

SOUTH AFRICA / JUDGMENT

Frese NO v Steve Biko Foundation (00172/2016) [2016] ZAGPJHC 358 (5 August 2016)

[2016] ZAGPJHC 358

COURT

South Gauteng High Court, Johannesburg

BEFORE

Mahalelo

CASE / FILE NUMBER

00172/2016

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REPUBLIC OF
SOUTH AFRICA
IN THE HIGH
COURT OF SOUTH AFRICA,
GAUTENG LOCAL
DIVISION, JOHANNESBURG

CASE NO: 00172/2016

Reportable: No
Of interest
to other judges: No
Revised.
In

the matter between: JORG RAINER
FRESE
NO Applicant
(as and in
his capacity as business rescue
Practitioner
of Rainbow Construction (Pty) Ltd,
In
business rescue/under supervision)
and
STEVE BIKO
FOUNDATION
(IT3566/98)
(represented

by its trustees for the time
being) First
Respondent
RAINBOW
CONSTRUCTION (PTY) LIMITED Second
Respondent

JUDGMENT

MAHALELO, AJ:

- [1] The first and second respondents were parties to a standard written agreement utilised in the building industry referred to as the Joint Building Contracts Committee (“JBCC”) Services 2000 Principal Building “(the agreement” or “JBCC agreement”) concluded on 15 October 2010.
- [2] The second respondent was contracted to build the Steve Biko Centre, located on Erven 1470 to 1474 in the Ginsberg Township in the King Williams Town District. The contract sum was R74,770,320.00. For present purposes the relationship between the first and the second respondents is that which pertains between an employer and a contractor in a construction agreement. The applicant is the duly appointed business rescue practitioner of the second respondent. For the sake of convenience the parties will be referred to as applicant and respondent.
- [3] The dispute resolution procedure agreed upon between the parties is that contained in clause 40 of the JBCC agreement. Of particular relevance to this application are clauses 40.2.1, 40.2.2 and 40.3.3. They provide that disputes between the parties are referred to adjudication where the adjudication shall be conducted in terms of the edition of the JBCC rules for adjudication current at the time when the dispute was declared. The adjudicator is then to give a decision on the disputes.
- [4] A party dissatisfied with the decision given by the adjudicator may give a notice of dissatisfaction within 10 working days of receipt of the decision after which it is to be referred to the arbitrator; but that the decision of the adjudicator is in the interim binding on the parties who shall give effect to without delay unless and until it is subsequently revised by an arbitrator. [40.3.3]
- [5] It is common cause that disputes did indeed arise between the parties, which in terms of the agreement were referred for adjudication. Advocate SD Mitchell was appointed the adjudicator. On 10 January 2013 the adjudicator made the following determination:
- “Final award as regards quantum:*
7. The defendant is to pay to the claimant the sum of R5 549 227-20 (being between the amount awarded to claimant and defendant respectively),

8. Defendant is to pay interest on this sum at 15% as from the date of this award to date of payment,
9. Defendant is to pay arbitrators costs,
10. Defendant is to pay the claimant's reasonable costs which I shall determine on submission of a memorandum of fees to me by the defendant.

Cost Award dated 28 January 2013

1.4 Defendant is to pay the claimant's costs in the sum of R61 902-00(VAT incl)".

[6] It is further common cause that after the adjudicator's determination was

Published, the respondent gave notice of its dissatisfaction with the determination within the required period.

[7] The respondent failed to satisfy the adjudicator's determination resulting in the present application.

[8] The application is opposed by the respondent. The opposition to the application is multi-layered. In support of its opposition the respondent firstly stated that:

"1. The relief sought in the notice of motion is to have an "award "made an "order of court".

2. Courts do not make decisions of independent tribunal "an order of court". Courts hand down judgments (also known as "orders")...

3...

4. In the circumstances, the issue to be decided is whether this court has before it an "award" as envisaged in the Arbitration Act which could be made an order of court.

...

7. In this case it is common cause that there is no "award" but rather a "determination made by the "adjudicator".

9. In the premises, there is no "award" that can be made an "order" of court.

10. The result thereof is that this court has no authority or power to grant the relief sought in the application and the application should be dismissed on this ground alone.

