IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA) CASE NO: 36414/2012

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

DATE 15/2/2016 SIGNATURE

In the matter between

24/2/2016

ARGENT STEEL GROUP (PTY) LTD		APPLICANT
and		
GO SUSPENSIONS AND AXLES (PTY) LTD		RESPONDENT
	AND	
T. P. KUBERE		1ST INTERVENING PARTY
D. M. MADHLABANE		2ND INTERVENING PARTY
and		
ARGENT STEEL GROUP (PTY) LTD		1ST RESPONDENT
GO SUSPENSIONS AQND AXLES (PTY) LTD		2ND RESPONDENT
M. F. RAMONETHA N.O.		3RD RESPONDENT

JUDGMENT

PRELLER J:

This is a dispute about liability for the reserved costs of an opposed application for the liquidation of the respondent. There was also an application to intervene by two of the employees of the respondent. For the sake of convenience I shall refer to the parties in the main application as the applicant and the respondent and where applicable, to the others as the parties for intervention.

The history is briefly that the applicant and the respondent have had a business relationship since about 1993. The respondent manufactures axles and suspensions for heavy trailers and uses the services of the applicant to make certain bushes and other components. For this purpose the respondent had provided certain moulds to the applicant. The respondent, incidentally, alleges that the applicant used these moulds in order to compete unlawfully with the respondent and in fact stole one of its main customers in the process, resulting in severe financial losses for the respondent. The allegation is denied by the applicant, who points out that the respondent surprisingly does not annex nor even allege any correspondence to corroborate this serious accusation.

What is not disputed, however, is that the respondent experienced financial difficulties during 2012. As a result the applicant was informed by a firm of business consultants that they had been "*mandated to facilitate the recapitalisation*" of the respondent. It seems to me that what it means is that money would be lent to the respondent against the security of a bond over its property. At that stage the respondent was indebted to the applicant to the tune of almost R 200 000.

I am not informed what the outcome of the mandate, the facilitation or the recapitalisation was, but the respondent alleges that it made an arrangement with the applicant to purchase goods from it on a C.O.D. basis with the qualification that all payments made on that basis would be allocated not to the current sale, but to the oldest debt on the applicant's books. The purpose of the arrangement was, according to the respondent, "*to enable the age analysis on the respondent's trade account to reflect a more healthy balance and would allow the respondent to pay off the arrears owed to the applicant sooner rather than later.*" This probably means nothing more than the intention was to make the respondent's debts in the applicant's books look better, but the respondent does not explain how the outstanding balance would be reduced without additional payments.

By December 2012 the applicant caused a letter of demand in terms of section 345 of the Companies Act to be written to the respondent in respect of the outstanding amount. The letter was addressed to the registered office of the respondent and was to be served by the sheriff. For some reason service was only effected in April 2013. The managing director of the respondent says that the auditor of the company forwarded the letter to him, but that he did not pay particular attention to it because he received it at a time when he was very busy and when he noticed that it was dated some four months earlier, he assumed that the notice had lapsed and he just ignored it.

On 12 June 2013 the applicant launched the application for liquidation. It was served at the registered office of the company, being that of ARB Inc., the auditors of the company, on 18 July 2013. The delay of more than a month

between the issue and the service of the application is not explained.

Something needs to be said about the returns of service. In terms of Uniform Rule 4 service can be effected **on** a company **at** its registered office by handing a copy to a responsible employee. Despite the clear requirements of the rule, the sheriff merely rendered four returns of service according to which he had served copies "*on ARB*" by leaving copies with "*Tina the secretary*". The Rule requires service on the company and not on its auditors. It is the duty of an attorney to scrutinise the sheriff's return and if it is not in order, to insist on better service or that a proper return be rendered. The offices of the auditors are in Illovo, Johannesburg, while the principal place of business of the respondent is, to the knowledge of the applicant, in Alberton. Although service at the registered office would have sufficed, it would have made more sense to serve on the respondent, its employees and the relevant unions at its principal place of business. The terms of the attorney's instructions to the sheriff are not clear, but according to the last page of the Notice of Motion it was addressed to *inter alia* the respondent, its directors, employees and auditors, all at the same address in Illovo. The question whether service on the employees in this manner was valid, is a major dispute in this application.

The application is based mainly on the respondent's failure to react to the letter in terms of sec. 345 and also on its failure to pay as envisaged in the letter from the business consultants. Under the circumstances set out above the application was not opposed and on 1 August 2013 a provisional order of liquidation, returnable on 17 October, was granted. In terms of the order it had to be served on *inter alia* the Master, SARS and the employees of the company.

Once again there was an unexplained delay of more than a month before service was effected on 6 September 2013 on the secretary of ARB "...at THE DIRECTORS OF THE Defendant Company's registered office..." (presumably intended as service on the directors, since there was also service on the respondent at the same address) and also on her "...at THE EMPLOYESS (sic) Company's registered office...". The latter is the only indication that any attempt was made to serve the order on the employees.

