REPORTABLE

2876/2012

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 2876/2012

DATE: 26 NOVEMBER 2012

5

In the matter between:

CHRISTOPHER PETER VAN ZYL N.O. — 1st Applicant

JURGENS JOHANNES STEENKAMP N.O. — 2nd Applicant

MARC BRADLEY BEGINSEL N.O. — 3rd Applicant

10 [In their capacities as the duly appointed liquidators of Black River Development (Pty) Ltd (in liquidation]

and

15 **THE MASTER OF THE HIGH COURT OF SOUTH AFRICA, WESTERN CAPE HIGH COURT, CAPE TOWN** — 1st Respondent

GREAT FORCE INVESTMENTS 109 (PTY) LIMITED — 2nd Respondent

20

JUDGMENT

DAVIS, J:

25 Introduction:

Applicants are the liquidators of Black River Development (Pty) Limited (in liquidation) ("Black River"). Second respondent

/...

/bw

("Great Force") is an approved creditor in the winding up of Black River. The liquidators, being the applicants, acted in accordance with section 45 of the Insolvency Act 24 of 1936 and disputed Great Force's claim and sought to have it
5 expunged by first respondent. First respondent refused to do so. As a result, this is an application by the applicants to review and set aside the first respondent's refusal to expunge the claims of Great Force and for an order that Great Force's claim be expunged. The application has been opposed by
10 Great Force.

The relevant facts can be summarised thus. Great Force proved its claim for R22 909 793,18, based on an alleged building and construction agreement ("the JBCC agreement").
15 It did so by way of an affidavit of a Mr Anderson, one of its directors. Pursuant thereto, an inquiry was held into the affairs of Black River in terms of sections 417 and 418 of the Companies Act 61 of 1973. Anderson gave evidence at the inquiry as did other directors and persons involved in the
20 business of Great Force, including Mr Craig Young, about which more later. It became apparent that evidence given by these persons was perjured and Anderson, in his claim affidavit, had committed in relation to the basis of this claim.

25 The applicants presented to the Master a full exposition of the

law, including references to the perjured evidence and a summary of the evidence with specific references to pages in the record of the inquiry. Great Force, in response, did not contest the applicants' version or suggest that the facts had
5 been incorrectly presented. It merely contended that because Black River was indebted to Great Force, there was no basis for the rejection of Great Force's claim.

In a letter of 4 November 2011, which was generated by
10 Ms Langford on behalf of the applicants, acting as their attorney, the applicants' position was set out comprehensively. To the extent that it is relevant, the following appeared in this letter:

15 "In the liquidators' submission to you dated 16 August 2011, the liquidators sought to have the claim of Great Force expunged. The primary basis set forth for expunging the claim, was the false description of the facts giving rise to Great Force's
20 claim in the affidavit in support of the claim. John Winchester Anderson ("Anderson"), deponent to the affidavit, states in such affidavit that the claim arose in the manner and at the time set forth in the affidavit. However, from the evidence provided at
25 the inquiry, it has emerged that the claim did not

arise in the manner set forth in the affidavit and that Anderson was well aware of this when he deposed to the affidavit. Anderson, accordingly, committed perjury when deposing to the affidavit. Anderson
5 also perjured himself when he first testified at the inquiry on 29 March 2010, as did various further witnesses, including Craig Young. The circumstances strongly suggest collusion to ensure the enhancement of Great Force's position as a
10 creditor. In the liquidators' submissions too, it was expressly stated that the liquidators intend to institute action against Great Force in terms of section 31 of the Insolvency Act, arising from such collusion in order, *inter alia*, to ensure that Great
15 Force forfeits any claim that it alleges it has against Black River ... Great Force's representation set out in the Cliffe Dekker letter of 14 October 2011, do not deny that Anderson committed perjury when he deposed to the affidavit in support of Great Force's
20 claim, and do not deny that certain witnesses, including Young and Anderson, committed perjury at the inquiry. Instead, Great Force submits that:

> "The fact that the agreement was backdated and that Young and Anderson did not initially
25 disclose this fact, does not detract from the

> reality, which was that since July 2008, Great Force had, by agreement with Black River, undertaken the construction of Agape. Great Force did this by utilising the services of Garber and others as its subcontractors."

