowed in full and a notice was sent to the taxpayer on 6 February 2012;

5.5

There is a risk of dissipation or concealment of the assets by the First Respondent.

6.

SARS agreed to lend assistance to the Australian Commissioner in terms of the Protocol in the collection of the said revenue claim in accordance with art. 25 A of the Agreement. In the founding affidavit it is stated that at the time when the initial request was received, there was no special provision in the South African Tax Acts which entitled SARS to apply for orders to preserve assets and SARS therefore was, at that stage, dependant on the provisions of the common law in that regard. At common law, an Applicant for a

presentation order (interdict) had to prove on a balance of probabilities that assets would be diminished and that this would be done with the specific intent of frustrating a claim.

See: ***Knox D'Arcy Ltd vs Jamieson and Others 1996 (4) SA 348 A at 372 F – G and Janse van Rensburg N. O. and Another vs Minister of Trade and Industry and Another 2001 (1) SA 29 CC at par. 33***

7.

There after however, the ***Tax Administration Act no. 28 of 2011***, assented to on 2 July 2012 by the President, came into force on 1 October 2012. In terms of ***s. 185*** of this Act, the deponent to the Applicant's founding affidavit stated that he was authorised to apply on behalf of SARS for an order for the preservation of the Respondent's assets in terms of ***s. 163***. Such an order to preserve assets may be applied for if such order is required to secure the payment of taxes. It was also stated that in terms of ***s. 185 (3)*** the certificate received from ATO, was conclusive proof of the existence of the tax debt, and *prima facie* proof of the other statements contained therein. Accordingly, the allegation was made that the certificate amounted to *inter alia*, *prima facie* proof of a danger that the South African assets of the Respondent would be dissipated. Accordingly it was contended that as a result of the status of the certificate, a *prima facie* case for the preservation order in terms of the Notice of Motion had been established, especially in the absence of an answering affidavit by the First Respondent himself. In essence it is Applicant's case that in terms of ***s. 163 of the Tax Administration Act***, an intention to dissipate

assets is not necessary anymore. Preservation must merely be "required" in order to "secure" tax collection. I may add at this stage that "*Prima facie* evidence" in its customary sense is not merely "some evidence". It must be of such a character that if unanswered it would justify men of ordinary reasons and fairness in affirming the question which the party upon whom the onus lies is bound to maintain.

See: ***Alli vs de Lira 1973 (4) SA 635 T at 638 per Nestadt, J (as he then was)***

8.

Despite these allegations, SARS dealt with various defences of the Respondent raised in his mentioned objection to the ATO and submitted that the absence of an affidavit from the Respondent, viewed together with the glaring absence of any undertakings not to dissipate assets, was significant.

9.

The memorandum of understanding between the two competent authorities of the Republic of South Africa and Australia, concerning assistance in the collection of taxes under art. 25 A of the Protocol amending the agreement between South Africa and Australia, for the avoidance of double taxation and the prevention of fiscal evasion, with respect to taxes on income, states that its purpose is to outline the shared understanding between the competent authorities of the procedural issues involved, in providing mutual assistance to each other in their collection of revenue claims. It refers to the appropriate

form that must be used for a request for assistance in collection. The form, after making provision for the identity of the debtor and the amount owing, states that the request be accepted for collection by the Government of South Africa and the "conserving of assets for the purposes of such collection." Under the heading "Revenue Claim", details are given as to what documentation or evidence would be required for that purpose, and it is stated that a request for assistance in tax collection or conservancy, requires sufficient information to be provided to the requested authority to enable collection or conservancy action to be taken. Amongst others, this would include the providing of "evidence reflecting on the likelihood that the debtor's assets without conservancy action will be dissipated."

10.

