IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 15445/2022

In the matter between:

Inca Concrete Products (Pty) Ltd **Applicant**

(In business rescue)

(Registration Number: 2007[....]07)

And

Groeneveld Civil Engineering **Respondent**

Construction (Pty) Ltd

(Registration Number: 2014[....]07

Registered address: 7 Schoongezicht Street,

Simonswyk, Stellenbosch, Western Cape.

JUDGMENT ELECTRONICALLY DELIVERED

16 MAY 2023

Baartman, J

[1] The applicant seeks a provisional liquidation order against the respondent. The latter is indebted to the applicant in the amount of R330 507.74, but has failed to settle the debt. The respondent opposes the application on the basis that it has a counter claim against the applicant that would extinguish the applicant's claim by way of set-off but for an amount of R28 765.89. Therefore, on 18 July 2022, the respondent paid R28 765.89 into its attorneys' trust account.

[2] The applicant manufactures and supplies concrete face bricks, plaster bricks, blocks and paving products. It is common cause that the applicant has delivered bricks/paving blocks to various projects at the respondent's request. The applicant said the following about their business relationship:

> '20. The Respondent has been buying products from the Applicant for seven years since the Agreement was concluded in March 2015. Payments have been regular and consistent. Only after the Applicant went into business rescue have the Respondent's payments become scarce.'

[3] The respondent said the following about its 'scarce payments':

> '8. In a letter dated 16 April 2022... Applicant claimed payment for the overdue account of R324 122.08. At that stage Applicant was well aware of the dispute pertaining to damages suffered by Respondent due to the Applicant's supply of material at the project known as Grootvadersbosch that was already in dispute for ten months prior to the demand. ... there were several areas where the bricks/blocks supplied by the Applicant have cracked. We were expecting the Applicant's credit note for R180 000 plus V.A.T. whereafter Respondent would proceed with settling the outstanding balance. As reflected in the aforementioned correspondence, it is clear that Respondent were (sic) struggling with Applicant for almost ten months prior to the letter of demand to resolve the defects in goods supplied. Whilst some of the items or amounts constituting the Respondent's damages were easy to determine at that stage, some further items or amounts were not so easy to determine. Hence the more accurate determination of the full... amount...

10. On 10 June the Applicant issued summons against the Respondent ...under case number 9804/2022...However this summons was withdrawn on/about 30 June 2022 without explanation.'

[4] The respondent alleged that the applicant's inexplicable withdrawal of the summons to institute motion proceedings is an abuse of the process. The applicant's counsel has informed the court, from the bar, that the action was withdrawn because of the congested court rolls, therefore it was expedient to proceed with motion proceedings. An amazing admission in the circumstances of this matter. The respondent has been liquid and operating for 7 years on the applicant's version and the dispute pertaining to the defective materials is common cause. In those circumstances, I cannot agree with the submission that the failure to settle the debt is prima facie proof of the respondent's inability to pay. In addition to the applicant's attesting to the respondent's good credit record for many years, Mr Groenewald, the respondent's sole director, said the following in the answering affidavit:

'6.1 Respondent is not insolvent. Its non-payment to the Applicant is due to a counterclaim based on bona fide and reasonable grounds, in the amount of R301 741.85 (including VAT).'

[5] The common cause facts such as the relatively long amicable relations between the parties during which the respondent met its financial obligations to the applicant, the evidence of the respondent's sole director, the payment into the attorneys' trust account of the amount the respondent admits would be due if its counter claim was off-set against the applicant's claim and the absence of any other indication that the respondent is unable to meet its financial obligations, as and when they fall due, indicate that the respondent is not insolvent. There is also no indication that the respondent had to seek a loan or other financial assistance to meet its obligation. The respondent demanded credit for alleged defective material and tendered payment of substantial amounts in return. I accept that the respondent, for the reasons stated above, is unwilling to pay the debt and considers the liquidation application 'as a tactic to intimidate the Respondent into paying ...'