5 To say that Young and Anderson "did not initially disclose" certain facts, is a rather generous interpretation of what transpired. In fact, Anderson did not tell the truth, both in his affidavit and at the 10 inquiry on 29 March 2010 and Young also did not tell the truth when he initially testified at the inquiry on 30 March 2010. Not only did they omit certain facts, they both perjured themselves. Only later (on 23 April 2010) did Young recant his evidence and 15 revealed the correct facts to the inquiry. Anderson then likewise gave fresh testimony as to the correct version of events. The perpetuation of the myth that Great Force sought to convey, includes Anderson's letter, being Annexure B to the 20 liquidators' submissions on 16 August 2011 and that of its attorneys ... wherein they allege that possession of the site had been given to Great Force and that construction commenced by that entity on 14 April 2008. The truth is that Great 25 Force was nowhere in sight at that stage. This

manifestly false version is consistent with Anderson's founding affidavit on behalf of Great Force ..."

5 Although first respondent was in receipt of this information and legal argument, she nonetheless refused to disallow the claim, apparently on the basis that there were facts "in dispute", that neither the record of inquiry, nor the recommendations by the commissioner thereof had been lodged and that there were no
10 "judicial" facts to justify the expungement of the claim.

Before dealing with the law, it is instructive to compare first respondent's letter with that of Ms Langford. In her letter, to which I have already made reference, Mrs Langford writes:

15

"It is clear that although Black River may be indebted to Great Force, it is not indebted on the grounds alleged in the affidavit in support of the claim. It cannot be acceptable for the proof of claim
20 to be allowed to stand when it is based on patently incorrect facts and perjured evidence. The creditor is obliged to clearly explain not only the quantum of the debt, but also the *causa debiti*, i.e. the circumstances under which the debt arose, and if
25 the liquidator discovers that the creditor has

misrepresented the *causa debiti*, he must report this to the Master. The version set out in Great Force's proof of claim, is aimed at obscuring the truth and to lend Great Force the status of a secured rather
5 than a concurrent creditor (my emphasis)."

By contrast, first respondent produced the following explanation for the decision not to expunge the claim: "the liquidators made an application for [the] expungement of Great
10 Force's claim per letter dated 16 August 2011, contending that there was collusion between all the individuals (in their application) with regard to the JBCC agreement(s), their intention being to alter the position of Great Force from its exposed status as concurrent creditor of Black River to a mere
15 secure one. They believe that the underlying transaction on which claim is based (sic) constitutes a voidable disposition. They furthermore believe that the claim by Great Force, that was admitted to proof by Magistrate, is not a genuine claim. According to the liquidators, Great Force was never a building
20 contractor and the JBCC agreements were mere simulations. The liquidators relied on evidence that came to light at a Section 417 and 418 inquiry ... On 14 October 2011, an objection to proposed expungement (sic) was lodged by Cliffe Dekker Hofmeyr Inc Attorneys, on behalf of their client Great
25 Force Investments. According to Attorneys, Great Force was

the principal building contractor that utilised Garber as a building subcontractor. Great Force alleges that there was an oral agreement in place that was later reduced to writing (the JBCC agreement) to confirm the *de facto* position. They believe that the construction of Agape was funded by the monies which Great Force had managed to raise."

First respondent then concludes:

> "The liquidators had not shown judicial facts to create the reasonable belief that the claim by Great Force is non-existent and should be extinguished as required by the Rand-Metal case. A voidable disposition remains valid until set aside by a competent court of law."

Legal Framework:

With the key facts as set out, it is possible to turn to the legal framework. This application is lodged in terms of section 151 of the Insolvency Act, 24 of 1936, read with section 339 of the 1973 Companies Act and with item 9 of Schedule 5 of the Companies Act 71 of 2008. Section 339 renders the laws of insolvency applicable to companies unable to pay their debts, while the 2008 Act provides that the chapter on winding up as

set out in the 1973 Act is of continued application. To the extent that it is relevant, section 151 of the Insolvency Act reads:

5 "Any person aggrieved by any decision, ruling, order or taxation of the Master, or by a decision, ruling or order of an officer presiding at a meeting of creditors, may bring it under review by the court, and to that end may apply to the court by motion
10 after notice to the Master, or the presiding officer, as the case may be, and to any person whose interests are affected."