The relevant request for assistance in collection and/or conservancy, gives the necessary information and detail pertaining to the amount due, and the background to some extent relating to the taxes owed by Respondent to the Australian Government. It states that what amount is due to it, and that such a revenue claim is enforceable under the Tax Laws of Australia. It states that Respondent lodged an objection against the tax assessments and administrative penalties, but that this objection has been disallowed in full. As a result of the determination of the objection, the debt is not currently in dispute, so it was said. It was also stated that it was not believed that the objection was entered into solely to delay or frustrate collection of the amount

alleged. In par. (g), the following is stated "it is believed that there is a risk of asset dissipation or concealment of assets by Mr. Mark Krok..."

11.

The provisions of ***s. 163 of the Tax Administration Act of 2011***, deal with a preservation order. Such an order may be made if required to secure the collection of tax in respect of assets mentioned in ***s. 163 (3).*** It also provides for the appointment of a *curator bonis,* provides for certain reasonable living expenses and the duration of such an order. ***s. 185*** of the Act, in turn, deals with tax recovery on behalf of foreign governments.

s. 185, for present purposes reads as follows:

185 (1): If SARS has, in accordance with an international tax agreement received –

a. A request for conservancy of an amount alleged to be due by a person under the tax laws of the country where there is a risk of dissipation or concealment of assets by the person, a senior SARS Official may apply for a preservation order under Section 163 as if the amount were a tax payable by the person under a Tax Act; or
b. A request for the collection from a person of an amount alleged to be due by the person under the tax laws of the other country, a senior SARS Official may, by notice, call upon the person to state, within the period specified in the notice, whether or not the person admits liability for the amount or for a lesser amount.

185 (2): A request described in ***subsection (1)*** must be in the prescribed form and must include a formal certificate issued by the competent authority of the other country stating –

a. The amount of the tax due;
b. Whether the liability for the amount is disputed in terms of the laws of the other country;
c. If a liability for the amount is so disputed, whether such dispute has been entered into solely to delay or frustrate collection of the amount alleged to be due; and
d. Whether there is a risk of dissipation or concealment of assets by the person.

185 (3): In any proceedings, a certificate referred to in ***subsection (2)*** is –

a. Conclusive proof of the existence of the liability alleged; and
b. *Prima facie* proof of the other statements contained therein."

In this context, the answering affidavit on behalf of the first Respondent stated that there were no suggestions in Applicant's founding affidavit, of any objective events which might have transpired since January 2012 (when the first certification was made) and the date of the Notice of Motion, which would justify the position now contended for, that there was a risk of asset dissipation or concealment of assets by Respondent. In addition, no objective evidence had been tendered on behalf of the ATO that to support such a conclusion. There was therefore no need for these proceedings, and there

was no objectively sustainable argument to be advanced on behalf of the ATO justifying the "belief" that there is a risk of asset dissipation or concealment.

12.

The issues before me:

Obviously, the first issue before me is whether or not SARS has proven its case on a *prima facie* basis for the purposes of ***s. 185 of the Tax Administration Act*** in the context of the mentioned Protocol between the South African and Australian Authorities.

13.

First Respondent's Argument:

Mr. Ginsberg SC on behalf of the first Respondent submitted that three issues arose in this case for decision, namely whether or not Applicant had discharged the onus that rested on it in the context of the relevant legislation and the Protocol, whether or not the facts would justify a reasonable apprehension of dissipation, and whether the introduction of art. 25 A into the DTA (by the Protocol) applied to taxes claimed by the ATO from the Respondent for the income years ending 30 June 2004 to 30 June 2009. He said that upon a proper interpretation of all the relevant legislation and the Protocol, art. 25 A can only be invoked by the tax authorities if the taxes owing to the ATO arose during the income years commencing from 1 July 2009. The second Respondent's Counsel, Mr. A. Franklin SC associated

himself with the defence of the First Respondent, except in stating that if those grounds of opposition were not successful, then Second Respondent's case would be that it was the beneficial owner of the assets that formed the subject matter of the application, and that those assets therefore should not form part of any provisional or final preservation order.

14.

