IN THE HIGH COURT OF SOUTH AFRICA /ES

(NORTH GAUTENG HIGH COURT, PRETORIA)

REPORTABLE CASE NO: 15330/05

DATE: 17/4/2009

IN THE MATTER BETWEEN

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| KNA INSURANCE AND INVESTMENT BROKERS (PTY) LTD (IN LIQUIDATION) | APPLICANT |
| AND | |
| THE SOUTH AFRICAN REVENUE SERVICE | 1ST RESPONDENT |
| THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE | 2ND RESPONDENT |

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JUDGMENT

SITHOLE, AJ

(A) INTRODUCTION

[1] 0n 12 June 2006, the Applicant filed an application in this Court in terms of which he seeks the relief mentioned in paragraph [2] below. The matter was heard by me on the opposed roll of 20 June 2006. At the end of argument it became necessary that judgment be reserved as the matter involved abstruse principles of Tax Law and counsel, in their argument, had made copious references to case law

and to old authorities such as *Voet* and *Groenewegen*, as well as modern legal textbooks. What appears to be a considerable time has since passed before I could come round to finalise judgment in this matter. This has been on account of circumstances beyond my control such as poor health and pressure of work at the Bar and on the Bench during my acting stints. Any inconvenience which might have been occasioned to the parties by the delay is hereby deeply regretted. Nonetheless, my judgment follows below.

[2] In the relevant notice of motion the Applicant seeks an order in terms of which-

(a) the Respondent is ordered to pay the Applicant interest determined in terms of section 89*quat* (4) of the Income Tax Act, 58 of 1962, on R6 300 000,00 calculated at the prescribed rate from 30 September 1999 until 17 May 2002;

(b) alternatively, that the Respondent be ordered to issue an assessment against the Applicant in respect of the 1999 year of assessment within a reasonable time and thereafter pay the Applicant the amount of interest determined in terms of section 89*quat* (4) of the Income Tax Act on R6 300 000,00 calculated at the prescribed rate from 30 September 1999;

(c) that the Respondent pay the amount of R250 000,00 to the Applicant, together with interest at the rate of 15,5% per annum from 7 February 2002, alternatively, *a tempore morae*, to the date of payment;

(d) that the Respondent pay the Applicant *mora* interest in the amount of R53 082,19 being the amount calculated at the rate of 15,5% per annum on the amount of R1 250 000,00 for the period 7 February 2002 to 17 May 2002;

(e) alternatively, to (d) above, that the Respondent be ordered to pay the Applicant *mora* interest calculated at the rate of 15,5% per annum on the amount of R1 250 000,00 *a tempore morae*, to 17 May 2002.

[3] The parties were duly represented at the hearing. The Applicant was represented by Adv J M A Cane of the Sandton Chambers, whilst the two Respondents were represented by Adv H J de Wet of the Pretoria Bar.

(B) THE FACTS

[4] Whereas the Applicant contends and submits that the factual background narrated by it is common cause, the Respondents maintain that such background is not relevant to the present application, and to the extent that it is an exposition of the history of the matter from Applicant's point of view, then it is admitted. But to the extent that the statements of the Applicant's deponent are factually incorrect,

then such background is denied. For whatever it is worth and for completeness sake, however, it is necessary to restate the factual backdrop against which Applicant's claim has to be evaluated. It is as follows:

4.1 the Applicant is the wholly-owned subsidiary of KNA Holdings (Pty) Ltd ("KNA Holdings");

4.2 the Applicant's business was to purchase second-hand endowment policies in South Africa as the agent of Securefin Limited ("Securefin"). Securefin was a company incorporated in Jersey. During the period from about March 1998 to November 1999, Securefin provided (and also procured from an overseas financial institution) working capital from offshore to enable the Applicant to carry on its business;

4.3 The Applicant's erstwhile managing director was David Geoffrey Alexander ("Alexander"). During about November 1999 it became apparent that Alexander had been dealing in an irregular manner with the working capital provided to the Applicant. As a result, a police investigation into the affairs of the Applicant and Alexander commenced. Large scale theft of the financial resources that had been made available to the Applicant for the purposes of its business was uncovered;

4.4 on 24 February 2000 Securefin launched the successful application for the winding-up of the Applicant;

4.5 the joint liquidators investigated the financial affairs of the Applicant and it became apparent that in September 1998 the Applicant had declared a so-called dividend of R10 000 000,00 – not to its sole shareholder, KNA Holdings – but to persons related to the directors or to the directors themselves;

4.6 the company was not in a financial position to have declared the aforesaid dividend when it did. The erstwhile auditor of the company, Mr Retief Smith ("Smith") had prepared the audited financial statements for the year ending February 1998, and those audited financial statements show that the Applicant had carried forward retained reserves in the amount of R585 746,00;

4.7 Stewart Patterson ("Patterson") prepared an accounting and forensic report and provided balance sheets and income statements for the seven month period from 1 March 1998 to 30 September 1998;

4.8 Patterson confirmed that the so-called dividend of R10 000 000,00 did not pass through KNA Holdings' bank account. He reported, *inter alia*, that the Applicant had made an operating loss of R1 357 112,00 for the seven

months ended 30 September 1998, which exceeded the retained reserves brought forward from the previous year of R585 746,00;

4.9 Patterson reviewed the draft financial statements for the year ending February 1999 and confirmed that the aforesaid financial statements were reasonable and that it was accordingly reasonable to conclude that the Applicant had made a loss amounting to R4 184 974,00 for the period ended 28 February 1999;

4.10 the so-called dividend of R10 000 000,00 could thus not have been lawfully declared and paid, as it was not paid to the Applicant's shareholder and because there was no retained reserves nor current profits available for distribution as a dividend. The Applicant's managing director, Alexander, had merely described the misappropriation of this amount as a "dividend" to disguise the theft;

