Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case no.: 15059/2020

Before: The Hon. Mr Justice Binns-Ward

Hearing: 16 February 2021
Judgment: 19 February 2021

In the matter between:

NEW APPROACH TRADING 73 CC t/a LA DIESEL Applicant

and

PRECISION RIGGING (PTY) LTD Respondent

JUDGMENT
(Delivered by email to the parties' legal representatives and by release to SAFLII. The judgment shall be deemed to have been handed down at 10h00 on 19 February 2021.)

BINNS-WARD J:

[1] The applicant has applied for the provisional winding-up of the respondent company on the grounds that it is unable to pay its debts. The applicant alleges that it is a creditor of the respondent in the amount of R173 896,71 being in respect of certain services and repairs rendered to equipment that had been subject of 'sale and service' agreements concluded between the respondent and a third party, Portland Hollowcore Slabs (Pty) Ltd on 14 March 2019. The equipment included a Liebherr crane. Those agreements were subsequently

consensually terminated in terms of a 'Surrender and Termination Agreement' concluded on 23 January 2020.

[2] The respondent alleged that at the time of the conclusion of the sale and service agreements the Liebherr crane was 'broken'. It alleged that the crane was taken directly from Portland's premises to the applicant's premises to be repaired on the common understanding that the repairs to the crane were to be for Portland's account. It needs to be understood that in terms of the service agreement the purchased equipment was to be used by the respondent exclusively for the purpose of undertaking installation work for Portland in respect of 'Hollowcore Slabs' and 'other products to be installed such as stairs, steel/concrete beams or lintels'.

[3] The respondent has identified 15 invoices that it alleges are the subject matter of the applicant's alleged claim against it. Four of those invoices relate to the Liebherr crane. They are invoices 4898 (R1863,00), dated 31 May 2019, 5368 (R8320,20), dated 11 November 2019, 5369 (R57 375,35), dated 11 November 2019, and 5371 (R2906,94), dated 12 November 2019. The total amount charged in terms of the unpaid Liebherr crane-related invoices was therefore R70 465,49.

[4] I have some difficulty correlating the Liebherr crane invoices with the respondent's version described in paragraph [2] above because they all postdate the conclusion of the sale and service agreements by an appreciable time, and the first of the invoices, dated 31 May 2019 bears the narrative 'Proceed to vehicle at Portland Quarry, Check oil &water, bleed fuel system, check gearbox oil, oil needs to be topped up, test OK'. The amount invoiced comprised a call out fee of R350,00, 'travel to site' R270 and R1 000 for labour (all prices excl. VAT). It was only in mid-November 2019 that invoices for apparently extensive repair work to the Liebherr crane were rendered. Be that as it may, the applicant did not engage in

reply with the respondent's allegations concerning the Liebherr crane in any detail. It merely denied them.

[5] It seems to me that the merits or lack thereof in the Liebherr crane-related defence have been subsumed in the more general defence of the respondent that Portland undertook, in terms of the termination and surrender agreement, to pay all the amounts due to the applicant in respect of the repairs to the equipment that had been subject of the sale and service agreement.

[6] Clause 6 of the termination and surrender agreement provided:

> 'The parties agree that the total amount due to Precision [the respondent] by Portland in terms of "TA2" hereto [a copy of the service agreement] and/or otherwise, shall be retained by Portland as *inter alia* a termination penalty (which penalty Precision accepts to be reasonable) and/or damages for early termination of the agreements between Portland and Precision and/or an amount to be utilised to affect (sic) any repairs to the Goods'.

It is evident from the terms of the agreement construed as a whole that '*the Goods*' were the equipment that had been purchased by the respondent from Portland in terms of the sale agreement that was being terminated. The sale agreement was an executory agreement and, by virtue of its terms, Portland had retained ownership in 'the Goods' until the respondent had redeemed the purchase price thereof, which fell to be achieved by the appropriation by Portland of a stipulated percentage of the sums that it would periodically become liable to pay to the respondent for services rendered under the aforementioned contemporaneously concluded services agreement.

[7] The respondent alleged that the intended import of clause 6 was that Portland would assume responsibility for the payment of all of the outstanding repair bills for the 'the

Goods'. Mr *Newton*, counsel for the applicant, submitted, however, that it was clear upon a proper interpretation of clause 6 that the provision was intended to regulate responsibility for the payment of repairs that might be necessary to restore the returned equipment into proper operational order. It was, so counsel argued, plainly not intended to burden Portland with the debt already incurred by the respondent in respect of the repair of any of the equipment while it had been in the respondent's possession during the currency of the sale and service agreements.

[8] The clause might indeed be construed as Mr *Newton* would have it, but it is very loosely worded, and consequently ambiguous. That is in large part due to the employment in the clause of the expressions 'inter alia' and 'and/or'. The contextual setting does not make the respondent's contention as to the intended import of clause 6 an obviously far-fetched or untenable one. One of the objects of the surrender and termination agreement does appear to have been to draw a financial line under the abortive contractual relationship between the respondent and Portland, and it was done in a way that involved the appropriation of funds that would have accrued to the respondent in terms of the service agreement that was being terminated. It is by no means inherently improbable in that context that Portland would have undertaken to pay for the repairs effected to what was its own equipment from funds that would have come to the respondent.