SECTION 183 (3) OF THE TAX ADMINISTRATION ACT AND THE CERTIFICATE IN TERMS OF SECTION 183 (2) (d):

The question in this context is whether or not the Applicant has shown that there is *prima facie* proof of risk of dissipation or concealment of assets by first Respondent? Before I deal with the presence or otherwise of objective facts in this context, it is necessary that I briefly refer to other contextual considerations relating both to the first and second Respondents. These appear in an affidavit in support of an application by second Respondent for leave to intervene in these proceedings;

Jucool is a company incorporated in the British Virgin Islands on 23 December 2008. The sole shareholder of Jucool is Nova Trust Ltd, in its capacity as a Trustee of the Jucool Trust. Jucool Trust was established on 22 December 2008 by way of a Declaration of Trust executed by Nova Trust Ldt. It is a discressionary Trust governed by Jersey Law, and its sole material assets are shares in Jucool and a loan receivable from Jucool. The beneficiaries of the Jucool Trust are the first Respondent, his children, and the Jersey Blind Society. The first Respondent is not, nor has ever been, a

Director of Jucool or a Trustee of the Jucool Trust. Nova Trust Ltd is a company incorporated under Jersey Law and carrying on business in Jersey. It is licensed and regulated for the conduct of fiduciary business by the Jersey Financial Services Commission. It is a professional Trustee which acts as a Trustee of several hundred trusts which, between them, hold substantial assets. It appears therefore that during 2002, the Respondent had "re-located" from South Africa to Australia where he had become a resident and had ceased to be a resident of South Africa for tax, exchange control or any other purpose. At that time, and as required by Law (including The Exchange Control Regulations as promulgated by Government Notice R.1111 of 1 December 1961 and amended up to the Government Notice no. R.445 in Government Gazette no. 35430 of 8 2012) certain assets were placed under the control of an authorised dealer in foreign exchange, in this instance Investec Bank. In 2008, first Respondent decided to re-locate from Australia to the United Kingdom. As part of his planning to take up residence in the United Kingdom, on 29 December 2008, the first Respondent and Jucool entered into the following agreements:

14.1

An Income Sale Agreement, in terms of which Jucool purchased from the Respondent certain specified rights and interests in the assets listed in that agreement, for a purchase price of R 72 500 000.00. The purchase price payable in terms of the Income Sale Agreement was left outstanding as an interest-free loan owed by Jucool to the Respondent;

14.2

An Asset Sale Agreement, in terms of which Jucool purchased from the Respondent those rights and interests in the assets, which had not been sold by the Respondent to Jucool in terms of the Income Sale Agreement. The purchase price was R 217 500 000.00. The purchase price in terms of the Asset Sale Agreement was also left outstanding as an interest-free loan owed by Jucool to the Respondent.

15.

In consequence of those agreements, Jucool had a debt owing to the Respondent in the amount of R 290 000 000. Also, on 29 December 2008, and immediately after the conclusion of the Income Sale Agreement and the Asset Sale Agreement, the Respondent entered into a Deed of Assignment pursuant to which he assigned absolutely all his right, title and interest in and to the debt to Nova Trust Ltd as Trustee of the Jucool Trust, free of consideration. The deponent to this affidavit continues to state that the directors of Jucool were aware that the assets of persons emigrating from South Africa could not be freely transported from that country, but were subject to certain rules and procedures and were accordingly aware that the assets were "blocked" in South Africa under South African Exchange Control Regulations as is generally the case with all emigrants from South Africa (at that time). Transactions of this sort entered into by the Respondent were therefore common under similar circumstances. In terms of the agreements (specifically Clause 7.2 of the Income Sale Agreement and Clause 6.3 of the

