IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 33468/2013

DELETE WHICHEVER IS NOT APPLICABLE

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

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

(3) REVISED. ✓

17/8/16
DATE

SIGNATURE

17/8/2016

In the matter between:

ETIENNE TOLMAY t/a QUALITY PLANT HIRE — **APPLICANT**

And

BLUE MOONLIGHT PROPERTIES 82 (PTY) LTD — **RESPONDENT**

SOTHERN PALACE INVESTMENTS 265 (PTY) LTD — **1ST INTERVENING PARTY**

LOUWRETTE FOURIE — **2ND INTERVENING PARTY**

JUDGMENT

Fabricius J,

1.

This application served before me in the Opposed Motion Court on 10 August 2016. Because it appeared to me that there could be scope for settlement of the various disputes between the Applicant and the Respondent I indicated to the parties that if no such settlement was forthcoming by 17 August 2016, I would make the appropriate order.

2.

As far as the formal application in terms of the relevant statutory provisions is concerned, I am satisfied that they have been complied with. In the Founding Affidavit the Applicant alleges that it performed certain contractual work for a residential development project. It says that during 2011 Respondent signed an acknowledgement of debt in which it accepted liability for the amount of R 1 399 746.82. This acknowledgement of debt was annexed to the Founding Affidavit. It is

further alleged that Respondent undertook the transfer of seven stands from the particular development to the Applicant on completion of the development. The value of these sites came to R 4 263 225.80. On that basis the work was eventually completed by the Applicant, and on 24 August 2012 he issued completion certificates. The relevant letters of demand were sent to the Respondent and all the payment certificates remained unpaid to date, so it was said. As I have said, the relevant section 345 Notice in terms of the Old Companies Act 61 of 1973 was delivered during January 2013. Applicant then gave details of the financial affairs of Respondent and concluded that Respondent was in fact unable to pay its debts and was also commercially insolvent.

3.

The Founding Affidavit was signed during May 2013. There was a long delay in the proceedings relating to the late filing of the Respondent's Answering Affidavit for which condonation had to be sought, and in that context further affidavits were filed as well, there were also intervening parties involved, but at this stage of the

proceedings, I was told by Counsel from the Bar, that I need not concern myself any further with either the condonation application affidavit, nor the intervening party's.

4.

The final liquidation application was launched on 30 May 2013. On 7 August 2013, the parties hereto, plus a further two parties, entered into a settlement agreement which the Applicant annexed to the papers by way of a Supplementary Affidavit dated 22 April 2014. He says in that Affidavit that "subsequent to the launching of the liquidation application, whereupon the matter was set down on the Unopposed Motion Roll for hearing, an agreement was entered into with the Respondent, titled Memorandum of Agreement, dated 5 August 2013 and attached hereto marked "A"." He also stated that in the light of the agreement the application for liquidation was postponed and then referred to certain terms of the agreement itself. The conclusion in the Supplementary Affidavit is that Respondent admits that it cannot pay its debts, that Applicant is a creditor of the Respondent in the sum of R 4 200,000, which amount is due and owing, and that it would be just and equitable that the company

be wound up. It is common cause from this Affidavit that the Option 1, referred to in the agreement fell by the wayside, and that Applicant relies on Option 2.

5.

Paragraph 3 of the agreement, which is presently relevant states as follows:

"3 RECORDAL:

3.1 QPH and Etienne have performed services rendered deliverables to Blue Moonlight in respect of the development property.

3.2 The costs associated with this service and deliverables performed by QPH and Etienne for and in favour of Blue Moonlight have not been discharged by Blue Moonlight to QPH and /or Etienne in full.

3.3 As from date hereof, capital amount outstanding to QPH and Etienne, jointly and severally is a sum of R 4 200 000.

3.4 QPH and Etienne have instituted proceedings, including liquidation proceedings against Blue Moonlight based on their capital."

Other paragraphs follow with reference to Forum SA, Southern Palace and Investec Bank, but for present purposes these are in my view not relevant any further.

6.