15 In Nel & Another NNO v The Master (ABSA Bank Limited & Others Intervening) 2005 (1) SA 276 (SCA), the court held the following with regard to section 151:

"South African courts have long accepted that the
20 review envisaged by s151 of the Insolvency Act, is a "third type of review identified more than 100 years ago in Johannesburg Consolidated Investment Company v Johannesburg Town Council, i.e. where Parliament confers a statutory power of review upon
25 the courts. In the Johannesburg Consolidated

Investment Company case, Innes, CJ stated ... with reference to this kind of review that a court could -

> "... enter upon and decide the matter *de novo*. It possesses not only the powers of a court to review in the legal sense, but it has the functions of a Court of Appeal with the additional privileges of being able, after setting aside the decision arrived at ... to deal with the matter upon fresh evidence ... Thus when engaged in this third kind of review, the Court has the power of both appeal and review, with the additional power, if required, of receiving new evidence and of entering into, and deciding the whole matter afresh. It is not restricted in exercising its powers to cases where some irregularity or illegality has occurred."

Section 45 of the Insolvency Act, constitutes the provision in terms of which the applicants sought to have the claim expunged. In terms of subsection (3) thereof, if a trustees dispute a claim after it has been proved against the estate at a meeting of creditors, "he shall report the fact in writing to the Master and shall state in his report his reasons for disputing the claim. Thereupon the Master may

confirm the claim or may, after having afforded the claimant an opportunity to substantiate his claim, reduce or disallow the claim ... provided that such reduction or disallowance shall not debar the 5 claimant from establishing his claim by an action of law."

Much of the dispute in this case turned on the proper approach to be adopted to a review, pursuant to the dicta as set out to 10 Nel's case, supra, read together with section 45. Accordingly, there was considerable reliance upon the decision in Caldeira v The Master & Another 1996 (1) SA 868 (N), for the proper approach to the question of a disallowance of a claim, both from the point of view of the trustee or liquidator and of the 15 Master; in particular at 874:

"If a trustee disputes the claim, he must have a reasonable belief, based on facts ascertained by him, that the insolvent estate is not in fact indebted 20 to the creditor concerned. Mere suspicion about the claim would not be sufficient. This belief would, I think, generally arise after the examination of the company's records and the conclusion derived from the records that the indebtedness does not exist or 25 has been extinguished. Of course, the facts giving

rise to the belief are not necessarily derived from the company's records, they could arise, for example, from the records and interrogation conducted at the meeting of creditors."

5

Turning to respondents' case. Mr Manca, who appeared on behalf of the second respondent, submitted, on the strength of this case, that the first respondent was faced with a situation in which Great Force had substantiated its claims by way of
10 reasons furnished by it to first respondent. This substantiation was unsurprisingly disputed by the applicants. However, respect of first respondent, Mr Manca submitted that she had no choice but to disallow the expungement of the claim in these circumstances. She was simply not in a position to
15 determine which version was preferable and she was correct when she held that she had no power to adjudicate upon factual disputes of the kind which were raised in the present case.

20 By contrast, Mr Goodman, who appeared on behalf of the applicants, referred, in some detail, to the broad factual scenario which did not seem to have been placed in significant dispute. In particular, Great Force carried on business as a building contractor. Great Force and Black River entered into
25 a JBCC agreement on 3 July 2008 to supply building and

contracting services and to incur disbursements to Black River to construct a retirement complex on immovable property owned by Black River, to be known as Agape. Great Force was in possession of the immovable property and enjoyed security in the form of an improvement or builder's lien. Great Force supplied services and materials to Black River, and the payment certificates were annexed to the claim dated 29 May 2008 to 27 April 2009. Tax invoices by Great Force to Black River were annexed to the claim dated 31 May 2008 to 30 April 2009. Black River was indebted to Great Force in the sum of R22 909 793,18.

As Mr Goodman submitted, what was conveyed by Mr Anderson at this stage, was that Great Force was a building contractor, which had entered into a JBCC agreement on 3 July 2008, that it supplied building contracting services, was in possession of the retirement complex, that the requisite certificates provided for in terms of the JBCC agreement of 3 July 2008, were dated from 29 May 2008 and tax invoices from Great Force to Black River were similarly dated from the end of May 2008. In reality, it would not be disputed that Great Force had never been registered with the National Homebuilders Registration Council. It was a previously dormant company and had not built anything in the past.

The JBCC agreement, to the extent that it was entered into, was concluded in November 2008 as opposed to 3 July 2008. Great Force was not in a position to supply building contracting services. It had no employees. It utilised the
5 services or Garber Construction CC, whose sole member was Mr Young's father, Albertus Young. The requisite certificates, to which I have made reference, were all backdated, in particular, certificates from Visser & Visser Quantity Surveyors, were redrawn with similar backdating. Certain of
10 the evidence at the section 417 inquiry, was then relied upon by Mr Goodman, on behalf of applicants, in order to support these particular submissions.