[9] Secondly, the respondent contended that:

"24 The second respondent is in business rescue and is hopelessly insolvent. It is clear from the reading of the business rescue plan that the second respondent's liabilities far exceed its assets and that there is no prospect of rescuing the company. The business rescue plan contemplates that some creditors will be paid a few cents in a rand and that Rainbow will then be liquidated. This means that were the first respondent to make payment to the applicant of any amount, the first respondent would have no way of ever recovering or recoup its money in the event that the arbitration tribunal ultimately finds in our

client's favour. Any money that our client pays to the (second respondent) will go into the general pot to be distributed to a few lucky preferential creditors, leaving our client high and dry".

- [10] The respondent further contended that there will be no arbitration as the applicant would have been liquidated, that the applicant seeks to convert the provisional nature of an adjudicator's determination into a final order and to appropriate the money in circumstances where there will be no arbitration and no opportunity for it to recover its money. The respondent submitted that for the applicant to seek to implement the agreement in this manner and to appropriate the money and then liquidate the applicant would be unconscionable and *contra bonos mores*.
- [11] Thirdly, the respondent contended that the adjudicator was not a tribunal of final instance, the adjudicator's determination is not final, but provisional, that it is only binding until varied or overturned on arbitration. The respondent added that the effect of the adjudicator's determination is dependent upon a consideration of the agreement and rules, taking into account that the respondent gave a notice of its dissatisfaction, the obligation to refer the matter then to arbitration would rest on the applicant, alternatively, in the event that the obligation to refer the matter to the arbitrator rests upon it, as there is no time limit within which to refer the matter to arbitration, the delivery of the answering affidavit constitutes the referral to arbitration and there is no obligation to give effect to the determination once a party has given a notice of dissatisfaction.
- [12] The respondent argued further that to allow the adjudicator's determination to stand where there will be no arbitration would be in violation of its rights in terms of Section 34 of the Constitution of South Africa. It is further the respondent's argument that for the court to make an order that it effect payment of any amount to the applicant in the circumstances of this matter would be against public policy as the contract relied upon is unenforceable.

Is the adjudicator's decision one that qualifies to be made an order of court?

- [15] Prayer 1 and 2 of the applicant's notice of motion reads as follows:

"1. That the adjudicator's award published on 10 January 2013 and annexed to the notice of motion as X1 be made an order of court.

2. That the adjudicator's award published on 28 January and annexed to the notice of motion as X2 be made an order of court.

- [16] It is common cause that the disputes which arose between the parties were referred to adjudication and not arbitration. Although described as an award the adjudicator's decision was in fact a determination because it purported not to make a final determination of a substantive issue between the parties. The issue raised by the respondent in this regard should be resolved by a proper interpretation of the dispute resolution clauses dealing with the effect of the adjudicator's decision. It will therefore be necessary to consider the agreement as a whole in order to determine the parties' intentions and purpose in agreeing to the dispute resolution process.

- [17] It is so that the relief sought by the applicant presupposes that the relief sought pertains to an award made by an arbitrator. This appears to be a mistake or inconsistency because only the arbitral award can be made an order of court. Furthermore the applicant's founding affidavit as well as the answering affidavit can only be construed as referring to the adjudicator's determination in this matter. The order to enforce compliance is sought because the respondent has refused to pay the amount due to the applicant in terms of the adjudicator's determination. This is not a matter where no facts are asserted in the founding affidavit to support the relief sought. It seems to me that the underlying facts which form the basis of the applicant's claim are the same even in the respondent's answering affidavit. The only difference is the use of the words "award" to be made an "order of court". There has not been a change in the facts relied on in the founding affidavit for the relief sought. In my view it would be unjust to penalise the applicant for its mistaken use of this terminology. In any event one of the reasons why the respondent's contention cannot succeed is that no prejudice has been shown to have been suffered by the respondent in consequence to the applicant's use of the terminology. The purpose of a relief sought along these lines is to render the decision of the adjudicator enforceable.
- [18] Having reached that conclusion, I now turn to deal with the merits of the application and I will deal with the issues with the above understanding.

Is the adjudicator's determination binding on the parties in the interim?

