
SOUTH AFRICA / JUDGMENT

Steve Biko Foundation v Frese NO and Another (A5008/2017) [2018] ZAGPJHC 446 (7 March 2018)

[2018] ZAGPJHC 446

COURT

South Gauteng High Court, Johannesburg

BEFORE

SNI Mokose, CG Lamont, MA Makume

CASE / FILE NUMBER

A5008/2017

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case

Number: A5008/2017

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

7/3/2018

In

the matter between:

STEVE
BIKO FOUNDATION
(IT3566/1998)
Appellant
(represented
by its trustees for the time being) (1st
Respondent in court a quo)
and
JORG
RAINER FRESE N
.O 1ST
Respondent
(in
his capacity as the business
rescue (Applicant
in court a quo)
Practitioner
of Rainbow Construction (Pty) Ltd,
In
business rescue/under supervision)
RAINBOW
CONSTRUCTION (PTY)
LIMITED 2nd
Respondent
(in
business rescue/under supervision) (2nd
Respondent in court a quo)

JUDGMENT

MOKOSE AJ

- [1] This is an appeal against the judgement of Mahalelo J. For the sake of convenience, the parties are referred to herein as they were referred to in the application before the court a quo. The applicant, the business rescue practitioner of the second respondent, brought an application against both the first and second respondents seeking the following relief:

“1. That the adjudicator’s award published on 10 January 2013 and annexed to the Notice of Motion as X.1, be made an order of court.

2. That the adjudicator’s award published on 28 January 2013 and annexed to the Notice of Motion as X2, be made an order of court.
3. Directing the first respondent to pay the costs of this application.
4. Further and/or alternative relief.”

- [2] On 15 October 2010 the first and second respondent (which was at the time not subject to business rescue proceedings) concluded a building contract in terms of which the second respondent was to perform certain works for the first respondent for a contract price of approximately R74 million. The second respondent commenced the works and was in the process of completing the works when it was placed under business rescue in September 2011. The second respondent continued with the works notwithstanding that it was placed under business rescue. During December 2012 disputes arose between the parties. The disputes fell to be determined in accordance with the procedure set out in the contract.
- [3] Clause 40 of the contract dealt with what was to occur in the event of a disagreement between the parties. Clause 40.1 provides that in the event of a disagreement arising either party may give notice to the other to resolve such disagreement. Clause 40.2 provides that if the disagreement is not resolved within 10 working days of receipt of notice, the disagreement is deemed to be a dispute and shall be referred by the party which gave such notice to either adjudication (clause 40.2.1) or arbitration (clause 40.2.2). The disputes were referred to adjudication and an adjudicator appointed. In due course the adjudicator published two awards annexed to the notice of motion as X1 and X2.
- [4] The first respondent was dissatisfied with the awards and gave notice to the second respondent and the adjudicator of such dissatisfaction

within the required time and referred the dispute to arbitration. The notice given by the first respondent was in accordance with the provisions of clause 40.3.4 which read as follows:

“40.3.4 Should either party be dissatisfied with the decision given by the adjudicator....the dissatisfied party shall refer the dispute to arbitration.”

- [5] In consequence of the steps taken by the first respondent the awards were not final but were subject to the outcome of the arbitration.

During January 2013 the applicant requested the first respondent to confirm that it was approaching the Association of Arbitrators for the appointment of an arbitrator. The first respondent proposed that before it approached the Association of Arbitrators the parties attempt to agree on the appointment of a mutually acceptable arbitrator. During April 2013 the applicant advised the first respondent that it would revert to the first respondent concerning the proposal. The applicant never reverted. The applicant's written consent to proceed with the arbitration was never given as required by Section 165 of the Companies Act 71 of

2008. The first respondent has not yet approached the Association of Arbitrators and the arbitration is pending.

- [6] The applicant brought an application to this court seeking to make the awards orders of court notwithstanding that the arbitration had not been finalised. The applicant sought the relief set out above and expressly stated the following:

“7. I depose to this affidavit in support of an application to have an adjudicator’s award made an order of court...”

[7] The applicant submitted that by reason of clause 40.3.3 of the contract, notwithstanding the referral to arbitration, the adjudicator’s award was binding on the parties who were obliged to give effect to it without delay unless and until it was subsequently revised by an arbitrator. The applicant’s further submission was that in terms of the adjudication rules and in particular, Rule 7.2.2, it was entitled to apply to court for the enforcement of the determination as a contractual obligation.

[8] The court a quo accepted that the award could not be made an order of court but held that the applicant’s use of terminology had not prejudiced the first respondent. The court accordingly held that the adjudicator’s award was enforceable and that the notice of dissatisfaction did not detract from its enforceability. The court accordingly made the following order:

“51.1 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;

51.2 That 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;

51.3 The respondent shall pay the applicant’s costs of the application.”

[9] The relief claimed by the applicant as well as the cause of the action which founded that relief was to make the awards orders of court. The relief claimed by the applicant was not directed towards obtaining payment of money or enforcing a contractual

obligation. Had the applicant claimed enforcement of the contractual obligations arising out of the contract, the relief

sought would have been different, other allegations would have had to have been made and the first respondent would have had the

opportunity of dealing with the allegations to raise whatever defences and factual matters it had in relation thereto.

[10] The contract between the first and second respondents recognises the difference between an award and the enforcement of contractual

obligations. To establish a right to enforce the award, the applicant was required to establish that it is in possession of an award that can properly form the subject of an order of court. See: *Vidavsky v Body Corporate of Sunhill Villas 2005 (5) SA 200 (SCA)* at paragraph 17.

- [11] There was no arbitration award which could be made an order of court as no arbitration had been held and as the adjudication itself had not been finalised. As such, the award was subject to the outcome of the arbitration.
- [12] The court a quo was not entitled to consider whether or not a contractual provision was to be enforced as this was not the issue before it. The applicant did not seek relief in the form of the enforcement of a contractual obligation. There was no factual basis laid for relief in the form of the enforcement of the contractual obligation. If the matter was to be decided on a basis otherwise than that laid out, proper notice had to be given to the parties who would be entitled to be afforded appropriate time to deal with the altered claim. See: *Kauesa v Minister of Home Affairs and Others* 1996 (4) SA 965 and 973. See also: *Johannesburg City Council v Bruma Thirty-Two (Pty) Limited* 1984 (4) SA 87 (T).
- [13] The matter before us is distinguishable in that it is an application for the enforcement of an arbitration award as opposed to a claim for the payment of money. See *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC)
- [14] In the premises, the appeal is upheld with costs and the order of the court a quo substituted as follows:

“The application is dismissed with costs.”

SNI MOKOSE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

I agree

CG LAMONT

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

MA MAKUME

For the Appellant:

AJ EYLES SC instructed by

Bowman Gilfillan Inc

For the First Respondent

J DANIELS instructed by

Frese Moll & Partners

Date of hearing: 26 February 2018

Date of judgement: 19 March 2018

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPJHC/2018/446.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/steve-biko-foundation-v-frese-no-and-others-unknown-topic-agpjhc-2018>

Prepared on 11 October 2026 · Esheria