4.11 notwithstanding that the Applicant had not paid a dividend, on 30 0ctober 1998 the Applicant had made a payment to SARS in the amount of R1 250 000,00 as secondary tax on companies ("STC"), as if the R10 000 000,00 had in fact constituted a "dividend";

4.12 Smith had advised the Applicant that it would be liable for interest in terms of section 89*quat* of the Income Tax Act, 58 of 1962 ("the Income

Tax Act") unless it made a payment of provisional tax before 30 September 1999. He estimated the Applicant's liability for provisional tax to be R6 300 000,00, payment of which by 30 September 1999 would, in his view, be sufficient to avoid the aforesaid interest. In calculating the aforesaid amount, Smith was fraudulently misled as to the profits of the company and the true reason for its cash resources;

4.13 in accordance with Smith's advice, on 30 September 1999 the Applicant paid provisional tax in respect of the 1999 year of assessment in terms of paragraph 23A of the Fourth Schedule of the Income Tax Act in the amount of R6 300 000,00.

4.14 It is common cause that the Income Tax Act did not impose any liability on the Applicant for secondary tax on companies (STC) and, as the Applicant had made a loss amounting to R4 184 974,00 for the relevant tax year the Income Tax Act therefore did not impose any liability on the Applicant for income tax;

4.15 on 7 February 2002 the attorneys acting on behalf of the joint liquidators of the Applicant, made a written presentation to SARS (Johannesburg 0ffice) for the repayment of the amounts of R1 250 000,00 and R6 300 000,00, together with interest;

4.16 in a letter dated 17 May 2002 the SARS Johannesburg 0ffice informed the Applicant's attorneys that the amounts claimed were to be repaid except for the amount of R250 000,00, which would be retained "as a reserve in the event of tax claims against the estate". Also, that "the claim for the interest to be paid is noted and will be referred to SARS Head 0ffice";

4.17 by 30 September 1999 an amount of R6 300 000,00 had been paid to the Johannesburg 0ffice of SARS as provisional tax on behalf of the Applicant;

4.18 Applicant had no taxable income for the 1999 tax year of assessment and as at that date of hearing of this matter, Applicant had not yet been assessed for the said year of assessment.

(C) THE ISSUES TO BE DECIDED

[5] The issues between the parties and which have to be decided by the Court are threefold, namely,

5.1 whether the Second Respondent is liable:

5.1.1 for the payment of interest in terms of section 89*quat* of the Income Tax Act in respect of the amount of R6 300 000,00;

5.1.2 for the payment of *mora* interest in respect of the amount of R1 250 000,00; and

5.1.3 to refund the Applicant the amount of R250 000,00 together with *mora* interest.

(D) THE APPLICANT'S CASE

Payment of interest in terms of section 89*quat* in respect of R6 300 000,00

[6] 0n this issue it was contended and submitted on behalf of the Applicant that:

6.1 the rate and *quantum* of interest in respect of the amount of R6 300 000,00 is not in dispute. The total amount of interest payable is R1 532 194,52;

6.2 after quoting the provisions of section 89*quat* (1) and (4) it is submitted on behalf of Applicant that since the Applicant paid an amount of R6 300 000,00 on 30 September 1999 in terms of paragraph 23A of the Fourth Schedule in respect of provisional tax for the 1999 year of assessment, the amount of R6 300 000,00 thus constitutes the "credit amount" as defined in section 89*quat* of the Income Tax Act for purposes of section 89*quat* (4);

6.3 although the Respondent says that "it is not accepted that it is common cause that the Applicant had no taxable income for the 1999 year of

assessment", that is the only reasonable inference that can be drawn based on the evidence for the following reasons:

6.3.1 income tax is a tax levied on "taxable income" as defined in the Income Tax Act (sections 1 and 5 of the Income Tax Act);

6.3.2 the Applicant had no "taxable income" during the 1999 year of assessment, having sustained a significant loss:

6.3.2.1 page 5 of the Applicant's tax return shows a net loss of R3 961 698,00;

6.3.2.2 the auditor's Annual Financial Statements prepared during April 2005 and submitted with the tax return confirm the aforesaid;

6.3.2.3 the aforesaid amount differs in an immaterial amount from the estimated loss of R4 184 974,00 reflected in the draft financial statements prepared by the liquidators during 2001;

6.3.2.4 Patterson confirmed the aforesaid draft financial statements as a reasonable assessment of the position in 0ctober 2001.

6.3.3 The Second Respondent has not disputed any of the aforesaid figures, furnished any basis for doubting their correctness or even suggested that his own audit could establish that the Applicant had taxable income during the 1999 year of assessment;

6.3.4 in addition, the Second Respondent refunded the amount paid in respect of provisional tax "on the basis of a decision … that the amounts did not constitute taxes properly due and chargeable at the time". The refunds must have been made upon a determination that the Applicant had no taxable income and hence no liability for tax for the 1999 year of assessment (at the very least, not exceeding R250 000,00), because if not, the Second Respondent acted *ultra vires* in refunding the amounts;

6.3.5 furthermore, the only claims submitted by SARS to the liquidators were in respect of VAT, which claim was paid in full and PAYE, which claim was substantially paid. No claim was submitted in respect of income tax and accordingly the Second Respondent did not timeously prove a claim against the company in liquidation in terms of section 44 of the Insolvency Act 24 of 1936 as read with sections 339 and 366 of the Companies Act. The Second Respondent cannot, after the payment of claims in terms of a

liquidation and distribution account, reopen that account for the purpose of submitting a further claim in respect of income tax, except if there has been fraud;

Henochsberg on *The Companies Act*, Vol 1 at 865 and the authorities set out in the notes to section 408 of the Act;

6.3.6 lastly, the Applicant's tax return was submitted on 6 May 2005. To date the Second Respondent has failed to issue his assessment notwithstanding that this application was pending. Even if the assessment could now be relevant, it is submitted that it is appropriate to draw an adverse inference against the Second Respondent and determine this matter on the basis that there is no taxable income for the 1999 year of assessment.

