REPUBLIC OF SOUTH AFRICA

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

CASE NO: 36738/15

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

5/10/2016 (A.J Mahalelo)
DATE SIGNATURE

In the matter between:

WILLEM SWANEPOEL BOUERS CC
Registration Number 2007/183010/23 Applicant

and

MONT BLANC CONSTRUCTION (PTY) LTD
Registration Number 2008/0158855/07 Respondent

J U D G M E N T

MAHALELO, AJ:

INTRODUCTION

[1] The applicant applies for provisional liquidation of the respondent and ancillary orders.

[2] The applicant launched the present application having served a letter of demand in terms of Section 345 of the Companies Act No 61 of 1973 on the respondent calling upon it to pay an amount of R161 365, 65. In terms of the letter of demand the respondent had three weeks within which to make payment of the indebted amount. The respondent failed and or neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the applicant. In consequence of the respondent's failure to liquidate the debt, the applicant is resolute that the respondent is unable to meet its current financial obligation in the ordinary course of business and therefore deemed insolvent.

[3] The applicant is a Close Corporation specialising in project management and civil construction. The applicant subcontracted from the respondent.

[4] There is no dispute that the applicant supplied and installed the structural screeds and performed other works as per the quotation and or orders. The parties are however divergent as to whether the applicant was appointed in accordance with the provisions of the MBSA Domestic Subcontract Agreement (MBSA) and in line with the terms and conditions of the JBCC 2000 Series Edition 4.1 Code 2101 Principal Building Agreement (JBCC) to perform the work and whether there is an outstanding amount due to the applicant by the respondent emanating from their agreement.

[5] The respondent contests the application and persist that it is not indebted to the applicant in any sum and is fully able to pay its debts as and when they become due.

[6] Against that brief introduction I consider the factual background from which the claim emanates important and I endeavour to set it out below:

On 5 September 2014, following upon a quotation provided to the respondent by the applicant, the applicant was, by way of an appointment letter, appointed for the supply and installation of structural screeds at the Water Fall Mall in Rustenburg. According to the applicant payment was due upon completion of the work unless alternative arrangements were made. The terms of the appointment letter were couched as follows:

> *"We hereby advise you of your appointment for the supply and installation of structural screeds with Drikon 5.5L/50Kg cement as per your proposal (attached) ...*
>
> *Your appointment is made in accordance with the provisions of the MBSA Domestic Subcontract Agreement March 2005 Edition and in line with the terms and conditions of the JBCC 2000 Series Edition 4.1 Code 2101 Principal Building Agreement..."*

[7] Subsequent to the initial quotation, the respondent placed several further orders with the applicant for further work to be done at the site. The orders were placed either in writing or verbally. According to the applicant, it was also an explicit term of the subsequent orders that payment would become due upon completion of the work, unless an alternative arrangement had been made between the parties.

[8] The applicant complied with its obligations to the respondent in respect of the quotations and the orders received.

[9] On 25 November 2014, the respondent sent an email to the applicant requesting full details of all works performed to date and requested that one cumulative claim be submitted. The applicant obliged and submitted a statement dated 15 January 2015. The applicant, pursuant to this statement alleged that the respondent failed to pay amounts due and that its payment period was 30 days upon completion of the work unless alternative arrangements were made. It contended that no such arrangements were in place. In reply to the applicant's allegations the respondent emailed a letter to the applicant stating the following:

> *"It would appear that you are holding MBC (Mont Blanc Construction) to ransom to make payment including the release of retention before you complete the works. Before you proceed please note the following: Retention has not been released/paid to MBC and therefore not due to WSB. Payment for your invoice dated 04/12/2014 only issued to MBC on the 08/12/2014 has not been certified or paid to MBC. The last claim for 2014 was submitted on 27/11/2014 and payment certificate issued on 04/12/2014. The next claim will be submitted on the 19/01/2015. Once certified and paid, we will pay you."*

[10] On 26 January 2015, a further email was sent to the applicant requesting a break down and the particulars in respect of certain claims submitted. On 28 January 2015, the applicant emailed documents to the respondent in response thereto. The respondent considered the documents but found them to be inadequate. In reply to the applicant, the respondent once more requested details and provided an example of the information required.

[11] On the same day the respondent addressed an email to the applicant querying the applicant's invoice 2014/84 and requested a breakdown of the amounts of R110 000,00 and R75 000. Of note regarding this invoice is the fact that no mention is made that the quotation was for material only and pursuant to the stainless steel cladding being completed, the applicant rendered an invoice which now expressly excluded labour. An additional amount of R75 000,00 was invoiced by the applicant for labour for the installation of the stainless steel. According to the Respondent, despite its request to the applicant to provide it with a breakdown of the amounts of R110 000,00 and R75 000,00 and explain the incongruity, the applicant has failed to provide any detail thereof.

[12] In accordance with the JBCC and the MBSA agreements which according to the applicant governed the relationship between the parties, the respondent examined the documents submitted and the works completed by the applicant and thereafter prepared the draft final account for submission. The applicant was given 30 working days within which to accept or object to the draft final account. The applicant did not raise any objection thereto; as a result it became final and was submitted to the principal agent. The final account was submitted and was rejected by the principal agent. It was sent to the applicant together with a letter of rejection on 24 February 2015.