- [19] The issues raised with regard to whether the adjudicator's determination is binding in the interim and whether it should be given effect to promptly in essence are about the interpretation of clause 40 of the JBCC agreement read together with the rules. The applicant submitted that the parties are required to give prompt effect to the adjudicator's determination which is binding unless and until it is subsequently revised or set aside on arbitration.
- [20] As the disputes turns on the interpretation of clauses 40, I propose to quote the relevant provisions of the clause and its sub-clauses and then to discuss them. Clause 40 of the JBCC Agreement provides that:

"40.0 Settlement of Disputes

40.1 Should any disagreement arise between the employer including his principal agent or agents, and the contractor arising out of or concerning this agreement or its termination, either party may give notice to the other to resolve such disagreement.

40.2 Where such disagreement is not resolved within ten (10) working days of receipt of such notice it shall be deemed to be a dispute and shall be referred by the part which gave such notice to either;

40.2.1 Adjudication [40.3] where the adjudication shall be conducted in terms of the edition of the JBCC rules for adjudication current at the time when the dispute was declared , or

40.2.2 Arbitration [40.4] where the arbitrator is to be appointed by the body selected by the parties [41.3] whose rules shall apply...

40.3

40.3.3 The adjudicator's decision shall be binding on the parties who shall give effect to it without delay unless and until it is subsequently revised by an arbitrator [40.4]

40.3.4 Should either party be dissatisfied with the decision given by the adjudicator, or should no decision be given within the period set in the rules, such party may give notice of dissatisfaction to the other party and to the adjudicator within ten (10) working days of receipt of the decision or, should no decision be given, within ten (10) working days of expiry of the date by which the decision was required to be given the dissatisfaction shall refer the dispute to arbitration.

[21] The effect of the provisions of clause 40.3.3 is that the decision of the adjudicator shall be binding unless and until it has been revised on arbitration. It is clear from the wording of clause 40.3.3 that the intention was that a decision is binding on the parties, that such a decision will lose its binding effect if and when it is subsequently revised. The moment the decision is made the parties are required to give effect to it without delay. The view I take in this case is supported by a number of decisions in this court.

[22] In the unreported decision of Esor Africa (Pty) Ltd/Franki Africa (Pty) Ltd JV and Bombela Civils JV (Pty) Ltd, SGHC case No. 12/7442, the parties had referred a dispute to the Dispute Adjudication Board (DAB) in terms of clause 20.4 of the FIDIC conditions of contract. The DAB gave its decision which was in favour of the contractor. The employer refused to make payment in terms of the decision relying, inter alia, on the fact that it had given a notice of dissatisfaction and the contractor approached the court for an order compelling compliance with the decision. Spilg J commented that he found the wording of the relevant contractual provisions to be clear and that their effect is that whilst the DAB's decision is not final,

"The obligation to make payment or otherwise perform under it is".

[24] The court further found that the intention and purpose of the DAB process was that neither payment nor performance can be withheld when the parties are in dispute, at paragraph 12 of the judgment the court held:

"the DAB process ensures that the quid pro quo for continued performance of the DAB decision which it is required to give effect to is the employer's obligation to make payment in terms of a DAB decision and that there will be a final reconciliation should either party be dissatisfied with the DAB decision..."

[25] The court further held at paragraph 14 of the judgment that the respondent was not entitled to withhold payment of the amount determined by the adjudicator and that he

"is precluded by the terms of the provisions of clause 20 (and in particular clauses 20.4 and 20.6) from doing so pending the outcome

of the arbitration"

[26] The decision in Bombela was supported by a number of judgments dealing with similar provisions in different standard forms of construction contracts which point clearly to a practice relating to the immediate enforcement of an adjudicator's decision leaving it to the dissatisfied party to refer the decision to arbitration in order to set it aside, until so set aside or revised in the subsequent arbitration, it remains binding.

[27] In the case of Stocks and Stocks (Cape)(Pty) (Ltd) v Gordon and Others NNO 1993 (1) SA 156 (T) the Court could find no objection to giving effect to an agreement in terms of which interim payments are to be made which may later be followed by an adjustment of account and a claim for repayment of what has been paid should the opinion of the mediator be set aside in arbitration. The contract referred to mediation as opposed to adjudication. It provided that the parties could obtain the opinion of a mediator but if dissatisfied, it could refer it to arbitration. The wording of the agreement read:"

"The opinion of the mediator shall be binding upon the parties and shall be given effect to by them until the said opinion is overruled in any subsequent arbitration or litigation.