6.4 Accordingly, it is submitted that in terms of section 89*quat* (4) of the Income Tax Act, the Applicant is entitled to interest at the prescribed rate on the difference between the credit amount (being R6 300 000,00) and its normal tax (being R0) ie on R6 300 000,00, such interest to be calculated from 30 September 1999 (being the effective date) until 17 May 2002, being the date on which the R6 300 000,00 was refunded to the taxpayer. The applicable prescribed rates during the aforesaid period and the amount of interest, being R1 532 194,52, are common cause.

6.5 0nly if the above Honourable Court rejects all the aforesaid submissions, will the Applicant seek an order that the Second Respondent issue an assessment forthwith, having already had a reasonable time to do so, and thereafter pay the Applicant the amount of interest on the difference between the credit amount (being R6 300 000,00) and its normal tax (as reflected in the assessment), calculated at the prescribed rate from 30 September 1999 until 17 May 2002.

[7] 0n the Second Respondent's contentions in relation to section 89*quat* (4) of the Income Tax Act and interest in respect of the amount of R6 300 000,00, the Applicant argued and submitted that:

7.1 the Second Respondent's contentions are set out below.

7.2 Firstly, the Second Respondent contends that the normal tax payable in respect of the Applicant's taxable income has not been determined for the 1999 year as no assessment has been issued. This contention should, with respect, be rejected for the reasons set out in the above paragraph.

7.3 Secondly, the Second Respondent contends that the amount of R6 300 000,00 was not paid in terms of paragraph 23A of the Income Tax Act because the Applicant submits that there was no liability to pay

income tax. This contention should, with respect, be rejected for the following reasons:

7.3.1 on the Second Respondent's own version, provisional tax "is payment in advance determined by the taxpayer in respect of the estimated liability in respect of income tax for a specific year of assessment. A taxpayer, who is a provisional taxpayer, is obliged to make an estimate of taxable income";

7.3.2 provisional tax is by definition provisional ie it is paid prior to the final determination of normal tax for the year in question and is not necessarily equal to the taxpayer's liability for income tax;

7.3.3 a taxpayer is entitled to elect to make a third provisional payment in terms of paragraph 23A of the Fourth Schedule to the Income Tax Act for the purpose of avoiding or reducing its liability for any interest that may become payable. Section 89*quat* of the Income Tax Act is specifically necessary because provisional tax paid may be less or more than the liability to tax imposed by the aforesaid Act.

7.4 Thirdly, the Second Respondent contends that the excess on which interest will be payable must be determined at the time that the taxpayer's taxable

income is finally determined in respect of the relevant year of assessment. He contends that as final determination of a taxpayer's taxable income takes place upon the issue of an assessment, the credit amount will be between R0 and R250 000,00 at the most. The Applicant submits that this contention has no merit for the following reasons:

7.4.1 the timing of <u>when</u> interest is to run is fully set out in the last paragraph of section 89*quat* (4) as read with the definition of "effective date". The phrase in the lead in to section 89*quat* (4) "taxable income as finally determined for that year" is not a timing provision, but part of the prescribed method of determining the *quantum* upon which interest is to be paid;

7.4.2 the contention, if accepted, would lead to the absurd consequence that provided the Second Respondent repaid any excess the day before he issued an assessment, he would never incur any liability for interest in respect of provisional tax, irrespective of how long he retained that excess. In the light of the fact that provisional tax is by definition <u>provisional</u> ie it is paid prior to the final determination of normal tax for the year in question, this would frustrate the equity sought to be achieved by the legislature in section 89*quat* of the Income Tax Act. Accordingly, this interpretation of the Income Tax Act is to be rejected.

[8] Concerning the refund and *mora* interest in terms of the Prescribed Rate of Interest Act in respect of the amount of R250 000,00, the Applicant contended and submitted that:

8.1 The Second Respondent had no authority, under the Income Tax Act, the Insolvency Act, the Companies Act or the common law, to retain the amount of R250 000,00 as a reserve in the event of tax claims against the Applicant, and hence this amount should be refunded to the Applicant, together with interest at the rate of 15,5% per annum from 7 February 2002 to the date of payment.

8.2 The Second Respondent contends that the amount of R250 000,00 was retained in terms of an agreement with the Applicant. The SARS official who dealt with the matter has left SARS and the only evidence of the alleged agreement is a letter from the liquidators' attorneys at the time, the relevant part of which reads as follows:

> "1.2 an amount of R250 000,00 is to be retained by you for a period of <u>three months to enable you to determine whether there are any claims against the company in liquidation</u> and if in the affirmative, formal claims will be lodged against the estate therefore and if in the negative, the amount in

question will be electronically transferred to the same account." (Emphasis added.)

8.3 It is common cause that the Feinstein letter dated 17 May 2002 preceded the SARS letter dated 17 May 2002. It is clear that paragraph 1.2 of the said letter relating to the retention of the amount of R250 000,00 was not accepted by the Second Respondent as:

8.3.1 paragraph 1.2 of the said letter differs materially from the terms of the SARS letter;

8.3.2 the Second Respondent did not retain the amount for only three months to determine whether there were any claims against the Applicant;

8.3.3 the claims the Second Respondent submitted for PAYE and VAT were long after the period of three months had elapsed;

8.3.4 there was no set-off of the Second Respondent's aforesaid claims against the R250 000,00.

8.4 The Second Respondent's contention is not borne out by the evidence of his own conduct and his own correspondence. The alleged agreement is not established by the evidence.

8.5 Accordingly, at common law, as *mora* interest runs from the date of demand in respect of amounts which the debtor is not entitled to retain, *mora* interest ran from 7 February 2002 in respect of the R250 000,00. *Commissioner for Inland Revenue v First National Industrial Bank Ltd* 1990 3 SA 641 (A) at 654.