Notice of intention to oppose was delivered on 3 October together with an opposing affidavit by the respondent's managing director. The affidavit concludes with prayers that:

1. The provisional order be discharged;
2. The application be dismissed;
3. It be declared that the application is an abuse of the procedure, alternatively is malicious or vexatious and that the respondent be allowed to prove the damages (sic) that it may have suffered and to be paid such compensation as the court may deem fit;
4. An order for costs on the scale as between attorney and client as well as any costs incurred in the process of the provisional liquidation.

In the affidavit the managing director explains that he only learnt of the existence of the provisional order on 5 September when he received a phone call from the respondent's bank manager. He saw the respondent's attorney and auditor on 10 September and the affidavit was commissioned more than three weeks later on 2 October.

More than five pages of the answering affidavit are devoted to the respondent's objections *in limine*. The deponent complains that there has not been proper service on SARS because there is nothing more than a feint SARS date stamp on his copy of the application. He states that the time of service and also the name of the person who received the copy should have been reflected on the original and other copies. That is news to me since I have never in the years that I have been on the bench seen such an acknowledgement of receipt by SARS and a simple date stamp has consistently been accepted as sufficient proof of service.

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The main ground of objection in this regard is the applicant's failure to serve on the employees and any unions representing them at the principal place of business. The deponent complains in exaggerated terms about the applicant's "lack of respect and utter disregard for the plight" of the employees. He argues that the provisions of sec. 346(4A)(a) of the Companies Act are peremptory and that the application has to be served on every relevant union and also on the employees by affixing a copy on a notice board or at the main entrance to the premises. I have always understood the effect of the provision to be that the principle of notice to the employees and unions is peremptory and that the

20 manner of such notice is in the discretion of the court. I have often come across cases of a provisional order having been granted without adequate or even any notice to them and the court then giving directions for service of the final order on them.

The deponent goes further and submits that the failure of the legal practitioner moving the order to invite the attention of the court to the defects amounts to

improper conduct and should be reported to his/her professional body. Later in the papers the respondent insists on the name of the practitioner being disclosed and even asks for an order for costs *de bonis propriis* against the applicant's legal team. I prefer not to go into the details of the correspondence that was later exchanged between the attorneys on this topic. It is not clear on what basis this order is sought, i.e. whether the respondent intended that the matter be argued as an appeal or otherwise. No information is available about the events at hearing of the application and the respondent did not provide a transcript of the recorded proceedings. It is therefore by no means clear that the court hearing the application was unaware of the defective service on the employees and their unions. In my experience the first thing that a judge checks in preparing the roll for the unopposed motion court, is whether there has been proper service on all parties concerned. It is therefore likely that the court hearing the matter would have debated the defective service with counsel appearing for the applicant and may have been persuaded to condone whatever defects there may have been. If a court considered the service and decided to condone any defects, the order stands until it is set aside on appeal.

The respondent submits that the letter of demand and subsequent application constitute an abuse of the process, because the applicant was aware that the respondent is well able to meet its commitments in the ordinary course of business. According to the respondent this is evidenced by the fact that the applicant is continuing to sell goods to the respondent on a COD basis, which implies that the respondent is able to pay for its purchases. The running up of "enormous costs" in launching the application is described as "...simply a stratagem ... to obtain payment of its claim sooner rather than later and to

bypass the ordinary court process by holding a proverbial gun to the respondent's head." The respondent advances this alleged improper conduct as justification for a punitive cost order against the applicant. I have referred above to the respondent's argument about the COD payments and will come back to the running up of costs later in this judgment.

The following defences are raised on the merits of the application:

1. The respondent has a counterclaim for several million Rand arising from the unlawful competition mentioned above. Although the applicant pointed out the absence of any correspondence dealing with this aspect, the respondent did not deal with it in its further affidavit.

2. The claim for R 192 00 on which the applicant relies would have been "substantially reduced" by way of the payments made in terms of their C.O.D. arrangement and which the applicant failed to credit to the trading account. It is not explained how the respondent's total indebtedness, be it in terms of a trading or some other account, would be reduced by C.O.D. purchases unless there were additional payments, of which no mention is made. If the respondent's oldest debt were to be extinguished by the payment for a fresh C.O.D. purchase, a fresh debt for exactly the same amount would be added to the total indebtedness, making no difference at all to the amount owing.

3. The respondent is not insolvent and in fact has reserves of more than R 24 million. The respondent also annexes copies of its "Nedbank

Greenstone account" bank statements for the period since June 2013 "to the present", which would be the date of the affidavit, being 2 October 2013. The statements consist of 16 pages which are not chronologically bound. The earliest date that I could find on any of them was 31 May and the latest 11 September. There are no statements for the period between 12 September and the date of the affidavit. Furthermore I could not find any indication that the statements are from a Nedbank Greenstone account, if the name means anything. I could find the name of the respondent and the account number supplied on only three of the 16 pages. In the circumstances the annexures are of very limited assistance and constitute sloppy work. What is significant, however, is that the statements consistently show a credit balance, most of the time in excess of several hundred thousand rand, often more than R1 million and on a few days more than R2 million. It seems to me that some consideration should have been given to the possibility of saving the considerable costs of this litigation by simply paying the applicant's claim, if needs be under protest, or of providing security for the claim.

