

SOUTH AFRICA / JUDGMENT

Khewija Engineering and Construction (Pty) Ltd v Van Den Steen NO and Another (12760/2021) [2023] ZAGPJHC 760 (4 July 2023) [2023] ZAGPJHC 760

COURT

South Gauteng High Court, Johannesburg

BEFORE

P H Malungana

CASE / FILE NUMBER

12760/2021

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 12760/2021

REPORTABLE

OF INTEREST TO OTHER JUDGES

REVISED

04.07.23

In the matter between:

KHEWIJA ENGINEERING AND CONSTRUCTION PROPRIETARY LIMITED Applicant And PETRUS VAN DEN STEEN N.O First Respondent DAVID LAKE N.O Second Respondent (in their joint capacities as joint business rescue Practitioners of Group Five Construction (Pty) Ltd (in business rescue) In Re PETRUS VAN DEN STEEN N.O First Applicant DAVID LAKE N.O Second Applicant (in their capacities as joint business rescue practitioners of Group Five Construction (Pty) Ltd (in business rescue) And KHEWIJA ENGINEERING AND CONSTRUCTION PROPRIETARY LIMITED Respondent

J U D G M E N T

MALUNGANA AJ

Introductory

background

- [1] The respondents, the joint business rescue practitioners of Group Five Construction (Pty) Limited (presently in business rescue), were the applicants in the winding up application brought against Khewija Engineering and Construction (Pty) Ltd. The background to the winding-up application is succinctly set out in the judgment handed down by Oosthuizen-Senekal AJ, and need not be rehashed in this judgment[1]. Suffice it to state that the winding up application arose out of the applicant's failure to pay the sum of R6 216 655.31 for services rendered by Group Five Construction (Pty) Ltd ("Group Five"). For the sake of convenience I shall refer to Group Five Construction (Pty) Ltd as "Group Five", and Khewija Engineering and Construction (Pty) Ltd as "Khewija."
- [2] The main application before me is one in terms of which Khewija seeks an order to stay the liquidation application instituted by Group Five pending the outcome of arbitration proceedings to be lodged by Khewija against Group Five. The applicant further seeks an order for the moratorium provided for in terms of section 133 of the Companies Act of 2008, to be uplifted in order for applicant to institute arbitration proceedings against Group Five. The application is opposed and the respondents have delivered the necessary answering affidavit.
- [3] There is also an application for condonation brought by the Khewija for its failure to deliver the answering affidavit to the liquidation application. In this regard there is no formal opposition to the application, however, the respondents have filed their notice to abide. The reasons advanced by the applicant for late filing of the answering affidavit are set out in the supporting affidavit for condonation. Essentially Khewija contends that its erstwhile attorneys, Harris Billings were engaged in settlement discussions with Group Five attorneys prior to the commencement of liquidation proceedings. After the institution of the liquidation proceedings it became apparent that it had a counterclaim against Group 5, which arose post the approval of Group Five business rescue plan. On 21 April 2021 it notified Group Five of the existence of the counterclaim, and this led to further delay as it sought to explore cost effective mechanism to avoid protracted litigious process. It also sought to refer the dispute to arbitration and/or through any available mechanism in the business plan. I am of the view that there are merits in the applicant's condonation application. In the circumstances condonation stands to be granted.
- [4] Immediately I proceed to consider the merits of the stay application.