8.6 The *fiscus* is not immune from the payment of interest *ex mora* under the common law. The Applicant referred the Court to the following three tax cases:

*BAT v Commissioner of Taxes* 57 SATC 271 at 281;

*Commissioner of Taxes v Kristiansten (Pvt) Ltd* SC 57 SATC 238;

*Ellis NO v Commissioner of Taxes* 57 SATC 282 at p296.

8.7 The Second Respondent also contends that he will refund the amount of any excess paid once an assessment has been issued. The Second Respondent did not timeously prove a claim against the company in liquidation in terms of section 44 of the Insolvency Act, 24 of 1936 as read with sections 339 and 366 of the Companies Act for income tax. The Second Respondent cannot, at this stage, re-open the liquidation and

distribution account for the purpose of submitting a further claim in respect of income tax, except if there has been fraud. (*Henochsberg, supra* at 865.) He was not entitled to retain the R250 000,00 but was obliged to pay that amount to the liquidators, submit claims in terms of the laws of insolvency and receive the amounts out of the liquidated estate in terms of the laws of insolvency.

8.8 In conclusion, the Second Respondent is obliged to refund the R250 000,00 to the Applicant, together with interest at the rate of 15,5% per annum from 7 February 2002 to the date of payment.

[9] In so far as the claim for *mora* interest in terms of the Prescribed Rate of Interest Act in respect of the amount of R1 250 000,00 is concerned, the Applicant for the same reasons set out in paragraph 8 above and in terms of section 1 of the Prescribed Rate of Interest Act, the Second Respondent is liable to the Applicant for *mora* interest at the rate of 15,5% per annum on the amount of R1 250 000,00 for the period 7 February 2002 to 17 May 2002. It is not disputed that the total amount of interest payable is R53 082,19.

[10] In conclusion the Applicant submitted that the above Honourable Court should grant an order in terms of the notice of motion. If the Court is inclined to grant the alternative prayer to prayer 1, Applicant submitted that prayer 2 should be as set out in paragraph 6.5 above.

(E) THE CASE FOR THE RESPONDENTS

In his heads of argument, counsel for the Respondents contended and submitted that:

[11] 0n the basis of the foregoing factual background in paragraph [4] above, the Applicant is not entitled to interest in terms of section 89*quat* of the Act, because if a company such as the Applicant wants to avail itself of the provisions of section 89*quat* of the Income Tax Act it must be common cause that:

11.1 the payments on behalf of the company constitute provisional tax payments;

11.2 the taxable income of the company must have been finally determined;

11.3 the credit amount (ie the provisional tax payments, in relation to any year of assessment) must exceed the normal tax payable; and

11.4 the amount of the excess must exceed R10 000,00 or the taxable income must exceed R10 000,00 (R20 000,00 in the case of a company).

[12] As to whether in reality provisional tax was paid by the Applicant or not, the Respondents argued and submitted that:

12.1 Applicant's introductory averment namely that "all amounts were paid without legal liability" is common cause on the papers.

12.2 It is furthermore Applicant's case that the amounts purportedly paid as provisional tax were not really provisional tax. The income figures were inflated as a result of Mr Alexander's fraud and thus fictional: "In calculating the aforesaid amount (provisional tax), Smith was fraudulently misled as to the profits of the company and the true reasons for its cash resources." (Founding affidavit, par 5.11, p12.)

12.3 The Applicant made a voluminous presentation to Respondent to release the above monies and the monies were released:

> "5.8.1 Following due and proper consideration of the presentation and once Respondent was satisfied that the amounts were not proper due and chargeable the refund of the amounts was immediately affected on or about 17 May 2002, and in no manner wrongfully and unduly withheld …" (p123)

From the same paragraph it appears that Respondent's consideration of the presentation took approximately three months.

> The Applicant's submission, namely that there was no tax liability was thus accepted and the amounts were repaid on the basis that the same did not constitute taxes properly due and chargeable at the time. See also answering affidavit par 7.8, p127.

[13] In the matter *Commissioner of Inland Revenue v Bowman NO* 1990 3 SA 311 (SCA) tax returns were filed that reflected fictitious income, and the tax thereon was paid. The question arose whether the said fictitious income can be recovered by the liquidator of the company as dispositions for no value. The Supreme Court of Appeal found that these payments do constitute dispositions for no value due to the fact that no release of any obligation to pay has been affected by these payments (p314B-315A). 0n 314I-315 the following was said:

> "In having regard to all the circumstances under which the transactions was made, I am of the view that one must seek the substance rather than the form thereof. In the case before us, on the facts alleged in the summons, in substance no income tax was payable by the company to the appellant. The payments, therefore, did constitute dispositions of property not made for value. To use the words of WATERMEYER CJ in the passage from *Jager*'s case, cited above, 'no benefit or value is or has been received or promised as a *quid pro quo*'."

13.1 Respondent views Applicant's payments in a similar light: the amounts paid "do not constitute taxes properly due and chargeable at the time" (answering affidavit par 7.8, p127). Respondent is in effect saying that the monies were paid *sine causa*, alternatively reclaimable in terms of the *condictio in debiti*. These payments by Applicant did not release and were not intended to release Applicant from any payment obligation in terms of the Income Tax Act. No taxes were payable. The monies were paid as a result of Mr Alexander's fraudulent misrepresentations to the auditor. The director being the directing mind of the company, had no intention to pay provisional tax. His intention was to cover up his theft by alluding to fictional profits which would necessitate provisional tax payments. The substance of the transaction is thus not a regular payment of provisional tax but an effort to perpetuate the sham. See *Van Zyl & 0thers v Turner & 0thers* 1989 2 SA 236 (CPD) at 247.

13.2 There was no estimation of a tax liability due to the fact that the income was fictional.

[14] In the light of the above submission, the repayment of the monies were in law motivated on an enrichment basis. It matters not which enrichment condition applies. The Respondent realised that it is enriched at the expense of the Applicant and in that context an agreement was reached on 17 May 2002 in terms of which all monies but R200 000,00 (*sic*) was repaid to Applicant. The

repayment is not a refund of an over payment of provisional tax, but the reimbursement of an amount "paid without legal liability" as alleged by Applicant. The agreement simply confirms the underlying *causa*.