Asset Sale Agreement), as and when the assets become transferrable, the Respondent is required to transfer registered title to the assets into Jucool's name at such time as Jucool deems appropriate. There is also a requirement (Clause 6.2 of the Asset Sale Agreement) that the Exchange Control Regulations be adhered to by proper applications for consent to remit the assets from South Africa as and when that becomes legally possible. The agreements referred to were subject to the law of the British Virgin Islands and, according to an opinion furnished by a QC, an expert on the law of the British Virgin Islands, the agreements were valid and binding agreements under the laws of the British Virgin Islands. The conclusion therefore was that Jucool was the "beneficial" owner of the relevant assets which are held by the first Respondent upon Trust for Jucool. Furthermore, in terms of the relevant Exchange Control Regulations at the time, the income derived from the assets is, and always has been, remittable from South Africa. There is no prohibition whatsoever on a non-resident to whom income may be remitted, on assigning his right to that income to another non-resident. Both the spirit and the letter of the Exchange Control Regulations were respected, since such a transaction would in no way result in more flowing out of South Africa than would have been the case had the emigrant retained the right to income, in his own name. Both agreements recognise that the capital of the assets themselves cannot be remitted from South Africa, and that the transfer of the assets is subject to the consent of the Exchange Control Department of the South African Reserve Bank (now the Financial Surveillance Department). In particular, it is expressly a term of both agreements that the assets are sold subject to the restrictions arising from the Exchange Control Regulations (in particular

Clauses 1.2, 1.3, 1.5 and 2.1.2 of the Asset Sale Agreement) and that delivery of the assets would require permissions and consents, for example, with reference to Clause 6.2 of the Asset Sale Agreement. As required by the regulations therefore, the assets have throughout been held under the control of an authorised dealer in foreign exchange in an account which is recognised by all concerned as being subject to the provisions of Regulation 4 (2) of the relevant Exchange Control Regulations.

16.

It appears from first Respondent's own submissions to the ATO and the reasoning of the ATO in reply thereto, that the ATO based its assessments on the fact that contrary to first Respondent's contentions, he retained legal and beneficial interests in the assets held in South Africa. In this context, the following appears from the "Executive Summary" provided by the ATO: "You became an Australian resident in April 2002, after your emigration from South Africa, and continued your residence here until December 2008 when you immigrated to the United Kingdom. As an Australian resident you were required to declare all income derived from all sources, in or out of Australia. The ATO's position is that you have omitted assessable income from your Income Tax Returns, that was derived on assets you held in South Africa, whilst you were an Australian resident. This income includes ordinary foreign source income you derived on your South African accounts and assets administered on your behalf by Investec for South African exchange control

purposes. In addition, you have also omitted capital gains on disposals of those assets and when you ceased to be an Australian resident.

You have provided a submission to the Commissioner in which you contend that upon your immigration to Australia, you assigned your rights and interests to the income and capital of the assets held in South Africa to a BVI company. The ATO's position is that you retained legal and beneficial interests in the assets held in South Africa. Additionally, we consider that the purported assignment "arrangement" is prohibited by the South African Exchange Control Regulations and is not legally effective and/or is a sham."

17.

From the documentation supplied by the ATO to the South African authorities for purposes of the present application ('SARS 6'), it appears clearly that the first Respondent repeatedly applied through Investec to the relevant South African Reserve Bank Department for the release of "blocked" funds in substantial amounts, amounting to many millions of rands. It also appears from the same document that first Respondent's legal representatives held a meeting with the ATO offices on 19 July 2010. It appears from par. 147 and 148 of this document that the ATO was told that he had formalised his emigration facilities with the South African Reserve Bank EXCON Department on the basis that he was legally and beneficially the holder of the rights and interests to the South African assets, and that he remitted income and capital thereon in accordance with the formalised emigration facilities. The South African Reserve Bank did not grant exemption or approval to remit any

income or capital to the BVI Company under their purported assignment agreement that was described, and the rights and interests of the South African assets were at all times regarded by the SARB as belonging to him, the first Respondent. It was also stated that in his dealings with the South African Reserve Bank Department, first Respondent had maintained that those South African assets were legally and beneficially held by him solely, and that income accruing thereon was his. The following was said in par. 170:

"You have made numerous applications to the SARB EXCON Department commencing in 2004, to release and use your South African blocked funds in South Africa, including to support your mother and father, pay monthly steepens to former servants, pay holiday travel, accommodation and living expenses, purchase sporting tickets and to purchase land so that you may build and furnish a house. These applications further demonstrate that you regard it as South African assets and funds as belonging to you, that you maintain your beneficial and legal ownership of those assets for the period in which you were a resident in Australia. In addition, the SARB applications reveal your control over the assets, which conflicts with the purported assignment arrangement".