Khewija's contentions

- [5] It is not in dispute that in or about October 2018, Group Five and Khewija concluded the called an NEC Option A contract (“Secunda Contract”) for the replacement of Tank 056TK-1501 at Secunda.[2] Group Five was also contracted to provide the mechanical design, supply of materials, fabrication shop and field assemble, inspection, testing, painting, transport to the premises and final field assembly in accordance with the subcontract works information (“the Works”).
- [6] The agreement referred to above is shown in annexure “FA2” to the founding affidavit. Amongst other contractual obligations, Group 5 was supposed to provide subcontract works using only status “A” approved drawings and documentation for the site installations, and the use of Status “B” drawings and documentation would require the project managers approval prior to use in construction. On 5,28 November 2018 and 26 February 2019 respectively, Group Five submitted to the applicant the Tank roof drawings which were rejected.
- [7] The applicant further contends that on 11 March 2019, Group Five went into voluntary business rescue after which the respondents were appointed as joint rescue practitioners. During February 2019, the applicant was requested by Sasol to make some changes to Tank pertaining to the nozzle. In March 2019 it became apparent that Group 5 could no longer progress on the contract and it was agreed that both parties terminate the contract. The termination was based on the fact that Group 5, in business rescue could no longer provide performance bonds as required by Secunda Contract. Consequently Group Five has not performed or completed its performance in terms of the Secunda Contract.
- [8] In paragraph 39 of its founding affidavit Khewija avers that between 05 November to 28 November 2018 the applicant received four technical drawings for the roof of the Tank from Group 5 in relation to the design. The designs were rejected by the applicant owing to the fact that they did not meet the requirements set out by the applicant as the employer. Further technical drawing was submitted and rejected. In order to ensure that the work is done the applicant placed orders with relevant suppliers in order to attend to the completion of the work which Group 5 was contracted. Thereafter applicant provided Efficient Trotech with the technical drawings from Group 5. On 15 January 2020, Efficient Trotech queried the constructability of the design submitted by Group 5. The defect resulted in the applicant incurring substantial costs as well as time delays, in order to remedy the defective design of the roof of the Tank which had been previously submitted by Group 5. As consequence of the defective drawings applicant suffered damages which it stand to be claimed from Group Five. The total amount suffered by the applicant is R17,755,536.00.
- [9] In regard to the stay of the liquidation application. The applicant contends that the applicant’s damages are far more than the amount purportedly due to Group 5 and will not only settle but will completely extinguish the claim which Group 5 has against the applicant. According to Khewija, it would be inequitable to liquidate the applicant in the circumstances in which the applicant has a claim against Group Five, which if proved at the arbitration proceedings it will extinguish the claim upon which the liquidation is founded. In order to

pursue the claim, the applicant requires the moratorium provided in respect of legal proceedings against Group Five to be lifted. The respondents have not acceded to the applicant's request to have the dispute resolved in accordance with the dispute resolution mechanisms contained in the Group 5 business rescue plan shown in annexure "FA8". It is against this background that the applicant has approached this court for the relief sought in the notice of motion.

Group Five's contentions

- [10] Group Five's contends[3] that the application for liquidation of the applicant is based on the applicant's failure to pay its debt to Group Five of over R7 million, and to respond to a demand in terms of section 345 of the Companies Act. Khewija had expressly confirmed and sought to compromise the debt in at least 6 correspondences shown in annexure FA7-16 to the founding affidavit in the liquidation application. In essence the respondents' contention is that Khewija's indebtedness to Group Five is undisputed.
- [11] The respondents further contend that Khewija waited for almost two years after the termination of Group Five's contract to notify it of the alleged counterclaim of R15 021 910.00.
- [12] The stay application, according to Group Five is nothing more than a thinly veiled attempt to avoid liquidation. The counterclaim is unsustainable and lacks prospect of success. Khewija has omitted to disclose material facts. It has failed to disclose that it is responsible for the alleged defects in the design. The following portions from the respondents' answering affidavit are relevant:

"23. Certain clauses of the contract, which Khewija did not place before this court bear mention. Importantly, these illustrate that the counterclaim is invalid and/or may not be advanced by Khewija.

23.1 Clause 42.2 (read with the Subcontract Data) provides that, until 52 weeks after the completion of the whole of the works, any defects must be notified to the relevant parties as they are found.

23.2 Once an alleged defect is notified to the relevant party, that party may investigate the matter and accept or dispute liability for it. If the party disputes liability (or if it is assumed that liability will be disputed), a dispute arises. I am advised that the damages /loss alleged to be flowing from the dispute do not need to be fully and finally quantified for a dispute to arise or constitute a dispute.