If the submission is upheld that section 89*quat* does not apply then one has to have reference to the common law to determine the legal position.

[15] Concerning the common law position on the payment of interest Respondents argued and submitted that:

15.1 The common law position regarding interest is dealt with in *Kudu Granite 0perations (Pty) Ltd v Caterna Ltd* 2003 5 SA 193 (SCA) on 205C-E:

> "The learned Judge made no order in respect of the payment of interest. In *Baliol Investment Co (Pty) Ltd v Jacobs* 1946 TPD 269 the Court held, after a consideration of the common law, that interest is not recoverable under the *condictio causa data causa non secuta* or under the *condictio in debiti* unless the subject of agreement or the debtor is in default or has been placed in *mora*. See also *Commissioner for Inland Revenue v First National Industrial Bank Ltd* 1990 3 SA 641 (A) at 654C-D and 659A-B. The matter is now regulated by statute: s2A of the Prescribed Rate of Interest Act 55 of 1975 provides that the amount of every unliquidated debt as determined by a Court shall bear interest as

contemplated in s1, ie at the rate prescribed. s2A(2)(a) further provides that, subject to any other agreement between the parties, the interest on an unliquidated debt determined by a Court of law shall run from the date on which payment of the debt is claimed by service on the debtor of a demand or summons, whichever date is the earlier. In the present case there was no evidence of a demand but the summons was served on 6 January 1999."

15.2 It is submitted that in the present circumstances the Respondent investigated and evaluated the presentation of the Applicant; realised that the monies were not payable and paid *in debiti*, whereafter the agreement was reached to repay the said monies. Under these circumstances there can be no question of interest running from the date of payment by Applicant ie 30 September 1999 until the date of repayment by Respondent ie 17 May 2002. [Prayer 1 (*sic*).] The issuing of an assessment prayed for in prayer 2 (*sic*) is with respect not applicable in the light of the aforegoing submissions.

[16] Alternative argument: The taxable income of the company was at no stage finally determined when the monies were paid back to Applicant:

The statutory framework:

16.1 Part IV of the Fourth Schedule is titled "Employees' Tax And Provisional Tax To Be Set 0ff Against Tax Liability" and provides in terms of paragraph 28 that:

> "28.(1) There shall be set off against the liability of the taxpayer in respect of any taxes (as defined in subparagraph 8) due by the taxpayer, … the amounts of provisional tax paid by the taxpayer in respect of any such year, and if-
>
> (a) the sum of the said amounts of … provisional tax exceeds the amount of the taxpayer's total liability for the said taxes, the excess amount shall be refunded to the taxpayer;"
>
> "28.(8) For the purposes of this paragraph, 'taxes' means the normal tax levied under this Act."

16.2 Chapter II, Part I of the Act, is titled "Normal tax" and begins with section 5, the introduction of which reads as follows:

> "5. Levy of normal tax and rates thereof.- (1) Subject to the provisions of the Fourth Schedule there shall be paid annually for the benefit of the National Revenue Fund, an income tax (in this Act referred to as normal tax) in respect of the taxable income received by or accrued to or in favour of-"

16.3 "Tax" is defined in section 1 of the Act as:

"any levy or tax leviable under this Act and for purposes of Part IV or Chapter III includes any levy or tax leviable under any previous Income Tax Act."

16.4 Section 1 of the Act defines "assessment" as follows:

"means the determination by the Commissioner, by way of notice of assessment (including a notice of assessment in electronic form) served in a manner contemplated in section 106(2)-

(a) of an amount upon which any tax leviable under this Act is chargeable; or

(b) of the amount of any such tax; or

(c) of any loss ranking for set-off; or

(d) of any assessed capital loss determined in terms of paragraph 9 of the Eighth Schedule,"

16.5 It is submitted that before a refund of provisional tax can occur it is a prerequisite that there must be an assessment as defined, ie the determination by way of a notice of assessment of the amount of any such tax. The amount assessed constitutes the "liability of the taxpayer in respect of any taxes (as defined in subparagraph 8) due.", against which provisional tax paid must be set off to determine if there is an excess. It is only once this process has occurred that the Respondent is allowed to effect a refund.

16.6 It is common cause that the Income Tax Return for the relevant year of assessment has only recently been submitted and that an assessment has not been issued. Accordingly, it is submitted that the repayment effected by the Respondent on 17 May 2002 was not a refund falling within the provisions of paragraph 28 of the Fourth Schedule and accordingly cannot be subject to interest in terms of section 89*quat*.

[17] The Honourable Court is with respect referred to the following:

17.1 Applicant's taxable income has not yet been established in terms of the Act. A tax return for the 1999 tax year was only received by Respondent on 6 May 2005 (Answering Affidavit par 7.2.1, p125).

17.2 The further exposition in paragraph 18 below is with respect highly relevant and the Honourable Court is referred thereto.

[18] As to the issue of *mora* interest on the amount of R1 250 000,00 (STC), the Respondents contend and submit that:

18.1 It is common cause that secondary tax on companies was not due and payable and the only issue, in this regard, between the parties is for the payment of *mora* interest in respect of the R1 250 000,00.

18.2 It is submitted that in principle the Respondent can be held liable for the payment of *mora* interest. It has, however, been denied that the Respondent is liable *in casu*.

18.3 It is submitted that before *mora debitoris* can arise there are prerequisite elements that must be present, ie

(a) there must be a debt and the debt must be enforceable;

(b) performance must be due and, depending on the circumstances, the question of when performance is due can be determined by the terms of the contract (*mora ex re*) or by demand duly made by the creditor (*mora ex persona*);

(c) the debtor must be or deemed to be aware of the nature of the performance required of him and the fact that it is due.