It was then stated that during the period from January 2004 through to April 2010 he had made, through Investec, no less than 24 applications to the SARB EXCON Department to use his South African blocked assets to fund his expenditure in South Africa. With reference to a loan application to a St. George's Bank, details were then given of amounts remitted from South Africa which demonstrated his control thereof. In the loan application to St. George's Bank, statements were made, which conflicted with submissions made to the

ATO. The Commissioner then stated that he considered that his use of entities established in banking secrecy jurisdictions, such as the BVI and Lichtenstein, was an attempt to preclude the operation of the attribution regime under Australian Tax Law, and supported the Commissioner's view that he intended to avoid his tax obligations in Australia, particularly given the timing of his permanent departure from South Africa, and settlement in Australia. It was also stated that in the period subsequent to 15 December 2008, when he departed Australia to reside in the UK, through to 30 June 2010, he continued to remit funds abroad from the Investec Bank accounts in South Africa. It was noted however that none of these funds were remitted to the ostensible assignee which would have been expected if the assignment arrangement was intended to take effect according to its tenor. Instead, he remitted amounts from his South African accounts directly to his own personal accounts abroad (including his St. George Bank account in Australia) or to another offshore account held in the name of Jucool Enterprises Incorporated.

18.

As I have said, ***ss. 163 and 185 of the Tax Administration Act***, need to be interpreted in the light of the formal certificate requiring assistance. Such interpretation must be done in the light of its context, the apparent purpose to which it is directed, and the material known to those responsible for its production (the production of the certificate referred to in ***s. 183 (2)***).

See: ***KPMG Chartered Accountants (SA) vs Securefin Ltd and Another 2009 (4) SA 399 (SCA) par. 39 and 40; Natal Joint Municipal Pension***

Fund vs Endumeni Municipality 2012 (4) SA 593 (SCA) par. 18 and 19 and Ex Group (Pty) Ltd vs Trustco Group International (Pty) Ltd and Others [2013] ZASCA 120 a, judgment delivered on 20 September 2013, at ***par. 16***. It is clear that the documentation drawn by the ATO, parts of which I have referred to, was in their mind when the relevant certificate was drafted. This was then considered by the South African authorities who in the founding affidavit then say that the certificate, as per the wording of ***s. 185 (3) of the Act*** amounts to *prima facie* proof of a danger that the South African assets of the Respondent will be dissipated. What "*prima facie* proof" means, is discussed in some detail in the ***South African Law of Evidence, Zeffert, Paizes and St Q Skeen, 5th Edition, Lexis Nexis Butterworth, at 124***. In this context, it was stated on behalf of Applicant, in the founding affidavit and during argument that I should have regard to the following considerations:

18.1

The wording of ***s. 183 (2) of the Tax Administration Act***;

18.2

The contents of the certificate referred to in ***s. 183 (2) (d)***;

18.3

The wording of ***s. 183 (3) (b)*** which meant that the statement in the certificate that there was a risk of dissipation or concealment amounted to *prima facie* proof of that allegation;

18.4

The fact that second Respondent made no affidavit at all dealing with the allegations in the founding affidavit, such as one would normally expect and/or require;

18.5

The information that was available to the ATO at the time that they made the relevant certificate;

18.6

That information available to him by and large emanated from representations made to the ATO and/or objective facts relating to the two dozen requests by first Respondent for the release of funds;

18.7

The fact that conflicting and/or untrue representations were made to St George Bank;

18.8

The fact that proper consideration should be given to the purpose of the Protocol between the two countries and the ostensible reasons for establishing the tax structure that I have referred to when first Respondent left Australia;

18.9

The fact that the relevant assets are merely preserved, pending further procedures and rights which the first Respondent may exercise in Australia, the conclusion being that the confirmation of the Preservation Order will not prejudice the legitimate interests of the first Respondent or anyone else who may have a valid interest in the particular South African assets.

