

Warranties and indemnities are mechanisms to ensure trust between contracting parties. It is the proof in the proverbial pudding and aims to provide that a party to a contract does what they say they will. Or put differently, that something is the way it was presented.

In contracts, a range of warranties is typically supported by an indemnity to reimburse the other party in case of a breach.

In addition, this is also where indemnity insurance policies would play a pivotal role.

So, what are the limitations of these warranty and indemnity clauses in contracts and insurance policies?

In a recent case in the Western Cape High Court, of *EBS International (Pty) Limited and another v Shaun Edward Wright*,<sup>1</sup> this principle came under the spotlight.

### **Facts**

The shareholder director had furnished warranties and indemnities to the buyer of the business to the extent that he would make good any undisclosed tax liabilities that came to light after the conclusion of the sale agreement. It included the cost of a claim for a breach of the warranty set out in the contract of sale.

Some years after the sale, the tax authorities assessed the affairs of the business sold. Under the appropriate tax legislation provisions, once an assessment is raised by the receiver of revenue (SARS), they are deemed to be conclusive in terms of liability.

The seller was the sole shareholder and director at the time; as such, this effectively constituted a breach of directors' fiduciary duties, which caused damages suffered by the business and the buyer. This may, in turn, be recoverable from the shareholder director. However, the fact remains that the claimant must be placed in the position it would have been if there had been no breach of the fiduciary duty.

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<sup>1</sup> <http://www.saflii.org/za/cases/ZAWCHC/2022/69.pdf>: accessed 21 May 2022

## **The Law**

An indemnity is a contractual agreement between two parties where one agrees to pay for potential losses or damages claimed by a third party.

However, the question was whether the buyer had a claim for specific performance as a direct result of the breach of warranties. The court held that where a breach of a warranty has been indemnified, the injured parties' claim is not based on the breach of the warranty but on the indemnity clause itself. Therefore, the court said that the buyer had met the requirements for a claim for specific performance.

## **Conclusion**

A claim for specific performance is possible in the contest of warranties or indemnities given. This could have significant impacts on the insurance industry; however, this is a High Court decision, and therefore the position could be different in a higher court. For now, however, our courts move from a position of given effect to the contract and intent of the parties. Contact an expert at SchoemanLaw for all your commercial and contractual legal needs today!