23.3 The alleged arbitrable dispute (i.e the counterclaim) raised in the founding affidavit is alleged to constitute a dispute in terms of the contract. Clause W13(1), which deals with dispute resolution, states that:

- [13] In paragraph 23.7, the respondents contend that in terms of clause W1.3` (2):

“the times for notifying and referring a dispute may be extended by the Project Manager if the Contractor and the Project Manager agree to the extension before the notice or referral is due. The Project Manager notifies the extension that has been agreed to the Contractor. If a disputed matter is not notified and referred within the times set out in this contract, neither Party may subsequently refer it to the Adjudicator or the tribunal”

“Disputes are notified and referred to the Adjudicator in accordance with the Adjudication Table.”

[14] In terms of clause W1.4(1), the respondents further contend:

“A Party does not refer any dispute under or in connection with this contract to the tribunal unless it has first been referred to the Adjudicator in accordance with this contract.”

[15] Under the circumstances, Group Five contends that Khewija cannot refer any dispute to arbitration unless it had been adjudicated first. Therefore the counterclaim raised by the respondents is time-barred and may not be referred to arbitration.

[16] Having terminated the contract on 28 March 2019, Khewija appointed Trotech to replace Group Five. The applicant ensured that Group Five’s drawing complied with the requirements of the employer after it accepted Group Five’s last drawing. It does not make a logical sense that the applicant would blame Group Five for the alleged defects. Khewija waited until 2021 to notify Group Five of the alleged defect six days after Khewija’s answering affidavit was due in the liquidation application.

[17] Essentially, the respondents contend that the application to stay the liquidation is not genuine. The applicant failed to notify Group Five of the defect timeously. The alleged defect could have been rectified and any consequent damages could have been avoided or minimised. As a matter of law, Khewija bore an obligation to mitigate the damages, which it failed to do.

[18] Group Five is under business rescue, and even if the counterclaim is successfully, Khewija can expect to receive no more than 20 cents/Rand at best. The application to stay amount to abuse of court process.

NOTICE IN TERMS OF SECTION 345 (1) (a) OF THE COMPANIES ACT (“THE ACT”), AND VARIOUS UNDERTAKINGS BY THE APPLICANT SETTLE THE DEBT.

[19] On 22 January 2020, Group Five caused a section 345 notice to be issued against the applicant in terms of which Group Five demanded payment of the sum of the outstanding R6 523 126.60 from the applicant, in respect of construction and engineering services rendered to Khewija.[4]

[20] On 03 February 2020 the applicant proposed to settle the above indebtedness to Group Five as follows:[5]

‘We therefore propose that the outstanding amount be repaid as follows:

R1 million on 30th April 2020

R1 Million on 29th May 2020

R 4 523 126 on the 30th June 2020.

The above proposal, will be accepted depending on how quickly the Equity investment transaction is closed.

We request that you accept the repayment plan, as it is the best option for Khewija and Group 5, and look forward to your response.”

[21] In a communication by correspondence on 31 July 2020 the applicant informed Group Five that due to National Lockdown, Khewija had stopped its trading operation, and resumed limited trading under Alert Level 3 on 3 June

2020. The adverse trading conditions and National Lockdown had impacted Khewija’s ability to pay all its creditors on time. Specifically the applicant informed Group 5 that:

“This will result in not income being generated and earned during this period. As a result of this, we will not be able to afford to honour our debt repayment plan, including the 1st instalment due at the end of July 2020, as agreed.”

[22] On 1 December 2020, the applicant through its legal representatives Harris Billings, wrote:

“3.1 our client provided your client’s offices with an undertaking to settle the amount outstanding on or before 30 November 2020;

3.2 due to unforeseen delays, which delays were out of our client’s hands, our client is unable to effect payment to your client as per its undertaking in clause 3.1 above.”