19.

Having regard to the objective facts that were placed before me, the purpose of the relevant legislation and the purpose of the Protocol, and the proper context, I am of the view that ***ss. 163 and 185 of the Tax Administration Act***, in the context of the relevant Protocol, justify the confirmation of the Preservation Order that was provisionally made.

20.

THE PROTOCOL:

As said, the purpose of the 1999 Agreement between the two governments was for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income. It contained no provision for mutual assistance with regard to the latter stated purpose. All relevant provisions were aimed at the avoidance of double taxation. It provided in art. 27 when these provisions would come into force both in the case of Australia and in the case of South Africa. The 2008 Protocol amended this Agreement. Art. 1

introduced a new art. 2. Art. 2.3 is a new provision and provides for the purposes of art. 23 A, the taxes to which the Agreement shall apply are taxes of every kind and description. Art. 2.4 is also new and provides that for purposes of art. 25 and 25 A taxes to which the Agreement shall apply are taxes of every kind and description imposed under laws administered by the Commissioner of either Australia or South Africa. Mr. N. Maritz SC on behalf of Applicant submitted that in interpreting the new art. 2, Art. 2.1, 2.3 and 2.4 must be reconciled to avoid conflict. This would be achieved simply by reading art. 2.1 as providing that "the existing taxes to which this Agreement, save for art. 23 (a), 25 and 25 A shall apply, are:...". Art. 2.4 therefore states that taxes for purposes of art 25 and 25 A (in respect of Australia) are taxes of every kind and description imposed under Federal Tax Laws. Art. 2.1 is therefore not applicable to art. 25 and 25 A, and does not serve to identify the tax for purposes of those two articles. Therefore, when one turns to art. 13, the time periods referred to there in have no application. Art. 11 of the Protocol inserts a new art. 25 A after art. 25 of the Agreement. This art. provides for the assistance in the collection of taxes. Art. 25 A must be read together with art. 2.4 and it was submitted that art. 13 was not a clause in the Agreement, but deals only with the dates when the Protocol would come into force. It does not deal with the taxes to which the Agreement relates nor does it define such taxes. Art. 13 does not replace art. 27 of the Agreement, nor is art. 27 of the Agreement deleted in terms of the 2008 Protocol. Art. 13.2 stipulates that the Protocol, which amends the Agreement, shall come into force on the date of the last notification referred to in art. 13.1. This means that the effective date on which the Agreement of 1999 is amended by the

Protocol in respect of the matters identified in art. 13.2, and for which the provisions of art. 13.2 are relevant, is the "date of last notification". Art. 13.2 (a) (i) clearly relates to income tax. Art. 13.2 (a) (ii) refers to "other Australian tax". This clearly means Australian tax other than "withholding tax on income" referred to in art. 13.2 (a) (i). Regard must then be had to the definition of "Australian tax". This means tax imposed by Australia "to which the Agreement applies by virtue of art. 2". Art. 2 states that the "taxes to which this Agreement shall apply are" the Australian Income Tax and the South African Income Tax specified in art. 2.1 (a) and (b). "Other Australian Tax" is therefore not reference to Australian Tax of any kind or description, but a reference to "income tax, including the resource rent tax" but excluding the withholding tax of income referred to in art. 13.2 (a) (i). "The date of last notification" is the date on which art. 2.1 and all other art. relating to income tax, the avoidance of double taxation and the evasion of tax, become effective. Art. 13.2 (c) stipulates that the Protocol shall have effect for purposes of art. 25 from the date on which the "Protocol enters into force". This means that art. 25 is amended on the date on which the Protocol enters into force.