Of significance was the fact that Mr Young, a director of Great
15 Force, was recalled as a witness at the s417 inquiry. When he was recalled, he recanted his previous evidence by volunteering that the JBCC agreement, involving Great Force, had only been signed during the course of November 2008. They were backdated to 3 July 2008. There had been a written
20 JBCC agreement between Black River and Garber. When Black River could not fund the construction, Great Force funded it.

Further, when a creditor involved in the funding, AIK,
25 demanded repayment of the loan, Young realised that, since

Great Force had only a verbal agreement to construct Agape, it was now in a financially vulnerable position. Accordingly, Young then arranged the conclusion of a JBCC agreement between Black River and Great Force to be backdated to 3
5 July 2008 at which date it was reflected that the intention was for Black River to employ Garber even though there was no intention that Great Force would so employ Garber. This position had not changed until November 2008. Garber, had gone on to the site in April 2008. In other words, the entire
10 basis of the initial representations with regard to the contractual arrangements, were now confirmed by Young and, later by Anderson, when he was recalled, to be no more than a tissue of lies.

15 In the initial representation to first respondent, Ms Langford provides a careful summation of this position, particularly concerning manufacture of evidence:

> "It is clear that Anderson and Young initially
> 20 committed perjury at the inquiry, and that Anderson committed perjury when deposing to the affidavit in support of Great Force's claim. He was well aware at the time he deposed thereto, that various statements made by him in the affidavit were a false
> 25 description of events, but in order to secure an

> advantage for Great Force, he chose to lie under oath. His dishonesty continued in his letters to his attorneys ... It is clear that at the very least there had been a false description of the events giving rise to Great Force's claim in the affidavit in proof of the claim. Anderson clearly perjured himself, as did various further witnesses at the inquiry. The circumstances suggest collusion to ensure the enhancement of Great Force's position as a creditor. At the very least, the circumstances are highly suspicious."

In summary, the applicants' stance can be reduced to the following: There was collusion between the quantity surveyor, Mr Visser, Mr Albertus Young of Garber Construction CC and Messrs Anderson, Marais and Craig Young. That collusion was intended to alter the position of Great Force from its exposed status as a concurrent creditor of Black River to a secured creditor.

Second respondent contends that the mere backdating of the agreement, and Young and Anderson's failure initially to disclose these facts in evidence, which provided to be unreliable, did not detract from the fact that since July 2008, Great Force had undertaken the construction of Agape, by

utilising the services of Garber as a subcontractor. It followed, therefore, that second respondent denied that the back-to-back agreements in November 2008 constituted simulations which could justify the approach adopted by
5 applicants to expunge the claim. Significantly it was conceded that Young admitted at the inquiry that the back-to-back agreements concluded in November 2008 "were concluded in order to secure Great Force's position". Second respondent, however, argues that Great Force was the principal contractor,
10 that Garber acted as a subcontractor and there was no basis for the rejection of its claim or for its expungement.

The papers indicate clearly that Great Force was not, and never had been, a building contractor, and that it was not
15 registered with the relevant authorities, had no employees other than its directors and did not conduct any of the building work itself.

I have emphasised these facts because they are critical to the
20 approach that must be adopted to the contractual position as alleged by second respondent and which in turn is governed by a number of expositions of the law in various judgments. It is to these I must now turn in order to evaluate the competing submissions.

25

Evaluation:

In Estate Wilson v Estate Giddy and White and Others, 1937 AD 239, at 255, De Wet, JA said:

5 "By virtue of section 43 of the Insolvency Act, it is the duty of the trustee to examine every claim proved against the estate and to satisfy himself that the estate is indebted to the creditor in the amount of the claim. It seems to me that for this purpose
10 the trustee is entitled to a clear and unambiguous statement of the *causa debiti*, and that in this case the trustees were justified in objecting to the contradictory statements in the proofs of debt."

15 The duty of the applicants, as outlined, in this dictum of De Wet, JA, requires an analysis through the prism of the approach adopted in Caldeira, supra, to which I have already made reference. To return to that case, in referring to section 45(3) of the Insolvency Act, Levinsohn, J (as he then was)
20 noted at 874:

"This section enjoins a trustee, if he disputes the claim, to report to the Master his reasons for doing so. It seems to me that if a trustee disputes the
25 claim, he must have a reasonable belief, based on

facts, as claimed by him that the insolvent estate is not in fact indebted to the creditor concerned. Mere suspicion about the claim, would not be sufficient."

