REPUBLIC OF SOUTH AFRICA

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

Case No: 2018/0039706

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) ~~REVISED~~.

19/02/2020
SIGNATURE DATE

REMKOR MANUFACTURING (PTY) LTD Applicant

and

AVUKE TECHNOLOGIES (PTY) LTD Respondent

JUDGMENT

INGRID OPPERMAN J

INTRODUCTION

[1] The Applicant applies for the final winding up of the Respondent on the grounds that the Respondent is unable to pay its debts in terms of Section 344(f) of the Companies Act.[1]

[2] The application is premised upon two purchase orders[2], performed upon by the Applicant in terms of a detailed set of terms and conditions[3].

[3] The Respondent only partially performed in terms of the agreement by making payment only in respect of the first purchase order. The Respondent failed to honour its obligations owed to the Applicant in relation to the second purchase order, causing the Respondent to remain a trade creditor of the Applicant in the sum of R2,821,780.20 which amount remains unpaid.

[4] The Respondent opposed the application on the basis of an oral agreement allegedly concluded between the parties on 28 February 2018. Pursuant to filing its answering affidavit and after receipt of the replying affidavit, the Respondent filed a supplementary answering affidavit to which a reply was filed. The supplementary affidavit sought to introduce a further defense, which took a year to raise. At the commencement of the hearing, the receipt of these affidavits was argued and I ruled in favour of receipt of the further evidence. I did not provide reasons at the time but my considerations for allowing the supplementary matter were primarily that the Applicant had dealt with the new allegations comprehensively and there was little prejudice to the Applicant but considerable potential prejudice to the Respondent if not allowed.

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1 61 of 1973

2 First purchase order, 15 September 2017 for 100 steel enclosures (kiosks); Second purchase order dated 18 September 2017 for 700 units.

3 Section B of credit application – terms and conditions, p 41 - 44

RESPONDENT'S INDEBTEDNESS

Credit Application and Terms

[5] The relationship between the parties spawned from a credit application, submitted by the Respondent in September 2017. Such credit application was accompanied by the Applicant's standard terms and conditions (*'the agreement'*).

[6] The terms of the agreement included that any amount reflected in a tax invoice would be due and payable unconditionally within thirty (30) days from the end of the month in which the tax invoice had been issued;[4] the signature of any agent, subcontractor, contractor or employee of the Respondent on any delivery note would constitute proof of valid delivery of the goods so purchased;[5] the risk in and to the goods would pass from the Applicant to the Respondent at the time of delivery, notwithstanding that ownership was reserved until receipt of full payment;[6] the agreement constituted the entire agreement between the parties and no other terms, whether express or implied, would be of any force or effect unless reduced to writing and signed by both parties, including variations, cancellations or additions thereto.[7]

[7] It is common cause that the Applicant accepted the credit facility on 26 September 2017.

Purchase Orders

[8] The Respondent placed two purchase orders in short succession. The first order pertained to an order for 100 steel enclosures and each order was split into two components, the inside box (T-wiring) and the outside box. It is not contentious

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4 Clause 1.1
5 Clause 8.1
6 Clause 8.4
7 Clause 21

that the invoices in relation to the first order had been paid. In the context of this application, the outstanding payments are owed in relation to the second order.

[9] It was against such orders, that the Applicant continued to manufacture and supply the steel enclosures and delivered same to the Respondent's designated address.

Performance and breach

[10] The Applicant complied with the terms of each purchase order. This emerges from the complete transactional history (contained in a separate file) which shows each invoice, signed delivery note, together with a complete account ledger.[8]

[11] On 29 January 2018, the Respondent sought to place a further order for a further 1,000 units. On account of the Respondent's bad payment record, the Applicant refused to accept the order.

[12] Against the Applicants' performance, the Respondent provided a series of undertakings to pay, which undertakings were not honoured.

[13] On 30 July 2018 the sheriff served a section 345 of the Companies Act demand on the Respondent at its registered address. The demand called upon the Respondent to pay, secure or compound to the satisfaction of the Applicant, the amount of R2 821 780.20. The Respondent, through its attorneys, responded on 15 August 2018 disputing its indebtedness.

APPLICABLE LEGAL PRINCIPLES

[14] Where it *prima facie* appears that the Respondent is indebted to the Applicant, the onus is on the Respondent, not to prove that it is not indebted to the

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[8] The Applicant only attached to the founding papers the outstanding invoices and delivery notes, as those were regarded as the only relevant documents in support of its performance. However, a complete arch-lever file was prepared and served on the respondent containing the entire transactional history.

Applicant, but to prove on a balance of probabilities that the indebtedness is disputed on *bona fide* and reasonable grounds. The former principle has been augmented in *Machanick Steel & Fencing (Pty) Ltd v Wesrhodan (Pty) Ltd* 1979 (1) SA 265 (W) 269.