Art. 25 contains no temporal limitation. Having regard to art. 2.4 which stipulates, that for purposes of art. 25, the taxes to which the Agreement shall apply are "taxes of every kind and description". Once the new art. 25 comes into operation all information concerning taxes of every kind and description shall be exchanged. As I have said, the Respondents advanced the argument that on the interpretation of art. 2, only information concerning taxes arising after 1 July 2009 may be exchanged. Applicant's Counsel contended however

that this could not have been the intention, if regard is had to the fact that under the provisions of the previous art. 25 there was no limitation as to the time period in relation to which information could be exchanged. Art. 13.2 (d) provides that the Protocol shall have effect for purposes of art. 25 A from a date to be agreed between the parties by exchange of Diplomatic notes. This means that art. 25 A is introduced into the Agreement with effect from a future date to be agreed. Once art. 25 A comes into effect, in its terms, has no temporal limitation. It was also contended by Mr. N. Maritz SC on behalf of Applicant that the Government Notice of 23 December 2008, no. 31721 is in fact a notification as contemplated in ***s. 108 (2) of the Income Tax Act of 1962.*** It states that the Protocol has been published in Government Gazette no. 31721 dated 23 December 2008, and therefore does no more than to give the dates which do not appear from art. 13 of the Protocol. It adds nothing to the meaning or the content of the Protocol itself. The relevant date for purposes of par. (d), with reference to the coming into operation of art. 25 A, it is common cause that this date was subsequently agreed to as being 1 July 2010. Accordingly, with effect from 12 November 2008 the whole Protocol became effective, with the exclusion of the introduction of art. 25 A. Therefore, so it was contended, all the avoidance of double taxation provisions and art. 23 A and 25 were in operation from 12 November 2008. When art. 25 A came into effect and operation on 1 July 2010 it applied to a revenue claim, being a claim in respect of "taxes of every kind and description", according to the provisions of art. 2.4. Art. 25 A has no retrospective operation.

21.

The conclusion is that for art. 25 A and the assistance obligation to apply, at the time assistance is sought or given:

21.1

There must be an amount owed;

21.2

The amount owed must be in respect of taxes of any kind or description;

21.3

There was no specification in regard to the period for which the taxes are owing. It really means that assistance would be granted in future for already existent obligations. I already said that it was contended on behalf of first Respondent (and second Respondent adopted the same approach) that on a proper interpretation of the Agreement and the Protocol, SARS and the ATO are only entitled to invoke the provisions of art. 25 A of the Agreement if the taxes owing to the ATO arose during the income years commencing from 1 July 2009. The taxes claimed by the ATO from the first Respondent therefore fell beyond the scope of art. 25 A of the Agreement. In these circumstances, the provisional order was wrongly sought and should not have been granted. I do not agree with that argument and I do not agree that art. 13 (2) (d) provides the dates from which the provisions of art 25 A can be utilised. The interpretation of it by Applicant's Counsel is in my view the correct and logical one having regard to the mentioned provisions and their purpose. It is in my

view not a question of retrospectivity at all, such as Mr. Ginsberg SC on behalf of first Respondent contended. Applicant's Counsel agreed that the co-operation was prospective, but that it related to all taxes, and certainly to all taxes service inception of the agreement, in other words since 1999. I agree with that interpretation for the reasons stated.

22.

Second Respondent's Defence:

As I have said, the second Respondent supported the grounds of opposition relied upon by the first Respondent.