5 What is, therefore, required is a reasonable belief predicated upon established facts. The central feature of applicants' case concerns the nature of a transaction between Black River and Great Force and the contention that applicants had a reasonable belief, based on facts, as I have set them out, that
10 there was no debt as claimed by Great Force.

The central issue of this case is that the contractual arrangements that I have outlined are no more than a simulation. There is a vast jurisprudence on the law related to
15 simulated transactions. See, for example, Christie Law of Contract in South Africa, (6th ed) at 202ff. Suffice it to state for the purposes of this judgment that in Kilburn v Estate Kilburn 1931 AD 501 at 507, Wessels, ACJ said:

20 "It is a well known principle of our law that courts of law will not be deceived by the form of a transaction. They will render aside the veil in which the transaction is wrapped and examine its true nature and substance - *Plus valeat quod agitur*
25 *quam quod simulate concipitur.*"

The question, which a court is thus required to ask in the present case, is whether the parties actually intended that the contract should have the effect between them according to its tenor. If the answer is in the negative, effect must then be given to what the transaction actually is. See also Zandberg v Van Zyl 1910 AD 302 at 309.

The material placed before first respondent included an uncontested summation of the evidence, which was led at the section 417 inquiry. This constituted a more than sufficient basis to prove that Great Force's claim was one that deserved to fall within this jurisprudence of simulated transactions. It raised more, in my view, than a reasonable belief that the transaction was a sham, a set of arrangements designed to convert an unprotected creditor into one with legal protection to which it was not entitled by the creation of an illusion that second respondent was the relevant building contractor.

For this reason, the approach adopted by Watermeyer, J, (as he then was) in Chapell v The Master & Others 1928 CPD 289 at 291, is manifestly of application in this case:

> "Before dealing with the facts of the case, I would like to say that my view is that when claims are

submitted for proof to the Master, and there are reasonable grounds for suspicion that the claims are not genuine claims, the Master ought to disallow them and leave the parties that are putting forward
5 these claims to apply to court to establish their claim for way of action. If this is not the principle followed, then once claims are admitted, the onus of disproving their existence, which may amount to proving a negative, is thrown upon a trustee or
10 some creditor, who may object to these claims and I do not think that that is fair. That principle would apply especially in cases where the interests of the insolvent coincide with the interest of the person putting forward these claims and especially to cases
15 where claims are proved by the insolvent on behalf of children or relatives ... When all these matters are taken together, it seems to me there is such considerably doubt cast upon the insolvent's statement, that he gave this money to his minor
20 children as a donation, but I think the Master should have taken the view that these claims ought not to be admitted, merely on affidavits, and that the evidence which was then before him, and that they ought to be properly proved in a court of law, before
25 they could be admitted."

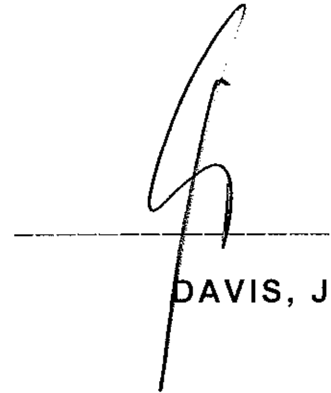
It follows that once this conclusion is reached, it would be incumbent upon first respondent to have expunged the claim. The obligation would then rest upon the second respondent to
5 satisfy a court in subsequent action if it so choses to establish its claim, that the elements of fraud, perjury, and indeed simulation (all of which are claimed by applicant), do not affect the validity of the claim or that they can be explained away. I should add that second respondent and the persons who
10 perjured themselves, have not sought to do so in these particular proceedings.

In the result, applicants have shown more than sufficient ground in my view for the expungement of second respondent's
15 claim. Accordingly, it is ordered:

1. That the first respondent's decision in terms of the Master refused to expunge the claim of the second respondent is set aside and replaced with one in
20 which the second respondent's claim is expunged;
2. That the second respondent is to pay the costs of this application;
3. That the costs of the liquidators of Black River Development (Pty) Limited (in liquidation) ("Black
25 River") for this application (to the extent that costs

are not borne by the second respondent in terms of paragraph 2 above) shall be costs in the winding-up of Black River.

5



DAVIS, J