

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO. 12559/2012

In the matter between:

**SHAMLA CHETTY
t/a NATIONWIDE ELECTRICAL**

APPLICANT

and

O.D. HART N.O.

FIRST RESPONDENT

R. VENGADESAN

SECOND RESPONDENT

JUDGMENT delivered on 25 March 2014

NZIMANDE A J

[1] The applicant seeks an order in the following terms:

[1.1] setting aside an award made by the first respondent in the arbitration proceedings between the applicant and TBP Building & Civils (Pty) Limited, the plaintiff and defendant respectively in those proceedings and

[1.2] costs against the first respondent alternatively against both respondents, jointly and severally.

[2] The first respondent abides by the decision of the court in respect of the relief sought against him.

The common cause facts

[3] The defendant in the arbitration (now in liquidation and represented by the second respondent) applied for business rescue under Section 129 of the Companies Act No. 71 of 2008 (the Act) on 05 October 2012, being a date prior to completion of the arbitration. In terms of Section 132 of the Act the business rescue proceedings began when the defendant filed the resolution, which was on 05 October 2012, according to Annexure A to the founding affidavit.

[4] Business rescue was registered on 11 October 2012. Argument was delivered on 12 October 2012 at a time when the business rescue proceedings had begun and had not yet terminated i.e. in the language of Section 133 of the Act “during business rescue proceedings”.

[5] The award was signed and published on 23 October 2012, also during business rescue proceedings. A written consent was not given and the Court did not grant leave for the proceedings to continue as envisaged in the relevant section.

Argument

[6] The applicant argued that in the circumstances the award is defective and falls to be reviewed and set aside. The defendant raises the following defence:

[6.1] that the business rescue practitioner would have provided his written consent if he had been asked to do so;

[6.2] that Section 133 of the Act only hit the applicant's claim against the defendant but not the defendant's counter-claim so the proceedings could lawfully proceed in part.

[6.3] that the applicant's claim would have been set off against the counter-claim and so Section 133 (c) of the Act applied as an exception to the prohibition.

[7] The applicant and the second respondent agree that it is convenient for the legal argument on the one issue (the business rescue argument), in respect of which there are no factual questions to be argued separately from the alternative basis for the review. However, the first respondent was not party to this agreement.

The parties subsequently agree that a decision on the above issue will be decisive of the matter.

[8] What is sought therefore is an order setting aside the entire award of the first respondent, in effect declaring the award in the circumstances

of this case to be null and void on the following grounds:

[8.1] the award was improperly obtained in that it was issued at a time when the defendant in the arbitration was under business rescue, which the defendant failed to disclose; and

[8.2] the continuation of the proceedings which were part heard was not permissible in terms of Section 133 of the Act and the arbitrator committed a gross irregularity in the arbitration proceedings by allowing them to proceed during business rescue;

[8.3] the arbitrator also exceeded his powers in publishing an award during business rescue because he lacked the legal capacity to make the award when he did, as the law forbade the proceedings to continue.

[9] The relevant provisions of Section 133 (1) of the Act are:

“During business rescue proceedings no legal proceedings, including enforcement action, against the company may be commenced or proceeded with without the written consent of the business practitioner or the leave of the Court”.

[10] The issue that arises therefore is whether the arbitration proceedings constitute legal proceedings for purposes of Section 133 of the Act.

[11] In the applicant's short heads of argument it is contended that arbitration proceedings are legal proceedings as contemplated by Section 133 of the Act. The Court was referred to ***Bristol Airport plc v Powdrill and others (1990) 2 All ER 493 (CA) 506f*** where Sir Nicolas Browne-Wilkinson V-C stated the following:

"In my view the natural meaning of the words 'no other proceedings may be commenced or continued' is that the proceedings in question are either legal proceedings or quasi-legal proceedings such as arbitration".

No argument was provided by the second respondent in this regard.

[12] No definition of the term "legal proceedings" or "enforcement action" is provided in the Act. In ***Lister Garment Corporation (Pty) Ltd. v Wallace N.O. 1992 (2) SA 722***, the Court was dealing with security for costs in "legal proceedings" by companies and body corporates in terms of Section 13 of the Companies Act No. 61 of 1973, which also did not define "legal proceedings"

In the aforesaid case Howard J P referred to the case of ***Van Zyl v Eudodia Trust (Edms) Bpk 1983 (3) SA 394 T*** where Dijkhorst J pointed out that the ordinary meaning of "legal proceedings" is a "lawsuit" or "hofsak".

[13] From the reading of the ***Bristol Airport plc*** case, the contention by the applicant that the arbitration proceedings are legal proceedings for purposes of Section 133 of the Act cannot be sustained. I am of the view

that the interpretation of “legal proceedings” in Van Zyl’s case above should be applied to legal proceedings, as envisaged by Section 133 of the Act. In the circumstances I hold the view that arbitration proceedings are not legal proceedings as contemplated in Section 133 of the Act. Therefore the application to set aside the award made in the arbitration proceedings must fail.

Accordingly I make the following order:

The application is dismissed with costs.

NZIMANDE AJ

Appearances /

Appearances:

For the Applicant : Mr. M. Pillimer S C

Instructed by : Pierce, du Toit & Moodie
Durban

For the First Respondent : Mr. D. Schaup

Instructed by : O.D. Hart Attorneys
Durban

For the Second Responent: A. Kissoon Singh SC

Instructed by : V. Chetty Incorporated
La Lucia, Durban

Date of Hearing : 25 October 2013

Date Judgment delivered : 25 March 2013