[13] On the 11 August 2015 the applicant's attorneys forwarded a letter of demand to the respondent requesting payment of the amount of R161 365, 65. The applicant contended that the amount owed to it by the respondent is for work performed in accordance with the quotation furnished and does not

form part of the MBSA and JBCC agreements. The applicant further contented that the respondent is indebted to it in the said amount and has failed to timeously pay the amount due to lack of financial resources and that it will be just and equitable for the respondent to be liquidated.

[14] On the other hand the respondent disputed the applicant's allegations that the explicit terms of the agreements were that payment would become due upon completion of the work. According to the respondent, the procedure in terms of the MBSA and the JBCC Agreements had to be followed for payment to become due as the MBSA and JBCC agreements take preference over any quotation. The respondent contended further that it duly made payments to the applicant over the course of the agreements as and when claims were submitted and certified.

[15] A cursory reading of the appointment letter shows that the applicant's appointment for the supply and installation of screeds work was in accordance with the provisions of the MBSA and in line with the terms and conditions of the JBCC agreements.

[16] Against this background this court must decide whether the respondent is insolvent and unable to meet its financial commitments.

LEGAL FRAME WORK

[17] In an opposed application for provisional liquidation the applicant must establish its entitlement to the order on a prima facie basis. The applicant must show that the balance of probabilities on the affidavits is in its favour

(See *Kalil v Decotex*[1]). This would include the existence of applicant's claim where such is disputed.

[18] Even if the applicant established its claim on a prima facie basis, a court will ordinarily refuse the application if the claim is *bona fide* disputed on reasonable grounds. The rule that winding up proceedings should not be used as a means of enforcing a debt the existence of which is *bona fide* disputed on reasonable grounds is part of the broader principle that court's process should not be abused. (See *Badenhorst v Northern Construction Enterprises (Pty) Ltd*[2]).

[19] In relation to the applicant's claim the court must consider not only where the balances of probabilities lie on the papers, but also whether a claim is bona fide disputed on reasonable grounds. The court can reach this conclusion even though on a balance of probabilities, based on the papers, the applicant's claim has been made out. (See *Payslip Investment Holdings CC v Y2K Tech Ltd*[3]).

[20] The only answer to applicant's claim is that the applicant failed to provide a breakdown of the account and therefore failed to provide the basis upon which it alleged that payment of certain invoices was outstanding.

[21] In the answering affidavit the respondent denied that it is unable to pay its debts. This denial is elaborated upon by filling a report by its registered auditors dated 13 November 2015. In this report the auditors G M Engelbrecht & Associates, *inter alia*, makes the following unequivocal statement: "*to the*

[1] 1988 (1) SA 943 (A)
[2] 1956 (2) SA 346 (T)
[3] 2001 (4) SA 781 (C)

best of our knowledge and belief, the financial affairs of the company are in good standing and the internal financial controls adequately meet the requirements of the Companies Act 71 of 2008" ("the Act"). In the replying affidavit the applicant points out that the respondent made no tender to pay the outstanding amounts into the respondent's attorneys' trust account or into court pending litigation and submits that this would have been a sign of good faith and added some credence to the respondent's version that it is still solvent.

[22] The *onus* of demonstrating a respondent's inability to settle its debts during the conduct of ordinary business rests on the party making the allegation, the applicant in this instance. According to the report of the respondent's auditors dated November 2015 the respondent's financials were in good standing. There is no evidence of any litigation in progress against the respondent by its creditors. At the hearing of this matter it appeared that the respondent was still in business there being no reports presented that its bankers have declined any of its instruments meant for the settlement of its debts. After consideration of all the facts and of the arguments and counter arguments presented, I am not persuaded that I can on a balance of probabilities on the papers conclude that the respondent is unable to pay its debts. I say this for the following reasons:

The claim by the applicant is clearly disputed by the respondent. The finding that the dispute is not genuine and *bona fide* is not justified on the papers. It cannot be inferred from the respondent's failure to meet the applicant's claim that the respondent is unable to do so. This is said bearing in mind the report by the respondent's auditors. In my view it is equally likely that the respondent

is unwilling to do so because the claim is unsubstantiated by the applicant. The applicant is at liberty to institute an action against the respondent if it believes that the respondent is indebted to it. It is not entitled to use liquidation proceedings to settle claims which are *bona fide* disputed.

[23] It follows that the applicant has, in my view, failed to make out a case for the relief he seeks. Consequently the application cannot succeed. What appears to be clear from the papers is that there was some sort of misunderstanding with regard to payment invoicing.

[24] In the result the following order is made:

24.1 Application is dismissed with costs.

M B MAHALELO
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARENCES:

Counsel for applicant: Adv J Scallan

Instructing Attorneys: Botha & sutherland

Counsel for respondent: Adv WC Carstens

Instructing Attorneys: Richard Meaden and Associates Inc

Date of Hearing: 4 August 2016

Date of judgment: 5 October 2016