[9] As the applicant's counsel was at pains to emphasise, however, an agreement between the respondent and Portland that the latter would pay for the repairs to the equipment commissioned by the respondent would not, by and of itself, release the respondent from its contractual obligations to the applicant in respect of such repair work. The applicant would have to agree to accept Portland as its debtor in the place of the respondent for that to happen.

[10] The respondent has alleged that the applicant did agree to look to Portland instead of to it for payment for the repairs. The applicant disputes that there was any such agreement.

It is not for a court seized of a winding-up application to determine such disputes, which go to the very existence of the applicant's claim to legal standing to move for a liquidation order against the respondent.

[11] The proper approach in the given circumstances was described by Corbett JA in *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A) at 980 C-D as follows:

> '… where the respondent shows on a balance of probability that its indebtedness to the applicant is disputed on *bona fide* and reasonable grounds, the Court will refuse a winding-up order. The *onus* on the respondent is not to show that it is not indebted to the applicant: it is merely to show that the indebtedness is disputed on *bona fide* and reasonable grounds.'

That is the essence of what the learned judge labelled as 'the Badenhorst rule' (named after the judgment of Hiemstra J in *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347H - 348B). Cf. also in this regard *Hülse-Reutter and Another v HEG Consulting Enterprises (Pty) Ltd (Lane and Fey NNO intervening)* 1998 (2) SA 208 (C) at 219E-220A and *Payslip Investment Holdings CC v Y2K Tec Limited* 2001 (4) SA 781 (C) at 783H-I.

[12] In my view, the respondent has shown that it is bona fide in disputing the applicant's claim and that the grounds upon which it does so are reasonable, by all of which expressions I understand is meant that the claim is genuinely disputed on apparently cogent grounds. There are a number of factors that support such a conclusion. Firstly, there is the uncontroverted averment in the respondent's answering affidavit that the applicant initially requested payment for the repairs from Portland, and turned to the respondent for payment only when Portland refused to make payment. Secondly, there is a demonstrated pattern of behaviour in which the respondent has paid those of the applicants invoices that it says were

not subject to the aforementioned payment arrangements incidental to the surrender and termination agreement. And thirdly, the respondent has shown, at least prima facie, that it is able to pay the amount claimed by the applicant, and furthermore tendered to pay into its attorneys' trust account prior to the hearing of the application the full amount claimed by the applicant, to be held in trust pending the determination of the disputed claim in appropriate proceedings. (The tender was not accepted.)

[13] In the circumstances, applying the principles elucidated in the passage from *Kalil v Decotex* quoted above, the application falls to be dismissed, with costs to follow the result. An an order to that effect will issue.

[14] I should have mentioned that the applicant relied on the provisions of s 345 of the Companies Act 61 of 1973 for the purposes of establishing the respondent's alleged inability to pay its debts. It has not been necessary, in view of the conclusion at which I have arrived, to make any determination in respect of the respondent's contentions that the applicant's demand in terms of s 345 was ineffectual by reason of the applicant's failure to comply punctiliously with the letter of the provision. Mr *de Jager*, who appeared for the respondent, relied in support of the respondent's attack on the efficacy of the s 345 demand on certain obiter dicta of Margo J in the full court of the Transvaal Provincial Division's judgment in *BP & JM Investments (Pty) Ltd v Hardroad (Pty) Ltd* 1978 (2) SA 481(T).

[15] The learned judge's remarks in that case would indeed appear to lend support to Mr *de Jager*'s argument, but at p.487B-C, Margo J expressly stated that he did not find it necessary to determine the point. In the other judgment relied upon by Mr *de Jager*, *Bank of Baroda v Annex Distribution (Pty) Ltd* [2020] ZAGPPHC 158 (14 May 2020), Kirstein AJ followed *BP & JM Investments* without acknowledging that Margo J's remarks in the latter matter were expressly obiter. In classifying the provisions of s 345 as 'peremptory', and applying the approach favoured by Margo J in a judgment delivered nearly half a century

ago, the learned acting judge may, with respect, have overlooked the following observation in the Constitutional Court's judgment in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC)) [2013] ZACC 42 (29 November 2013) in para 30:

> 'Assessing the materiality of compliance with legal requirements in our administrative law is, fortunately, an exercise unencumbered by excessive formality. It was not always so. Formal distinctions were drawn between "mandatory" or "peremptory" provisions on the one hand and "directory" ones on the other, the former needing strict compliance on pain of non-validity, and the latter only substantial compliance or even non-compliance. That strict mechanical approach has been discarded. Although a number of factors need to be considered in this kind of enquiry, the central element is to link the question of compliance to the purpose of the provision. In this Court O'Regan J succinctly put the question in *ACDP v Electoral Commission* [1] as being "whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose". This is not the same as asking whether compliance with the provisions will lead to a different result.'
>
> (Footnotes omitted.)

Had it been necessary to determine the point, my inclination would have been to hold that what the applicant did in purported compliance with the provisions constituted effective compliance therewith viewed in the light of their purpose; for it is undisputed that the demand came to the respondent company's notice and there was no doubting, despite a misnomer, that it was the applicant which was making the demand.

[16] The application is dismissed with costs.

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[1] *African Christian Democratic Party v Electoral Commission* [2006] ZACC 1 (24 February 2006); 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC) at para 25.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

Applicant's counsel:	**A.R. Newton**
Applicant's attorneys:	**Lombard & Kriek** **Bellville** **MacGregor Stanford Kruger** **Cape Town**
Respondent's counsel:	**Nick de Jager**
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