Numerous examples abound in the documentation emanating from the ATO and submissions made to it, which indicate that the first Respondent dealt with relevant assets as if he was still the beneficial owner thereof. On numerous occasions he sought release of blocked funds from the South African Reserve Bank without any reference to second Respondent. From the nature of many of these requests it is apparent that it could only have been for release to the first Respondent and his family personally. Also, on 25 July 2013, the First Respondent sought permission to invest funds, which were blocked in terms of Regulation 4 (2), to purchase a property in South Africa. In terms of this request, the first Respondent, without any reference at all to the second Respondent, required some R40 000 000 for the purchase of a property in Clifton, Cape Town. He then stated what his remaining assets were as at 30 June 2012 which amounted to some R295 000 000. He also required a further R5 000 000 to furnish the property and also purchase a car

for his use in South Africa. Those funds would emanate from "his" cash balance with Investec Bank Ltd. It was submitted by Applicant that in the absence of an affidavit from the first Respondent and the persons who allegedly negotiated the 2008 Agreements with him, the 2008 structure was just as unreal as was the previous 2002 structure. Furthermore, the second Respondent failed to show that it was his so-called beneficial owner of the relevant assets. It is clear from the alleged Agreements, that the parties had an overriding intention that the first Respondent was not required to transfer any rights or assets in contravention of the Foreign Exchange Dispensation as applicable to him. There was also no explanation how the second Respondent could in law become the owner of immovable property situated in South Africa, contrary to the laws of South Africa, that require registration in the Deeds Office for the transfer of immovable property from one person to another, including to a Trust. The contention of the second Respondent that Jucool was the "beneficial owner" of the relevant assets, is nowhere to be found in the particular contracts. Furthermore, no effective transfer of rights could have been taken place under circumstances where the authorised dealer was not even consulted. The result really is that it would be impossible to transfer the so-called beneficial ownership of the assets without the consent of Investec Bank and still to comply with Foreign Exchange Regulations, which regulations the parties clearly had in mind. I agree with Applicant's Counsel that the stated reservation would not allow any definitive intent to immediately transfer any rights to the Second Respondent in terms of the Asset Sale Agreement.

23.

What is the basis for the transfer of ownership in South African Law? An essential element of the passing of ownership is that there must be an intention at the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property.

See: ***Legator McKenna vs Shea 2010 (1) SA 35 SCA at 44 par. 22, and the decisions referred to therein.***

In the affidavit of the second Respondent's Deponent it is stated why the "Income Sale Agreement" and the "Asset Sale Agreement" were separately entered into. It was stated that "both Agreements recognise that the capital of the assets themselves cannot be remitted from South Africa and that the transfer of the assets is subject to the consent ...it is expressly a term of both Agreements that the assets are sold subject to the restrictions arising from the Exchange Control Regulations... And that delivery of the assets would require permissions and consents ..." I agree with Mr. Van der Merwe SC on behalf of Applicant that these admissions destroy any notion of an immediate transfer of rights. There was simply no intent to immediately transfer any rights to the second Respondent in my view and there is no merit in that defence. At best it could be said that the Respondents only intended to create personal rights in favour of the second Respondent, pending consent being granted and a transfer taking place thereafter. There is no concept like "ownership" of a "right-to-claim".

See: ***Grobler vs Oosthuizen 2009 (5) SA 500 (SCA) at par. 18***.

24.

In the light of the above it is not necessary to deal with any other contentions advanced by the parties in great detail. I thank Counsel for all parties for their thorough Heads of Argument.

25.

The following order is made:

1. **The Provisional Preservation Order made by this Court on 18 February 2013 is confirmed in respect of par. 3 to 7 thereof;**
2. **The Respondents are ordered to pay Applicant's costs jointly and severally, including the costs of two Senior Counsel.**

JUDGE H. J. FABRICIUS

JUDGE OF THE HIGH COURT

Case no.: 1319/13

Counsel for the Applicant:	Adv J. L. Van der Merwe SC
	Adv N. G. D. Maritz SC
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	Adv G. Goldman SC
	Instructed by: Cliffe Dekker Hofmeyr Inc. Sandton
Counsel for the Second Respondent:	Adv A. Franklin SC
	Adv S. W. Burger
	Instructed by: Bowman Gilfillan Inc. Sandton

Heard on: 2 to 3 December 2013

Date of Judgment: 31 January 2014 at 10:00