[23] On 02 December 2020 Group Five granted the applicant’s request to settle the outstanding amount of R6 523 126.60 by no latter than 11 December 2020.[6]

[24] On 19 January 2021 Group Five proposed another settlement offer to the applicant, paraphrased as follows:

- (a) That the applicant pays an amount of R6 523 126.60 in 3 (three) equal monthly instalments of R2 174 375.53 with the first payment falling due on 31 January 2021; alternatively
- (b) That the applicant makes payment of the amount of R7 037 805.03 to Group Five, in 12 equal monthly instalments of R586 483.75, with the first payment falling due and payable on 31 January 2021;

[25] The applicant conditionally accepted the offer contained in paragraph (b) subject to the first payment being due on 04 February

2021. On 22 January 2021 Group Five rejected the applicant's counter-settlement proposals and advised the applicant that its offer contained in the letter of the 19th January 2021 constituted a final offer to the applicant. Group Five also informed the applicant that should it fail to accept its offer of the 19th January 2021, it would proceed with the legal action which would include the winding up of the applicant.

SUBMISSIONS AND DISCUSSION

- [26] Khewija submits that due to the moratorium created by section 133 of the Companies Act, the applicant is unable to pursue its contractual damages claim of R17 755 536.00 against Group Five, in business rescue. The stay application is instituted pursuant to section 6 of the Arbitration Act 41 of 1965, after a notice to oppose was delivered and before the pleadings were delivered in the main application. This applicant argues that the upliftment of the moratorium on legal proceedings will afford the parties equal footing, and enable the dispute to be arbitrated upon in terms of the agreement.
- [27] On behalf of Group Five it was submitted that the applicants have misconstrued the provisions of section 6 of the Arbitration Act. The liquidation application is not a matter that the parties had agreed ought to be referred to arbitration in terms of the relevant section. A claim for liquidation is not an arbitration claim. The respondents submit that the applicant has not made out a case for this court to exercise its discretion in favour of Khewija in that the applicant has not shown in its founding papers (i) that it is solvent, (ii) offers no proof of how many employees it employs and what their salaries are (iii) no proof of its subcontracts or income it derives from them; and (iv) failed to demonstrate that there is prospect of success in the alleged counterclaim.
- [28] In paragraph 39 of the written heads of arguments the respondents argue that, if Khewija is placed under liquidation, the liquidators will be obliged to investigate Khewija's claims and, if any found to have merit, to pursue the alleged counter-claim. The respondents further submitted that the present application is not genuine, and unless it is found to be genuine is not a bar to the liquidation application.
- [29] In the course of argument, I was referred to a. recent judgment from the Supreme Court of Appeal in *Afri Operations Ltd v Hamba Fleet (Pty) Ltd*, 2022
- (1) SA 91 (SCA). I am very grateful to counsel of the respondents for referring me to this judgment. It has been very helpful indeed. In dealing with the 'genuine Wills JA stated in para 6 -7 of the said judgment as follows:
- "[6] It is trite that winding -up proceedings are not to be used to enforce payment of a debt that is disputed on bona fide and reasonable grounds. This is known as the so-called "Badenhorst rule." Where, however, the respondent's indebtedness has prima facie, established, the onus is on it to show that this indebtedness is indeed disputed on bona fide and reasonable grounds.*

[7] The existence of a counterclaim which, if established, would result in a discharge by set off of an applicant's claim for liquidation order is not, in itself, a reason for refusing to grant an order for the winding-up of the respondent, but it may, however, be a factor to be taken into account in exercising the court's discretion as to whether to grant the order or not."

[30] For the reasons which will become apparent in this judgment I find that there is no prima facie case made out that the applicant has a reasonable prospect of success in the alleged counterclaim. As argued by the respondents, Group Five has established the debt and Khewija's liability, and the onus have now shifted for the applicant to show that the counterclaim is genuine.