See: LAWSA (new edition), paras 217(1), 218(2) and 220(4);

R H Christie *The Law of Contract* 3rd ed at 551.

18.4 *In casu* the Applicant is seeking *mora* interest from 7 February 2002, the date that interest was purportedly demanded. It is submitted that on such date all the necessary requirements were not present inasmuch as there was no enforceable debt. In this regard I refer the above Honourable

Court to the case of *CIR v First National Industrial Bank Ltd* 1990 3 SA 641 (A) at pp652 and 653, where it is stated:

> "The Commissioner could not be in *mora* as regards repayment until such time as it was decided that a duty to repay existed. That was the very point of their understanding: that the money would only be refundable once it has been established (by a tribunal or by compromise) that the Commissioner misconstrued the statute and was obliged to repay the money. Any claim by the Bank for repayment to be made prior to the determination of the dispute could be met by the Commissioner with the defence that such a claim would be premature and might yet prove to be idle.
>
> That in my view, is the short and simple answer to the Bank's contention: the Commissioner was not in *mora* and so cannot be liable for interest *a tempore morae*."

18.5 It is submitted that on the facts of this matter that a duty to repay was established by compromise, such compromise being reached on 17 May 2002. The Applicant's cause of action lies in the agreement concluded on 17 May 2002, in terms of which the earliest point at which the Respondent could possibly have been in *mora ex re* is 17 May 2002. However, it is common cause that payment was effected on this date so the question of liability to *mora* interest does not arise.

[19] In so far as the interest on the amount of R250 000,00 is concerned, the Respondents argued and submitted in conclusion that:

19.1 In this regard the Applicant is requesting repayment of the capital amount together with interest at the rate of 15,5% per annum from 7 February 2002 to date of payment.

19.2 It is submitted that prior to 17 May 2002 there was no legal obligation on the Respondent to repay any amounts to the Applicant. 0n 17 May 2002 it was agreed between the parties that the amount of R250 000,00 would be retained by the Respondent for a period of three months. The obligation to repay this amount arises in terms of the agreement and the Respondent could only be held liable for interest (*mora ex re*) as from 17 August 2002.

19.3 The obligation to pay interest running from 17 August 2002 at the prescribed rate on the amount of R250 000,00 is not in dispute and either already being paid to Applicant or in the process of payment.

That concluded the Respondents' argument.

(F) ANALYSIS AND FINDINGS

[20] In order to address the first question, namely, whether the Second Respondent is at law liable for the payment of interest in terms of section 89*quat* of the Income

Tax Act in respect of the amount of R6 300 000,00, one has, of necessity, to have a close look at section 89*quat*'s wording and accord to it its true meaning by means of well-known canons of construction so as to determine whether it applies *in casu* in the light of the facts. This implies a determination of whether the Applicant paid the R6 300 000,00 to the Second Respondent as provisional tax in terms of section 89*quat* of the Act.

[21] Section 89*quat* provides for interest on underpayments and overpayments of provisional tax. The relevant subsections applicable to Applicant's claim are (1) and (4). Section 89*quat* (1) of the Income Tax Act no 58 of 1962 provides, *inter alia*, as follows:

> "For the purposes of this section-
>
> > 'credit amount', in relation to any year of assessment of any provisional taxpayer, means the sum of-
> >
> > (a) the provisional tax paid by the taxpayer under the provisions of paragraph 21 or 23 of the Fourth Schedule in respect of such year;
> >
> > (b) any additional provisional tax paid by the taxpayer in respect of such year under the provisions of paragraph 23A of that Schedule;
> >
> > (c) …
> >
> > (d) …

'effective date', in relation to any year of assessment of a provisional taxpayer, means-

(a) where the provisional taxpayer is a company which has a year of assessment which ends on the last day of February … the date falling seven months after the last day of such year; or …"

And section 89*quat* (4) provides as follows:

"If in the case of any provisional taxpayer the credit amount in relation to any year of assessment exceeds the normal tax payable in respect of his taxable income as finally determined for that year and-

(a) the amount of that excess exceeds R10 000,00; or

(b) such taxable income exceeds R20 000,00 in the case of a company or R50 000,00 in the case of any person other than a company,

interest shall be payable to the taxpayer at the prescribed rate on the difference between the credit amount and such normal tax, such interest being calculated from the effective date in relation to the said year until the date on which such difference is refunded to the taxpayer: …"

[22] The Applicant alleges that on 30 September 1999 it paid an amount of R6 300 000,00 in terms of paragraph 23A of the Fourth Schedule in respect of provisional tax for the 1999 year of assessment. The Applicant further alleges

that that amount thus constitutes the "credit amount" as defined in section 89*quat* of the Income Tax Act for the purposes of section 89*quat* (4).

[23] Section 23A of the Income Tax Act no 58 of 1962 provides that:

(1) Any provisional taxpayer may for the purpose of avoiding or reducing his liability for any interest which may become payable by him in respect of any year of assessment under section 89*quat*, elect to make an additional payment of provisional tax in respect of such year.

(2) If any additional payment of provisional tax contemplated in subparagraph (1) is paid after the end of the period ending on the effective date in relation to the said year as determined under section 89*quat* (1), such payment shall be deemed for the purpose of section 89*bis* (2) to be an amount of provisional tax which was payable within the said period.

[24] Further provisions on provisional tax are to be found in Part III of the Fourth Schedule of the Act. These include the following: the definition of a provisional taxpayer; obligations of the provisional taxpayer; the basis of calculation of provisional tax; the manner and time period for the submission of provisional tax to SARS; how and when it will be determined that a provisional taxpayer has made an overpayment as well as the point in time and the circumstances in which the Respondent (SARS) shall determine and make a refund of the excess amount to a provisional taxpayer. (See Schedule Four paragraphs 21-29 of the Act.)