4. On 5 June 2013 and in the regional court the applicant issued summons against the respondent for the same amount. The claim is defended on the basis of the respondent's counterclaim, but unfortunately the respondent does not say whether the application was launched before or after the notice of intention to defend. The respondent says that the fact that the applicant instituted action rather than bringing an application for judgment, indicates that the applicant is aware that there are genuine disputes of fact that would rule out motion proceedings.

5. Insofar as it may be a defence, in answer to the applicant's reference to the proposed recapitalisation the respondent says nothing more than that the industry as a whole suffered a downturn, but that the respondent succeeded in obtaining sufficient capital to ensure that it could continue to trade profitably. Nothing is mentioned about paying the applicant's claim.

The respondent concludes by submitting that the prejudice caused to it by the application is "extremely grave and real". This consists mainly of the prejudice to its reputation in the market place, the deprivation of its board of its powers of decision-making and the interruption of its ongoing work.

On the return day of the provisional order (17 October 2013) the respondent applied in the unopposed motion court for the discharge of the provisional order. Not unexpectedly the court did not decide the opposed application in the court for unopposed matters and simply extended the return day to 20 December, being the next available motion court day.

The respondent thereupon launched an urgent application on 21 October for hearing on 29 October. The immediate relief sought was for the anticipation and discharge of the provisional order with a punitive cost order, and further relief in the form of a declaratory order that the application constituted an abuse of the procedure and certain ancillary relief, which was to be heard at a later date. On 23 October the applicant served its replying affidavit in the original application, which was apparently also intended to serve as its opposing affidavit in the urgent application. The applicant points out that the financial

statement annexed by the respondent shows that it made a loss of R 8.7 million in 2012/3 and a profit of only R 209 193 over the next six months. It also remarks (somewhat cynically, in view of the admittedly lame explanation for the respondent's failure to oppose the initial application) that the "technical objections" about service of the papers should have been raised when the application for the provisional order was heard.

The respondent did not file any replying papers in the urgent application and the outcome was that the application was struck off the roll with costs for lack of urgency. In its "Further Affidavit in Regard to Costs" the respondent submits that the latter order was incorrectly made, without any attempt to explain the delay between being informed of the provisional order and the launching of the urgent application.

On 4 November 2013 certain employees of the respondent gave notice of an urgent application, to be heard on 12 November, for leave to intervene and have the provisional order declared a nullity. It seems that at this late stage sanity finally prevailed: the parties obviously discussed the matter sensibly and the order was granted by consent, the costs of the proceedings being reserved for later determination. The court order also noted that the respondent had, without admitting liability, consented to provide security for the amount of the disputed claim.

After the order referred to above the respondent filed a further affidavit regarding the issue of costs. This evoked an answering as well as a replying affidavit which, together with the annexures thereto, ran to more than 200

pages. They consist mainly of arguments, reproaches and a regurgitation of the contents of letters exchanged between the attorneys of which neither side can be proud. If the ball had been played rather than the man, the dispute could have been resolved long before the start of litigation.

I should also mention that the answering affidavit deals with 10 letters (annexures AFL3 to AFL12) as well as an affidavit which are simply not included in the bundle before me. In addition the first 13 pages of the answering affidavit were not bound in sequence and I had to dismantle the bundle and sort out the pages and bind them again before I could read the affidavit. As *dominus litis* it is the responsibility of the applicant to ensure that the record is in order.

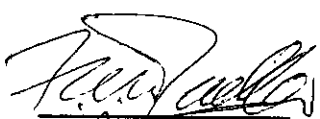
I am astonished that two substantial enterprises that had been in a business relationship with one another for almost 20 years could waste the amount of money and time that they did over an amount that is trifling when compared to the amount of the legal costs incurred in avoidable litigation. What is even more regrettable is that the mudslinging became only worse once their attorneys became involved.

I am now asked to decide who should be liable for the costs of these unfortunate proceedings. I take into account the cavalier approach of the applicant to its duty to effect proper service of the letter of demand and the application on the respondent and its employees as well as the state of the papers that were placed before me. On the side of the respondent I take into account that by its conduct and failure to react to the letter of demand, it was almost asking to be wound up. If it had all the cash available that is reflected in

the annexed bank statements, it would have been a simple matter to either pay or put up security for the amount of the applicant's claim, thereby putting an end to the prejudice of which the respondent was complaining. It is regrettable that neither of the parties nor their attorneys thought of simply making a phone call to the other side to put an end to the wasting of time and money. Furthermore the mudslinging and the playing of the man instead of the ball that is apparent from the correspondence annexed to the papers is not what one would expect from professional men acting in the interest of their clients.

10 As a mark of my disapproval I am not inclined to award costs against either party.

ORDER: **No order of costs is made.**



20 F G PRELLER
JUDGE OF THE HIGH COURT