[31] In deciding whether the applicant has raised a genuine counterclaim this court has to have regard to various factors as set out in Afri Operations above with reference to the alleged facts, and also the history of the case. The factors relevant in deciding whether it is appropriate to lift the moratorium are case specific.[7] Boruchowitz J held in *Arendse and Others v Van der Merwe and Another NNO*, regard will always be had to the following:

"(a) The effect that the grant or refusal of leave would have on the applicant's rights as opposed to other affected persons and relevant stakeholders, (b) the impact that the proposed legal proceedings would have on the wellbeing of the company and its ability to regain its financial health, and (c) whether the grant of leave would be inimical to the object and purpose of business rescue as set out in section 7 (k) and 128 (b) of the Act."[8]

[32] It cannot be overstated that the manifest purpose of placing the company under business rescue is to give it breathing space so that its affairs may be assessed and restructured in a manner that allows its return to financial viability. Given the ubiquitous use of arbitrations to resolve commercial disputes, an interpretation of s 133(1) that exclude them from the moratorium on legal proceedings against financial distressed companies would significantly hinder its

attainment.[9]

[33] As already been indicated, the applicant has made a number of written commitments to settle its indebtedness to Group Five prior to the liquidation application and It cannot be gainsaid that the debt remains unsettled. Throughout its engagement with Group Five, not once was the issue of counterclaim been raised until the 21st of April 202, when it wrote in the letter to Group Five as follows:

"2 In compiling our client's defence to the Liquidation Application launched by your offices on 13 March 2021, it has come

to our attention that our client has a claim against your client in the amount of R15,021,910.00 ("the Counter-Claim").

The Counter-Claim arose post commencement of your client's business rescue and also post approval of the business rescue plan adopted in respect to your client's business rescue (the "Business Rescue Plan")."

It is curious that the counterclaim was only uncovered long after the Khewija had defaulted in a number of its undertakings to settle Group Five's debt, which was at the heart of the liquidation application. The only reasonable inference one can draw from this belated counterclaim is that Khewija had run out of tactics and keeps grasping at straws. In any event the existence of a counterclaim is no bar to the liquidation application.

[34] Even if I am wrong in holding the above view, I find that the application is not bona fide and lacks prospect of success. There is evidence that the applicant has not complied with the procedural requirements set out in the contract relating to dispute resolutions. The applicant's argument that by the time the defect was identified, the contract had been terminated, Group Five was under business rescue, unable to issue any performance bonds is unsustainable. The applicant only came up with the counterclaim after its last counter settlement proposals was rejected by Group Five. This argument is further untenable when regard is had to clause 42.2 of the contract between Group Five and Khewija, which provides that any defects must be notified to the relevant parties as soon as they are found.

[35] It appears from clause W1.3(1) of the contract that the dispute was supposed to have been referred for adjudication after notification in accordance with the Adjudication Table. The dispute in question arose around January 2020 and the applicant failed to comply with the relevant procedural requirements.

Conclusion

[36] Having regard to all these considerations I conclude that there are no reasonable grounds for this court to exercise its discretion in favour of the applicant. The uplifting of the moratorium would only be inimical to the object and purpose of the business rescue of Group Five. The business plan has already been adopted, and therefore the company should be afforded that reasonable breathing space to recover from its financial distress.

[37] For all the reasons set out above the application to stay the liquidation of the applicant is dismissed with costs.

Order

1. The application is dismissed with costs

P H Malungana

Acting Judge of the High Court,

Gauteng Division.

APPEARANCES

For the applicant Adv Michael Peacock Instructed by Purdon Munsamy Attorneys For the Respondents Adv J Brewer Instructed by Werksmans Attorneys

- [1] Case lines 023-1. Judgment of Oosthuizen-Senekal CSP AJ
- [2] Case lines 007-6-007-38 Founding Affidavit of the KHEWIJA
- [3] Case lines 007-170
- [4] Case lines 001-86. Notice in terms of s 345(1) (a) of the Companies Act, 61 of 1973, read with item 9 of Schedule 5 of the Companies Act 71 of 2008.
- [5] Case lines 001-88. Correspondence to the Respondents' attorneys from Khewija
- [6] Case lines 001-94 to 001-95
- [7] SA Airlink (Pty) Ltd v South African Airways (SOC) Limited (in Business Rescue) (238/2020) [2020] ZASCA 156 (30 November 2020) para 20.
- [8] Arendse and Others v Van der Merwe No And Another [2016] ZAGPJHC 292(GJ), 2016 (6) SA 490
- [9] Chetty t/a Nationwide Electrical v Hart NO and another [2019] 4 All SA 401 (SCA)

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