> "In my approach to this matter I must bear the following in mind. An application for the liquidation of a company should not be resorted to to enforce the payment of a debt which is *bona fide* disputed by the company. The liquidation of a company affects the interests of all creditors and shareholders and an order for its liquidation should not lightly be granted on the application of a single creditor (*Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T)).
>
> On the other hand, as appears from this case, where it *prima facie* appears that a respondent is indebted to an applicant in an application of this kind, the onus is on the respondent to show that such indebtedness is disputed on *bona fide* and reasonable grounds. I refer in this regard to the judgment of HIEMSTRA AJ, as he then was, at 348B, where the learned Judge is reported to have stated the following:
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> 'Die respondent betwis die geldigheid van die beweerde skuld en ek is van oordeel dat die juiste benadering is om te oorweeg of respondent die Hof op 'n balans van waarkskynlikheid oortuig het, nie dat die beweerde skuld nie opeisbaar is nie, maar dat dit *bona fide* en op redelike gronde betwis word."
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> See also *Meyer NO v Bree Holdings (Pty) Ltd* 1972 (3) SA 353 (T); *Kalil v Decotex (Pty) Ltd* 1988 (1) SA 943 (A) at 980.

[15] It has been held that it must be the debt that is disputed and not the amount, see: *Re: Tweeds Garages Ltd* 1962 1 All ER 121; *Prodential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd* 1976 (2) SA 856 (W) at 867.

[16] In *Absa Bank Ltd v Rhebokskloof (Pty) Ltd & Others*[9] it was held that the Court has a *"limited discretion"* to refuse a winding-up order. At 440F-I it was held:

> "Turning to the merits of the matter, Mr Gauntlet contended that ABSA was entitled to a final winding-up order on the basis that Rhebokskloof was 'commercially insolvent'. The concept of commercial insolvency as a ground for winding-up of a company is imminently practical and commercially sensible. The primary question which the Court is called upon to answer in deciding whether or not a company carrying on business should be wound-up as commercially insolvent is whether or not it has liquid assets or readily releasable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading – in other words, can the company meet current demands on it and remain buoyant? It matters not that a company's values, fairly valued, far exceeds its liabilities: once the court finds that it cannot do this, it follows that it is entitled to, and should, hold that the company is unable to pay its debts within the meaning of Section 345(1)(c) as read with Section 344F of the Companies Act, 61 of 1973, and is accordingly liable to be wound-up."

> And at 441F-I the Learned Judge is furthermore reported to have said:

> "Mr Hodes submitted, in the second place, that this was a case where the Court ought to exercise its discretion against the grant of a final order ... there is, however, to my mind, no justification for exercising that narrow discretion open to me in favour of the company, and the suggestion that a mortgage bond be passed by the company over its property does not warrant a finding that this would constitute an asset readily available or even an asset sufficiently available as to justify a refusal to grant a final winding-up order. Nor is there any obligation on ABSA to execute against the company's immovable property or to institute provisional sentence proceedings on the basis of security held; nor can the Court assist on ABSA doing so; nor should the Court exercise its limited discretion against ABSA because it chooses to seek a winding-up order." (emphasis provided)

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[9] 1993 (4) SA 436 (C)

BASIS OF OPPOSITION

The oral agreement

[17] The Respondent's opposition to the application is firstly based on an oral agreement, concluded on 28 February 2018. The oral agreement was to the effect that payment is not yet due and payable as the parties agreed that payment of the Applicant's invoices were made subject to Eskom's performance of its contractual obligations to the Respondent, namely to accept deliveries and make payment therefore; the Applicant would stockpile kiosks at its own expense with the hope of the Respondent supplying Eskom as and when Eskom places orders with the Respondent; all future dealings would be on the basis of sale and return, i.e. the Respondent would be entitled to return kiosks, which it was unable to sell Eskom.

[18] There are four compelling reasons that strongly militate against the conclusion of the alleged oral agreement in February 2018.

Timeline with Reference to the Date of Its Conclusion

[19] The Applicant's claim relates to orders agreed to and executed during September 2017. The third order dated 31 January 2018 was rejected on account of the Respondent's bad payment history.

[20] The oral agreement, allegedly concluded in February 2018, could only have been concluded in respect of the third order that never came into being. The oral agreement can thus not have any impact on the September 2017 orders.

The non-variation clause

[21] Clause 21, the non-variation clause, is a total bar to the existence of the oral-agreement.