[28] In Basil Read (Pty) Ltd V Regent Devco (Pty) Ltd (41108/09)201 ZAGPJC75 (9 March 2010), Clause 40 of the JBCC Principal Building

Agreement dealt with dispute resolution and allowed a referral of a dispute to an adjudicator. Any party dissatisfied with the

adjudicator's decision was entitled to give notice of dissatisfaction within a stipulated time and may then refer the dispute to arbitration. It stipulated, however, that "the adjudicator's decision shall be binding upon the parties who shall give effect to it without delay unless and until it is subsequently revised by an arbitrator". The Court construed these provisions as imposing an obligation on the dissatisfied party to give effect to the decision without delay unless and until it is subsequently set aside by the arbitrator. The dissatisfied party's remedy is to procure set-off or adjustment in the following payment certificates should he succeed in having the decision set aside after he had performed.

[29] In Turbular Holdings (Pty) Ltd V DBT .Technologies (Pty) Ltd 2014 (1)SA 244 (GSJ) DBT Technologies, a subcontractor to Eskom in the Kusile Project, further contracted to Tubular Holdings in a deal worth some R1.3 billion. Contract FIDIC's clause 20 governs the dispute resolution procedure. Clause 20.4(4) of FIDIC provides that the decision of the Dispute Adjudication Board (DAB) shall be binding on both parties, who 'shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award'. Clause 20.4(5) provides that if either party is dissatisfied with the DAB's decision it can give a notice of dissatisfaction within 28 days. Clause 20.4(7) says that a DAB decision becomes final and binding if neither party files a notice of dissatisfaction within the 28-day period. Clause 20.6(1) provides that in cases where the DAB's decision has not become final and binding the matter shall be resolved by arbitration or agreement.

[30] A dispute arose between the parties, the dispute was referred to the DAB, the DAB made a decision, and DBT Technologies gave notice of dissatisfaction within the 28-day period. The legal issue that arose was this: was DBT Technologies obliged to give effect to the DAB's decision pending the decision of the arbitrator? Tubular Holding obviously argued that it was, but DBT Technologies took the position that the filing of the notice of dissatisfaction undid the effect of the DAB's decision. The court concluded that the parties must promptly give effect to the DAB's decision, that either party is entitled to file a notice of dissatisfaction within 28 days of the DAB's decision, but that the notice of dissatisfaction in no way detracts from the obligation to give prompt effect to the decision. Du Plessis J summarised this as follows:

"The parties must give prompt effect to a decision. If a party is dissatisfied he must nonetheless live with it but must deliver his notice of dissatisfaction within 28 days, failing which it becomes final and binding. If he has given notice of dissatisfaction he can have the decision reviewed in arbitration. But until that has happened the decision stands and he has to comply with it." He added this: 'The final sentence of clause 20.4(4) requiring the contractor to continue to proceed with the works, underscores the intention of the parties to the effect that life goes on and is not interrupted by a notice of dissatisfaction.'

The court continued that:

"because this obligation precedes the notice of dissatisfaction. This means that the DAB's decision is binding unless and until it has been revised by arbitration or agreement. In other words, the DAB's decision only loses its binding effect if and when it is revised."

[31] In the matter of Stefanutti Stocks (Pty) Ltd v S8 Property (Pty) Ltd 2013 JDR 2441(GSJ), the agreement between the parties was a standard written Joint Building Contracts Committee ('JBCC') Services 2000

Principal Building Agreement.

Clause 40 of the agreement provides that:

"40.0 DISPUTE SETTLEMENT 40.1 Should any disagreement arise between the employer or his principal agent or agents and the contractor as to any matter arising out of or concerning this agreement either party may give notice to the other to resolve such disagreement.

40.2 Where such disagreement is not resolved within ten (10) working days of receipt of such notice it shall be deemed to be a dispute and shall be submitted to:

40.2.1 Adjudication in terms of the edition of the JBCC Rules for Adjudication current at the time when the dispute is declared. The adjudicator shall be appointed in terms of such Rules. ...

40.3 The adjudicator's decision shall be binding on the parties who shall give effect to it without delay unless and until it is subsequently revised by an arbitrator in terms of 40.5. Should notice of dissatisfaction not be given within the period in terms of 40.4, the adjudicator's decision shall become final and binding on the parties.