From paragraph 4, the actual agreement is spelled-out and paragraph 4.1 states that Blue Moonlight acknowledges its indebtedness to QPH in the amount of R 4 200 000. It acknowledges that the debt is due and payable. Payment of this debt will be made by the parties exercising one of the two options:

Option 1, this is an option relating to property owned by Forum SA and is no longer relevant to these proceedings;

Option 2, is the relevant option (this is common cause), and in paragraph 6.3 of the agreement the following is said: "If the alternative method (Option 2) takes effect, QPH will be entitled to the transfer of the Forum SA Trading property into its name, or into the name of any nominee of QPH, at an agreed price of R 2 500 000. This purchase price will be set off against the debt owing and payable by Blue Moonlight in terms of this agreement. Forum SA Trading will sign all

documents and pay all fees and/or payments due in order to obtain a clearance certificate from the Greater Tzaneen Municipality". Clause 7 of this agreement dealt with payment of the balance of the capital amount. Paragraph 8 is relevant and states that "whereas QPH has filed an application for the liquidation of Blue Moonlight and Blue Moonlight has filed a notice to oppose said application, the parties agree for the liquidation application to be withdrawn, but on condition that the terms and conditions of this agreement are fully implemented". Paragraph 11 of the agreement deals with cession of rights which would be, if necessary, embody such agreement to a separate agreement.

7.

Paragraph 12 of this agreement deals with breach and the relevant parts read as follows: "Should any party commit a material breach of this agreement and fail to remedy such breach within seven days of written notice requiring the breach to be remedied, then the party giving the notice will be entitled, at his discretion, either to cancel this agreement, claim damages or to claim specific performance of all the

defaulting parties' obligations together with damages, if any whether or not such obligations have fallen due for performance.

12.2 The parties specifically agree that in the event of Blue Moonlight and/or Forum SA Trading being in breach of this agreement, and failing to rectify its said breach, after notice in terms of sub-paragraph 12.1, QPH will be entitled to relief required in the application".

8.

Mr Swanepoel, on behalf of the Applicant agreed in his argument that this clause ought to be read with the addition of "subject to law, and/or subject to the Court's discretion". There was certainly no suggestion that a liquidation order would or could be issued as of right.

9.

I may just repeat that in deciding this application, I will not have regard to any new allegations made in further affidavits, nor those that are relevant, or vexatious.

10.

On behalf of Applicant it was contended that the mentioned agreement had been cancelled and that it was therefore entitled to proceed with the liquidation application. On 12 November 2013, Applicant's Attorneys wrote to Respondent stating that it intended exercising its rights as set out in Clause 12.1 of the agreement, if the alleged breach was not rectified within seven days. The liquidation application would then be set down without further notice. At the same time however, Applicant relied on a further cancellation letter dated 29 April 2015. This is some 18 months after the initial "cancellation letter". It was then said that this letter serves as a final notice in terms of Clause 1 of the said agreement "of our client's intention to cancel the agreement, unless the breach of agreement as set out herein, but not limited thereto, are rectified within seven days from receipt hereof, no further notice of cancellation will be served".

11.

On behalf of Respondent, in the course of arguing a number of other defences, raised the issue which I regard as material, namely that the parties had in fact agreed that they did not cancel the settlement agreement. In this context reference was made to Respondent's Founding Affidavit in the condonation application with the deponent on behalf of Blue Moonlight said the following (paragraph 5.9 page 352): "The settlement agreement was never cancelled between the parties and I am not aware of the status of the transfer process of the immovable property". The Applicant then drafted an Opposing Affidavit to the application for condonation and said the following in reply to this particular paragraph (paragraph 20 page 388): "It is confirmed that the settlement agreement was never cancelled..." In Respondent's Answering Affidavit to the liquidation application, Respondent then said the following (paragraph 4.1.4 page 538): "It is common cause that Forum SA was unable to procure the sale of the property to an independent purchaser in terms of Option 1 and the Applicant therefore became entitled to specific performance in terms of Option 2". It continued to say that the Applicant was obliged to enforce the

settlement agreement because the parties had not cancelled the same, and the Applicant had not claimed damages for breach of contract. Furthermore, it was said that "a creditor, who has *locus standi* to apply for the winding up of a company is a person who, by reason of an existing *vinculum iuris* between themselves and the company, has a claim against the company which may at least become an enforceable debt on the happening of some future event or at some future time. It follows that a debt must sound in money and a claim for the transfer of property or specific performance is not such a debt. Having exercised Option 2 of the settlement agreement, the Applicant is precluded from subsequently claiming the money. As a result of the exercise of Option 2, the Applicant has a claim for the transfer of properties. He is accordingly not entitled to enforce any debt against the Respondent, because the original debt is no longer in existence.