[22] The Applicant's standard terms and conditions contains a non-variation clause, which is in line with clauses in similar agreements to the effect that no

amendment of the agreement or any provision or any term thereof and no extension of time, waiver or relaxation or suspension or consensual cancellation of any of the provisions or terms of the agreement shall be binding, unless recorded in a written document signed by the relevant parties.

[23] Our Courts have frequently confirmed the efficacy of such non-variation clauses, see *Spring Forest Trading CC v Wilberry (Pty) Ltd t/a Eco Wash & Others*, 2015 (2) SA 118 (SCA), para [13].

[24] Measured against the authorities, the oral variation of the agreement, is clearly impermissible in law. The concomitant result is that the terms governing the September 2017 orders, remain *extant* and continued to govern the relationship between the parties.

Agreement Makes no Commercial Sense

[25] The terms of the agreement are improbable as it makes no commercial sence. It is inconceivable that the Applicant would have agreed to create a stockpile, at its own expense, for the benefit of the Respondent in the hope that orders would be placed by the Respondent's customer (Eskom) in future in circumstances where the Applicant has no contract with the customer(Eskom), nor any legal *nexus* to enforce payment in respect of its production; the Applicant has no off-set for the specialised goods manufactured for the Respondent, for which the Applicant has no market.

[26] Perhaps the most curious feature of the oral agreement is that the Respondent alleges that the dealings would continue on the basis of 'sale or return', i.e. the Respondent would be entitled to return unsold kiosks to the Applicant in a situation where Eskom did not perform its part of the contractual bargain as between the parties.

The oral agreement was never raised in any correspondence

[27] Although the papers are littered with correspondence, the oral agreement is not raised even once. If the Respondent did indeed have a right to only make payment when it received purchase orders and payments from its customers, one would have expected the Respondent to have raised this.

[28] The Respondent would certainly have relied on such right. Instead the Respondent continually apologised for its inability to pay. The following extracts from the numerous undertakings undermines any reliance thereon:- by e-mail 23 May 2018 *"Please accept our sincere apologies for the inconvenience"*; on 15 June 2018 "*We as Avuke Directors apologise for the late payment and guarantee that this would not happen in the future*"; in the Respondent's letter dated 14 June 2018 "*We are profusely apologetic for all the late payment delays over the past couple of weeks. The Directors of Avuke would like to thank you for bearing with us in this time, but your accounts will be settled in a much faster fashion in the future. We endeavour not to have this happen again, we do understand that our reputation is at risk with your account. Understandable that you cannot be held to account for our client's misfortunate events."*

Defective goods

[29] Some of the kiosks manufactured by the Applicant, had been left covered in plastic wrapping, for over a year. As a result of the hot-house environment so created, the paint coating has started to peel. The Respondent seeks to place reliance hereon in an attempt to avert its liquidation.

Defense is contractually excluded

[30] The nub of the Respondent's defence is contained in para 20 of its supplementary affidavit signed in April 2019. It states:

'The Applicant is accordingly in breach of its warranties pertaining to both its ability to manufacture the outside enclosures in accordance with sample, specification and drawings and the undertaking that the enclosures would be good for a five (5) year period.

[31] Respondent contends there was a 5 year guarantee – yet clause 13 expressly excludes this. What is promoted in the supplementary answering affidavit, is a breach of warranty of five years coupled with a damages claim. Both such contentions have been contractually excluded.

[32] In respect of damages, clause 13.1 records that the Applicant will not be in any way responsible for losses, consequential losses, damages or delays sustained by the Respondent.

[33] The warranty relied on is also in conflict with the provisions of clause 13.2 which states that the Applicant '*provides no guarantees or warranties (whether express of implied) as to the suitability of any goods for any purpose for which they are required.*'

[34] There is a wealth of authority in support of the fact that a term may not be imputed, if it is in conflict with the express provisions of the agreement, see *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA) at para [18] and [19].

[35] The respondent sought to rely on clause 9.1 that: *'New goods are guaranteed according to either REMKOR'S specific warranties, or the original Manufacturer's warranties.'* There were no specific written warranties included in the application and this clause can, accordingly, not avail the respondent.

Exception non adempleti contractus

[36] It is important to point out that the agreement designated the time for the Respondent's performance. It is stated that the Respondent was to make payment within thirty days from the end of the month in which the tax invoice has been issued. The agreement continued to provide that payment shall be made without deductions of any nature (clause 1.1 of the agreement).

[37] The Respondent breached its own obligations. It did not make payment as and when it fell due. This situation persisted in the prelude to the Section 345 demand; and continued in protracted litigation stretching almost a year. Then by way of a supplementary answering affidavit in which this defense was raised for the first time.