40.4 Should either party be dissatisfied with the decision given by the adjudicator, or should no decision be given within the period set out in the Rules, such party may give notice of dissatisfaction to the other party and to the adjudicator within ten (10) working days of receipt of the decision or, should no decision be given, within ten

(10) working days of expiry of the date by which the decision was required to be given.

40.5 A dispute which is the subject of a notice of dissatisfaction shall be finally resolved by the arbitrator as stated in the schedule. Where such person is unwilling or unable to act, or where no person has been stated, the arbitrator shall be chosen and appointed by mutual agreement within ten (10) working days of such notice, the arbitrator shall be the person appointed at the request of either party by the chairman, or his nominee, of the Association of Arbitrators (Southern Africa). The adjudicator appointed in terms of 40.2.1 shall not be eligible for appointment as the arbitrator."

[30] Stefanutti Stocks, being the building contractor, referred a dispute between the parties to an adjudicator. The adjudicator issued his decision in terms of which he determined, inter alia that "the Contractor is entitled to be paid the full original preliminaries value of R2, 439,677.98." Stefanutti Stocks sought an order compelling S8 Property to comply with its obligations in terms of a building agreement, more specifically for specific performance under the terms of the agreement by S8 Property by paying amounts determined by an adjudicator to be due and payable to Stefanutti Stocks.

[31] S8 Property contended that it is not obliged to give effect to the adjudicator's decision as it had given notice of its

dissatisfaction therewith pursuant to clauses 40.3 to 40.5 of the agreement.

[32] The Court confirmed the enforceability of an adjudicator's decision prior to final arbitration. It also confirmed that an agreement between the parties that a decision is binding and shall be given effect to without delay, unless and until it is revised on arbitration, requires immediate implementation.

[33] In the present matter, it follows therefore that the terms of the contractual provisions are perfectly clear and unambiguous, the parties are obliged to give effect to a decision of the adjudicator without delay. The issue of the notice of dissatisfaction does not in any way detract from this obligation. The notice of dissatisfaction is necessary where the party wishes to have the decision revised; it does not affect that decision. It simply sets in motion the procedure in which the decision may be revised. The notice itself does not necessarily mean that the matter is referred to arbitration. Until revised, the decision binds the parties and they must give effect thereto without delay. The argument advanced by the respondent

in this regard therefore cannot stand.

Is enforcement of the adjudicator's determination (granted in favour of the applicant) in circumstances where the applicant is under business rescue contra bonos mores or against public policy.

[34] I have already stated the respondent's contentions above. The respondent seem to contend further that in considering whether enforcement of the adjudicator's determination is contrary to public policy two considerations come into play, firstly the purpose of adjudication and secondly the hopeless insolvent state of the applicant. The respondent contended that should the adjudicator's determination be enforced and the respondent be compelled to make payment this would have the effect of being a final payment. According to the respondent, the effect of any order granted in favour of the applicant would be contra bonos mores. The respondent further added that Section 133 of the companies Act 71 of 2008 places a moratorium on commencing legal proceedings against a company during business rescue proceedings. The respondent's submissions are therefore confined to the issue of public policy and the argument that the relief sought by the applicant ought to be refused because the implementation and enforcement of the provisions of clause 40.3.3 of the agreement is against public policy.

[35] On the other hand, the applicant contended that the respondent's objection to the enforceability of the adjudicator's

determination is based on the fact that the applicant is a company under business supervision (in business rescue). According to the applicant, business rescue per se is not the basis for the complaint but the size of the available dividend is. The applicant submitted that the respondent's position is hardly novel or unusual as the respondent is not the first nor will be the last to find itself in a situation where one party to a contract is placed under business rescue (or even liquidation). The applicant furthermore submitted that it entered into a contract with the respondent and the contract creates obligations on both parties. The respondent is trying to withhold performance in circumstances where clause 40.3.3 of the contract stipulates that the adjudicator's determination is binding on the parties and must be given effect to as a contractual obligation.

[36] According to the applicant, the fact that one party to a contract is in business rescue does not render enforcement of the contractual provisions contra bonos mores and a case to this effect is untenable as the present situation between the parties has been catered for, acknowledged and even sanctioned by statutory provisions. The applicant added that the facts of this case fall far short of justifying a finding to the effect that the contract, if implemented, is clearly "inimical to the interests of the community...contrary to law or morality, or...counter to social or economic expedience" and that the finding contended for by the respondent can and should only be made on very compelling grounds and in the "clearest of cases" where the "harm to the public is substantially incontestable" as stated in *Sasfin (Pty) Limited v Beuks* 1989 (1) SA 1 (A). The applicant submitted that far from the

clearest of cases” the respondent’s objections are motivated only by its “individual sense of proprietary and fairness”.