[6] Therefore, this matter is distinguishable from the facts considered in Gap[1] where the court held as follows:

> '53... The correspondence to which I have referred indicates that the respondent has often battled to meet its cash-flow requirements. Prima facie, therefore, the respondent is unable to pay its debts as they fall due, and this is the test for commercial insolvency...'

[7] The parties held differing views in respect of whether the respondent would be able to off-set its alleged claim against that of the applicant. The respondent's claim is for damages suffered as a result of the applicant's alleged defective performance. The parties could also not agree what effect, if any, the applicant's business rescue had on the respondent's alleged claim. It is obvious that the respondent's failure to settle the debt was induced by its legal representatives' view in respect of the possibility to off-set its claim against that of the applicant. The respondent's counsel appeared to accept that his view might not be correct; it was not conceded. The respondent has also not decided whether its claim arose before or after the applicant was placed in business rescue.

[8] I am persuaded to accept without finding that the respondent's claim for damages is not a liquidated claim capable of off-set. I do so because as indicated above, the respondent was caught off guard when the applicant decided to abandon the action in favour of motion proceedings. In Van Zyl[2], in strikingly similar circumstances, the court held as follows:

> '... The respondent justifies its failure to pay by claiming that it was entitled to set off the amount of R247 577.43 against the said amount of R286 347.75 leaving a balance of R38 770.31, which balance the respondent has paid into court.
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> ... This raises the question of whether the respondent's defence of set-off can be said to be bona fide and based on reasonable grounds I consider the

[1] GAP Merchant Recycling CC v Goal Reach Trading 55 CC 2016 (1) SA 261 para 53.
[2] Van Zyl NO v Look Good Clothing CC 1966 (3) SA 523 (SE).

respondent's defence of set-off to be an invalid one. This does not, however, mean that the applicant is entitled to the relief he seeks without more.

The applicant only became aware of the existence of the cession [in these proceedings].

What is more, apart from the fact that the respondent has failed to pay the amount which the applicant alleges the respondent owes there is nothing in the papers to suggest that the respondent is unable to pay its debts '

[9] The respondent's case, as it appears from the answering affidavit, is not a model of clarity and includes hearsay evidence pertaining to 'falsified laboratory test results to confirm the strength and composition of their bricks/blocks'. It appears that there are disputes over material delivered to several projects.

[10] The respondent has also referred to 'without prejudice settlement negotiations between the parties'. I agree with the applicant that the inclusion of those negotiations is 'to be deprecated', however, that explains why the applicant is unable to allege that the respondent has a cash flow problem and instead relies on the failure to pay the debt as prima facie proof of its commercial insolvency. In the circumstances of this case, that will not suffice.

[11] This application is brought on the basis that the respondent 'is unable to pay its debts...' I am unable to find that the respondent is unable to meet its financial obligations as and when they fall due. I am, however, persuaded that a dispute in respect of the quality of material delivered to the respondent arose in normal commercial circumstances and that the parties have thus far been unable to resolve the dispute despite attempts to resolve it. In the alternative, the applicant sought relief on the following basis:

'8. Alternatively, this application is brought in terms of section 344(h) of the 1973 Companies Act read together with schedules 5, item 9 of the 2008 Companies Act, on the basis that it would be just and equitable for the Respondent to be wound up.'

[12] Liquidations are by their very nature urgent; this is not such a case. Considering the perilous state of the economy resulting in dire unemployment, it is deplorable to liquidate an economically viable company because the court rolls are congested. In the circumstances of this matter, I consider the reasons for the alternative process an abuse of the court process justifying the exercise of the court's 'very narrow ...[discretion] that is rarely exercised.[3] In the circumstances of these proceedings, it is not just and equitable to liquidate the respondent. I intend to dismiss the application with costs to follow the result.

Conclusion

[13] I, for the reasons stated above, make the following order:

(a) The application is dismissed with costs.

Baartman, J

[3] Afri Operations Ltd v Hamba Fleet (Pty) Ltd 2022 (1) SA 91.