[25] In terms of Schedule Four par 29, if the sum of the amounts employees' tax and provisional tax paid exceeds the amount of the taxpayer's total liability for tax in respect of a year of assessment, the excess amount must be refunded to the taxpayer. Refunds may also be made in circumstances which are determined by the Commissioner (Second Respondent) in the deduction tables prescribed by him. This happens in terms of Schedule Four par 9.

[26] Also, if, in the case of a provisional taxpayer, the credit amount in relation to a year of assessment exceeds the normal tax payable in respect of his taxable income as finally determined for that year, and that the amount of such excess exceeds R20 000,00 in the case of a company (as *in casu*), interest is payable to the taxpayer at a prescribed rate on the difference between the credit amount and the normal tax [see section 89*quat* (4). See also par [21] *supra*].

[27] It may also be mentioned in passing that provisional taxpayers are obliged to make two obligatory estimates of their taxable income for each year of assessment. It is on the basis of these assessments that compulsory payments of provisional tax will be made. This is in terms of paragraph 19(b) and 23 of the Fourth Schedule of the Act.

[28] Paragraph 23 of the Fourth Schedule also provides that all provisional taxpayers are obliged to make only two compulsory provisional tax payments, ie the first payment within the period ending six months after the commencement of the

relevant year of assessment and the second payment within the period ending on the last day of that year.

[29] A third additional payment is not compulsory but a provisional taxpayer may, for the purpose of avoiding or reducing its liability for any interest which may become payable by him in respect of any year of assessment in terms of the provisions of section 89*quat*, elect to make another payment in terms of paragraph 23A of the Fourth Schedule.

[30] *In casu* the payment effected by the Applicant cannot, by any stretch of imagination, be regarded as an additional payment over and above the two obligatory estimates of the Applicant's taxable income by means of which compulsory payments of provisional tax which had been made (if any). Besides, in its founding papers, the Applicant states expressly that this application for the payment by the First Respondent of interest owing to the Applicant on certain amounts which were paid erroneously to the First Respondent "without any legal liability" to do so and "which have been refunded" to the Applicant. It follows that the amount of R6 300 000,00 which was paid by Applicant to Respondents on 30 September 1999 and which was refunded to Applicant on or about 17 May 2002 by the Respondents cannot, by any language, be termed a payment of provisional tax as defined in Schedule Four of the Act. It also follows that there cannot be any entitlement to section 89*quat* interest since the said amount could not, in the circumstances, have been paid in terms of paragraph 23A of the Fourth

Schedule of the Act and cannot be regarded as provisional tax. Needless to state that the existence of an excess of provisional tax is a *sine qua non* for payment of interest in terms of section 89*quat* of the Act.

[31] I also make the finding that, in the light of the foregoing, the refunds by Respondents which were made to Applicant on 17 May 2002 were not made on the basis of a determination of the Applicant's taxable income and tax liability for the 1999 year of assessment but on the basis of a decision by the Respondents that the amount did not constitute taxes properly due and chargeable at the time.

[32] As was, in my opinion, rightly held (per SCHABORT, J) in *D A Meyer Consultants CC v Allied Electronics Corporation Ltd and 0thers* 1994 4 SA 451 (WLD) that the payment of interest was something that had been provided *ex lege* and was incidental to the defendants' income tax refund but was in itself not a "refund" of anything that the defendants had paid to the Receiver of Revenue. [Cf *Van der Merwe v Minister of State Expenditure* 1999 4 SA 532 (T) at 534.]

[33] If one views the payment of R6 300 000,00 by the Applicant from the common law point of view, such payment was made *sine causa* and this resulted in the undue enrichment of the Respondents. It follows that the common law principles of enrichment ought to find application *in casu*, more so that the Respondents realised and accepted that they had been unduly enriched at the expense of the Applicant and, as a consequence thereof an agreement was reached on 17 May

2002 in terms of which all, except an amount of R250 000,00, was repaid to the Applicant, who admits that the amount of R6 300 000,00 was paid to Respondents "without legal liability". This means that the repayment of the said amount, minus the amount "retained as a reserve in the event of tax claims against the estate" was not a refund of an overpayment of provisional tax. Section 89*quat*, therefore, does not apply. What applies is the common law position on interest as articulated by NAVSA, JA et HEHER, AJA in *Kudu Granite 0perations (Pty) Ltd v Caterna Ltd* 2003 5 SA 193 at 205C-E, that interest is recoverable under the *condictio causa data causa non secuta* or under the *condictio in debiti* provided the subject of the agreement or the debtor is in default or has been placed in *mora*, as well as the provisions of the Prescribed Rate of Interest Act 55 of 1975.

[34] I now move over to the second question, namely, whether the Second Respondent is liable at law for the payment of *mora* interest in respect of the amount of R1 250 000,00. It is clear from a letter dated 17 May 2002 written by one J J G Viljoen under the letterheads of the Respondents to the liquidator of the Applicant one Mr N Klein that the said amount was paid to the Respondents as secondary tax on companies (STC). It is common cause, however, that such tax was not due and payable. This means that the only issue between the parties is the payment of *mora* interest in respect of the R1 250 000,00.

[35] The Applicant, in its heads of argument, advances the same reasons as in the *mora* interest in terms of the Prescribed Rate of Interest Act in respect of the amount of

R250 000,00. These will be considered under the third issue below. The Respondents deny that they are liable for the payment of such interest because the prerequisites of *mora debitoris* have not been shown. Besides, so contended the Respondents, the Applicant is seeking *mora* interest from 7 February 2002, ie the date that interest was purportedly demanded. Respondents submit that on such date all the necessary requirements of *mora debitoris* were not present inasmuch as there was no enforceable debt. For this proposition they rely on *CIR v First National Industrial Bank Ltd* 1990 3 SA 641 at 652I-J and 653A-B as authority. The Respondents further argue that the Applicant's cause of action lies in the agreement concluded by the parties on 17 May 2002 when the parties reached a compromise.