[38] In the case of reciprocal obligations, and in a bilateral contract, a claim for counter performance is only competent if such party has performed or is ready and willing to perform any obligations resting on him which are due and reciprocal, see *WD Russel (Pty) Ltd v Witwatersrand Gold Mining Co Ltd* 1981(2) SA 216 (W) at 219 – 220.

[39] So considered, the Respondent's failure to have made payment on the designated date (being a thirty day account) without deduction or set-off, constitutes a breach of its own obligations. It thus does not behove a Respondent to rely on defective performance manifesting more than a year later, as an excuse of what was due twelve months earlier.

[40] There are two further compelling reasons as to why any reliance on an *exceptio non adempleti contractus* cannot be sustained. In the first instance, it was the Respondent that elected to cancel the various agreements. There is no valid basis for such cancellation in the face of the Respondent's own failure to perform. In

addition, no demand was made to the Respondent to rectify any performance much less was performance tendered by itself. Such purported cancellation is bad in law and constituted a repudiation of the agreement. In such instance, the Respondent cannot raise the *exception non adempleti contractus* as a basis for withholding payment. This principle was endorsed by the Supreme Court of Appeal in the matter of *Food & Allied Workers Union v Ncobo NO* 2013 (5) SA 378 (SCA) at para [50].

[41] Secondly and crucially – the Respondent cannot cancel and then rely on the terms of the cancelled agreement. It is confined to damages.

The damages claim

[42] The respondent has resorted to defense labeling in relying on a fraud. There is no factual foundation laid in the papers before this court to suggest a fraud and I find that the reliance on *Brisley v Drotsky,* 2002 (4) SA 1 (SCA) at 12 A-B is misplaced.

[43] On the papers, the respondent contended that it cancelled the agreement by virtue of this fraud and communicated its election in its supplementary affidavit dated 16 April 2019, which left it with a damages claim at best. An unliquidated counterclaim to a winding-up application, does not raise a dispute as to the Respondents indebtedness, see *FirstRand Bank v Normandie Restaurants*, [2016] ZASCA 178 (25 November 2016) at [26]

[44] But even if I am wrong on the finding that no basis has been laid for the existence of a fraud and I ought to have found that the agreement is *void ab initio by virtue of this fraud* (misrepresentation which induced the conclusion of the agreement), this can't assist the Respondent as 800 units were supplied to the Respondent who remains possessed of 110 units only. Restitution is no absolute right. Where you cannot return what you received, which is the case here (save for

the 110 units), the Respondent is left with a claim for unliquidated damages and is faced with the *Normandie* (supra) difficulty.

[45] An argument was advanced that the damages suffered is liquidated. The facts do not bear this out. No evidence was placed before the court as to how many units were allegedly damaged, the amounts actually incurred in repairing the units do not necessarily equate to what ought reasonably to have been expended and the methodology is flawed as the Respondent does not disclose how many units were damaged. All of this impacts on the liquidity of the damages claim. Once the damages claim is illiquid, which I find it to be, it constitutes no defense to the winding-up application.

RESPONDENT MAKES ITS OWN CASE FOR LIQUIDATION

[46] The Respondent tendered return of 110 kiosks, which remains in its possession. According to the Respondent, it must then have sold 690 kiosks of the 800 kiosks ordered and delivered. It is common cause that the Respondent has not paid for 220 kiosks. It only has 110 in its possession. On Respondent's version, the Applicant is owed for 110 kiosks. To state the converse, the Respondent has already sold half of what is owed, yet failed to make the concomitant payment to the Applicant.

CONCLUSION

[47] A dispute as to the precise amount owing cannot defeat the winding up provided that such dispute does not push the amount of the indebtedness below the minimum statutorily required amount, which of course is not suggested here.

[48] I find that the Respondent has failed to prove on a balance of probabilites that the indebtedness is disputed on *bona fide* and reasonable grounds.

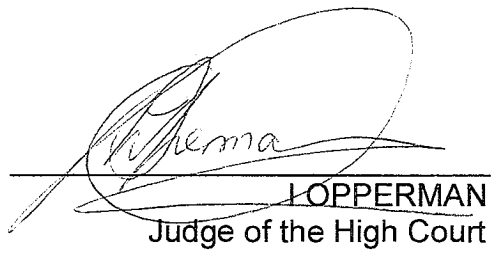
[49] It was accepted that all the statutory requirements such as service on SARS, trade unions and the like have been complied with and I am so satisfied.

ORDER

[50] I accordingly grant the following order:

50.1. The Respondent is placed under final liquidation.

50.2. The costs of the application are to be part of the winding-up of the Respondent which costs are to include the costs for the application for the condonation for the late filing of the replying affidavit.



I OPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

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Instructed by: Shapiro-Aarons Inc
Date of hearing: 3 & 4 December 2019
Date of Judgment: 19 February 2020