12.

On behalf of Respondent it was further pointed out that on 19 December 2013, Applicant's Attorneys in fact wrote and said that they demanded that the terms of the settlement agreement be implemented immediately. It was therefore argued that Applicant has to enforce the settlement agreement, because the parties have not cancelled the same and because the Applicant has not instituted a claim for damages for breach of contract. Enforcement and cancellation being inconsistent with each other, or mutually exclusive, the innocent party must make his election between them and he cannot both approbate and reprobate the contract. In this context I was referred to a judgment of Watermeyer J (as he then was) in ***Siegel vs Mazzur 1920 CPD 634 at 644 to 655***: "Now, when an event occurs which entitles one party to a contract to refuse to carry out his part of the contract, that party has a choice of two courses. He can either elect to take advantage of the event or he can elect not to do so. He is entitled to a reasonable time for which to make up his mind, once he has made his election he is bound by that election and cannot therefore and cannot afterwards change his mind..." It was, as I have already stated,

submitted that a debt must sound of money and a claim for the transfer of property was specific performance is not such a debt and, Applicant having exercised Option 2, is now precluded subsequently claiming the money. His claim would be for the enforcement of the settlement agreement. In any event, apart from what the parties themselves said in their Affidavits the purported notices of cancellation were ambiguous and certainly not clear and unequivocal as they must be.

See: ***PUTCO Ltd vs TV and Radio Guarantee Company (Pty) Ltd 1985 (4) SA 809 A at 830 E*** and ***Kragga Kamma Estate CC vs Flanagan 1995 (2) SA 367 (A) at 375 E to F.***

I agree with that submission. The authorities are clear.

Furthermore, the settlement agreement was not the only agreement that compromised Applicant's claim against Blue Moonlight, because on Applicant's own version the parties agreed that Blue Moonlight would transfer seven of its properties to Applicant. This is indeed what Applicant's own Founding Affidavit says.

13.

In the above context I was also referred to the decision of Watermeyer J in ***Fryburg vs Van Niekerk 1962 (2) SA 413 (C)*** where the distinguished Judge held that in an application for a sequestration order the claim of the petitioning creditor must under the section (of the 1936 Act) be a monetary claim. Consequently an Applicant who had a claim for transfer of certain property or payment, but who has elected to claim transfer, has no *locus standi* to apply for a sequestration order.

14.

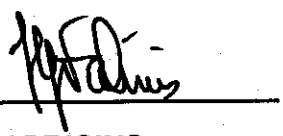
On behalf of Respondent it was further contended that Applicant's claim, whatever its true nature had become prescribed in terms of the Prescription Act. It was however not clear from the Respondent's own Affidavits in the context when exactly prescription had commenced to run, and whether or not it had been interrupted by an acknowledgement of debt subsequent thereto. I do not intend delving into this argument in any great detail inasmuch as it is not necessary on the one hand, and

on the other hand it seems that this particular issue could not be properly solved without the leading of oral evidence.

15.

In the result of all of the above, the following order is made:

1. **The application is dismissed with costs, such costs to include the costs of two Counsel.**



JUDGE H.J FABRICIUS

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA DIVISION

Case no.: 33468/13

Counsel for the Applicant: Adv P. A. Swanepoel

Adv P. A. Venter

Instructed by: Stephan van Rensburg Attorneys

Counsel for the Respondent: Adv D. B. du Preez SC

Adv J. A. du Plessis

Instructed by: Johann De Wet Attorneys

Heard on: 10 August 2016

Date of Judgment: 17 August 2016 at 10:00