- [37] In order for the court to be able to address the contentions raised by the parties in this regard it is necessary to firstly consider the principle of *pacta sunt servanda*. (sanctity of contracts). The principle of sanctity of contracts dictates that contracts which are not unlawful or *contra bonos mores* must be performed and if necessary be enforced by a court of law. The maxim *pacta sunt servanda* can be said to reflect the interest of society in ensuring that contractual parties keep their promises. In *Waltons Stationery Co (Edms) Bpk v Fourie en ‘n Ander* 1994 (4) SA 507 (O) Edeling J opined that in terms of common law, it had been repeatedly emphasised that it was in the public interest that people

be held bound by agreements entered into by them. This view was confirmed in *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC).

- [38] It is further accepted that once the parties in a contractual relationship have agreed to the contractual terms that govern their relationship, these terms should be honoured unless they are contrary to the law, public policy or public interest. (See Kerr AJ *The Principles of the Law of Contract* 6th Edition (20002) 181.
- [39] At common law, a contract is illegal and unenforceable if it is contrary to good morals or public policy. (*Magna Alloys and Research SA (Pty) Ltd v Ellis* 1984(4) SA 874 (A) at 891 G). This immediately raises the question what is meant by public policy, and when can it be said that an agreement is contrary to public policy.
- [40] Public policy is defined as “the principles, often unwritten, on which social laws are based. (See Wikipedia online dictionary last accessed on 23 August 2011). Public policy is also referred to as an expression of “vague import” (per INNES, CJ, in *Law Union and Rock Insurance Co Ltd v Carmichael's Executor* 1917 AD 593 at 598), and what the requirements of public policy are must needs often be a difficult and contentious matter. *Wessels' Law of Contract in South Africa : 2nd Edition, Vol 1, para 480* states that “(a)n act which is contrary to the interests of the community is said to be an act contrary to public policy”. *Wessels* goes on to state that such acts may also be regarded as contrary to the common law, and in some cases contrary to the moral sense of the community.
- [39] *Wiellie* in his *Principles of South African Law* 7th Edition, at 324 speaks of an agreement being contrary to public policy “if it is opposed to the interests of the State, or of justice, or of the public”. The interests of the community or the public are therefore of paramount importance in relation to the concept of public policy. Agreements which are clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience, will accordingly, on the grounds of public policy, not be enforced. (Cf. *Cheshire, Fifoot and Furmston's Law of Contract : 11th Edition, at 343*)

- [40] “It must be borne in mind that public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammelled by restrictions on that freedom. '(P)ublic policy demands in general full freedom of contract; the right of men freely to bind themselves in respect of all legitimate subject-matters” (See *Law Union and Rock Insurance Co Ltd v Carmichael's Executor* (supra at 598). A further relevant, and not unimportant, consideration is that 'public policy should properly take into account the doing of simple justice between man and man' (per Stratford CJ in *Jajbhay v Cassim* 1939 AD 537 at 544.)
- [41] It is against this background that the enforceability of the adjudicator's determination should be established.
- [42] I have already found that the notice of dissatisfaction is necessary where the party wishes to have the decision revised; it does not affect that decision. It simply sets in motion the procedure in which the decision may be revised. The notice itself does not necessarily mean that the matter is referred to arbitration. It is important to note that the respondent, notwithstanding the notices of dissatisfaction has not (a) referred any dispute to arbitration, (b) taken any steps to a possible arbitration, (c) nominated any potential arbitrator for appointment, (d) made any application or directed any request for an arbitrator to be appointed, (e) taken any steps to overturn or vary either the adjudicator's determination on quantum or costs. The respondent's opposition

to the application based on the letter dated 11 January 2013 where the respondent inter alia proposed that, before the association of arbitrators is approached in order to appoint an arbitrator, the parties should “try to agree on the appointment of a mutually acceptable arbitrator” has no merit. In my view the letter has no effect of suspending or even amending the relevant provisions of the agreement read together with the rules and it cannot be construed to excuse the respondent from complying with its contractual obligations.