[36] If regard is had to the fact that the Applicant claims *mora* interest on this amount from 7 February 2002 to 17 May 2002, I find it difficult to accept that the Respondents were in *mora* as from 7 February 2002, ie the date on which Feinsteins on behalf of the Applicant's joint liquidators made a written representation to the Respondents for the payment of the said amount. This is so especially if one has regard to the "discussions" and "agreement" referred to in Feinsteins' letter of 17 May 2002 to SARS. Furthermore, the fact that payment of the said amount was effected on 17 May 2002 the question of *mora* interest does not come into the picture. I therefore find that the Respondents are not liable for the payment of *mora* interest from 7 February 2002 to 17 May 2002 in the amount of R53 082,19 in respect of the STC payment of R1 250 000,00.

[37] In so far as the third and last question is concerned namely whether the Respondents are at law liable to refund the Applicant the amount of R250 000,00 with *mora* interest from 7 February 2002 to date of payment, the Applicant argued that:

37.1 the Second Respondent had no authority under the Income Tax Act, the Insolvency Act, the Companies Act or common law to retain the amount of R250 000,00 as a reserve in the event of tax claims against the Applicant;

37.2 it is basically for the above reason that this amount should be refunded to the Applicant together with interest at the rate of 15,5% per annum from 7 February 2002 to date of payment.

37.3 The contention by the Second Respondent that the said amount was retained in terms of an agreement with the Applicant is not borne out by the evidence and facts in that:

(a) In terms of paragraph 1.2 of the letter by Feinsteins to SARS dated 17 May 2002, the amount of R250 000,00 was to be retained by the Second Respondent for a period of three months to enable the Second Respondent to determine whether there are any claims against the Applicant in liquidation.

(b) The Second Respondent did not accept the retention of the said amount because in his letter to Applicant's liquidator dated 17 May 2002 he *inter alia* wrote:

> "R250 000,00 has been retained as a reserve in the event of tax claims against the estate."

This differs materially from the contents of paragraph 1.2 of Feinsteins' letter referred to above.

(c) Moreover, the Second Respondent did not retain the amount for only three months as per Feinsteins' letter.

(d) The claims the Second Respondent submitted for PAYE and VAT were submitted long after the period of three months had elapsed.

(e) No set-off was effected for the aforesaid claims against the amount of R250 000,00 by the Second Respondent.

37.4 I am inclined to agree with the Applicant that, under the foregoing circumstances, the Second Respondent had no justification for retaining the said amount longer than is stated in Feinsteins' letter of 17 May 2002 and the alleged agreement the Second Respondent relies on is not established by evidence. It follows that the Second Respondent, as a debtor for the amount of R250 000,00, is liable for interest *a tempore*

*morae* from the date of demand in respect of the said amount which he is not entitled to retain. This is the position at common law and in terms of the Prescribed Rate of Interest Act. The date of demand is generally considered to be the date of service of summons, but could, arguably, be taken to be the date of delivery of a letter of demand. Consequently, it is my considered opinion that the Second Respondent is liable for *mora* interest on the said amount not from 7 February 2002 as Applicant alleges, or from 17 August 2002 as the Second Respondent alleges, but as from 17 May 2002. Furthermore, I am in full agreement with the case law cited as authority by the Applicant for the proposition that although the old authorities thought otherwise, in our modern law the *fiscus* is not immune from paying interest *ex mora*.

37.5 As to the refund of R250 000,00 by the Second Respondent to the Applicant, the former contends that he will refund the amount of any excess paid once an assessment has been made. The latter, on the other hand, contends that the Second Respondent did not timeously prove a claim against the Applicant in liquidation in terms of section 44 of the Insolvency Act, 24 of 1936, read together with sections 339 and 366 of the Companies Act, for income tax purposes. The Applicant also contends that the Second Respondent was therefore not entitled to retain the R250 000,00 but was obliged to pay that amount to the liquidators, submit claims in terms of the laws of insolvency and receive the amounts out of

the liquidated estate in terms of the laws of insolvency. I have no quarrel with the contention by Applicant and am inclined to agree with it. In the premises the Second Respondent is obliged to refund the R250 000,00 to the Applicant together with interest on the said amount at the rate of 15,5% per annum from 17 May 2002 to date of payment thereof.

(G) CONCLUSION AND ORDER

[38] In the light of the preceding analysis, findings and authorities, I am constrained to arrive at the ineluctable conclusion that:

38.1 the first issue, ie whether the Second Respondent is at law liable for the payment of interest in terms of section 89*quat* of the Income Tax Act in respect of the amount of R6 300 000,00, is answered in the negative because the provisions of section 89*quat* of the Act are not applicable *in casu*;

38.2 the second issue, namely whether the Second Respondent is at law liable for the payment of *mora* interest in respect of the amount of R1 250 000,00 is also answered in the negative, because evidence indicates that there were discussions held between the legal representatives of the parties who arrived at an agreement confirmed in Feinsteins' letter of 17 May 2002. Also, that the said amount was repaid to the Applicant on 17 May 2002;

38.3 the third issue, namely whether the Second Respondent is at law liable to refund the Applicant the amount of R250 000,00 together with *mora* interest, is answered affirmatively with the qualification that such interest shall run from 17 May 2002 and not from 7 February 2002.

In the result the following order is hereby made:

(i) Prayers (a) and (d) of the notice of motion are dismissed with costs.

(ii) Prayer (c) is hereby granted. The Second Respondent is ordered to refund the Applicant the amount of R250 000,00 (within fourteen days after judgment) together with *mora* interest calculated at 15,5% per annum on the said amount from 17 May 2002 to date of payment, with costs.

M N S SITHOLE
ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT

15330-2005

HEARD ON: 23/11/2005

FOR THE APPLICANT: ADV J M A CANE

INSTRUCTED BY: WERKSMANS ATT, JHB,
c/o EDELSTEIN-BOSMAN INC, PTA

FOR THE RESPONDENTS: ADV H J DE WET

INSTRUCTED BY: STATE ATTORNEY, PTA