- [43] For the purpose of this application it is patent that the applicant is under business supervision. Section 133(1) of the Act acts as a general moratorium on legal proceedings against a distressed company, since such proceedings may have a detrimental effect on the outcome of the business rescue process, which is to ultimately avoid liquidation.

The relevant provision of Section 133 reads:

'(1) During business rescue proceedings, no legal proceedings, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except-

- (a) with the written consent of the practitioner;
- (b) with the leave of the court and in accordance with any terms the court considers suitable;
- (c) as a set-off against any claim made by the company in any legal proceedings, irrespective of whether those proceedings commenced

before or after the business rescue proceedings began;

- [44] The stringency of the protection afforded to the company is, however, not a blanket restriction against legal proceedings. If creditors wish to pursue legal proceedings or attach assets, they can seek the written consent of the business rescue practitioner or leave of court. The argument by the respondent that there will be no arbitration and therefore enforcement of the relevant provision of the agreement is against public policy is in my view completely without merit. Arbitration proceedings have been included in the meaning of “legal proceedings” (See *Chetty v Hart and Another* NNO 2015 (6) SA 424 (SCA)). The fact that a company is under business rescue is therefore no bar to institute legal proceedings against such company.
- [45] Furthermore, the nature of the hardship or prejudice the respondent stands to suffer should the determination be enforced is far from clear. The respondent gives no clue as to the actual case that it might have sought to advance on arbitration or on what basis it might have succeeded in any claim or any amount on arbitration. As a result there is no evidence of any nature that, after arbitration, the applicant will be indebted to the respondent in any amount. In fact the available evidence suggests that the respondent’s complaints and concerns are more perceived than real. The argument that enforcement of the adjudicator’s determination is contra bonos mores under these circumstances stands to fail. In *Sasfin (Pty) Limited v Beuks* supra it was held that: “no court should therefore shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one’s individual sense of propriety and fairness. In the words of Lord Atkin in *Fender v St John-Mildmay* 1938 AC 1 (HL) at 12 ([1937] 3 All ER 402 at 407B - C), ‘the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds’ (see also *Olsen v Standaloft* 1983
- (2) SA 668 (ZS) at 673G.
- [46] I agree with the applicant’s contention that the facts of this case fall far short of justifying a finding to the effect that the contract, if implemented, is clearly “inimical to the interests of the community...contrary to law or morality, or...counter to social or economic expedience” and that the finding contended for by the respondent is far from the “clearest of cases” and the respondent’s objections are motivated by its own individual sense of “proprietary and fairness”.

[47] The respondent only came up with the additional issue of prescription in its heads of argument. It was not part of the initial papers. The Prescription Act 68 of 1969 (“the current Prescription Act”) provides that prescription should be raised in pleadings. Section 17 provides that:

1. “a court shall not on its own motion take notice of prescription.
2. A party to litigation who invokes prescription, shall do so in the relevant document filed of record in the proceedings, provided that a court may allow prescription to be raised at any stage of the proceedings.”

[48] In its refusal to honour the adjudicator’s determination, the respondent alleged only for the first time in its heads of argument that the claim against it was unenforceable because it had prescribed. The issue of prescription is not merely a legal one but also depends on the facts. In my view it will be prejudicial to the applicant if the defence of prescription is considered without the applicant been given an opportunity to deal with it in its replying affidavit.

[49] I therefore conclude that the decision by the adjudicator is applicable, at least until it has been subsequently revised on arbitration.

[50] In the premises I make the following order:

- [1] The respondent is ordered to forthwith give effect to the adjudicator’s determination handed down on 10 January 2013 and annexed to the notice of motion as X1 and 28 January 2013 annexed to the notice of motion as X2;
- [2] The order in paragraph 1 above shall endure until such time, if at all, that the said decision of the adjudicator is revised in amicable settlement or an arbitral award;
- [3] The respondent shall pay the applicant’s costs of the application.

M.B. MAHALELO

ACTING JUDGE OF THE HIGH

COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Appearances

Counsel of the applicant : Adv. Jasper Daniels

Instructed by

: Frese, Moll & Partners

Counsel for the respondent : AJ Eyles SC

Instructed by

:Bowman Gilfillan Inc.

Date of hearing

5 August 2016

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