IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

REPUBLIC OF SOUTH AFRICA

CASE NO: 12729/2021

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: **NO**
(2)	OF INTEREST TO OTHER JUDGES: **NO**
(3)	REVISED: **NO**
(4)	DATE: 9 OCTOBER 2023
(5)	SIGNATURE: ***ML SENYATSI***

In the matter between:

MURRAY & ROBERTS LIMITED **Plaintiff**

And

ENERGY FABRICATION (PTY) LTD **First Defendant**

(In business rescue)

Second Defendant

	Third Defendant
HARVEY SICELO BUTHELEZI	**Fourth Defendant**
MICHAEL MATTHEW FYNN	**Fifth Defendant**
ULRICO MARCELLUS DAVIDS	**Sixth Defendant**
	Seventh Defendant
NONKULULEKO MKHIZE	
PRAGASEN DEVAKARAN PILLAYY	**Eighth Defendant**
SOUTHERN PALACE	**Ninth Defendant**
GROUP OF COMPANIES (PTY) LTD	**Tenth Defendant**
POULOS SELLO MAHLANGU	**Eleventh Defendant**
LUCAS LEFU TSEKI	**Twelfth Defendant**
MATJANYANA GLADYS MAHLANGU	**Thirteenth Defendant**
LEBOGANG GRACE MPAKATI N.O.	
TEBOGO CHRISTOPHER	
PHAHLANI LINCOLN MKHOBO N.O.	

JUDGMENT

SENYATSI J

[1] This is an application for separation of certain issues in the ongoing litigation between the parties. The application was brought by the first and eleventh defendants. The latter is Miss Lebogang Grace Mpakati, in

her official capacity as the business rescue practitioner (BRP) of the first defendant and is cited as the eleventh defendant in the action. The fourth, fifth and sixth defendants are in support of the application and have filed their supporting affidavits. For convenience's sake, the parties will be referred to as in the action procedure.

[2] The brief history of this matter is that the plaintiff concluded an amended and restated Sale of Business Agreement with the first defendant on 16 February 2018 which agreement was amended on 11 April 2018. The purpose of the agreement was to record and regulate the agreement terms of the which the plaintiff sold 100 % of its share capital in Genrec Engineering carried out by Energy Fabrication (Pty) Ltd("EF") to the Southern Palace Group of Companies (Pty) Ltd ("SPGC"). It was after EF went into business rescue during May 2020 that the disputes arose.

[3] The plaintiff filed its claim with the eleventh defendant as part of the turnaround process and is a concurrent creditor together with many other creditors. A business plan was put together by the eleventh defendant, however, the plaintiff voted against it. In terms of the business plan, if it was endorsed by the majority of the creditors, it would result in each concurrent creditor receiving R0.01 for every R1.00 owed by the first defendant.

[4] Evidently unhappy with the business plan, the plaintiff initiated litigation during March 2021 in terms of which it seeks to recover its vendor loan of R100 million advanced to the first defendant which at the time of filing the suit had a balance of just over R80 million. In terms of the agreement the loan was to be repaid within five years from the transaction date and the loan would have become repayable from March 2023 reconned from the transaction date. The plaintiff did not seek leave from the eleventh defendant before initiating litigation as required by section 133(1)(a) and (b) of the Companies Act 71 of 2008 ("the Act").

[4] In the action, the plaintiff claims the following: -

(a) leave to be granted to it by Court to bring the proceedings against the first defendant under section 133(1) (b) of the Companies Act, 71 of 2008 ("the Act").

(b) ordering the first, second, seventh to ninth and eleventh defendants to comply with the 7 September 2020 demand.

(c) ordering the relevant defendants, jointly and severally to pay the sum of R80 029 843,50 to the plaintiff, together with interest thereon, as contemplated in clause 12.2 of the sale of business agreement from April 2018 to date; and

(d) declaring the second, third, fifth and eighth **to** tenth defendants to be delinquent directors in terms of section 162(5) of the Act. Alternatively,

placing the second, third, fifth and sixth defendant under probation as contemplated in section 162(7) of the Act.

[5] The pleadings between the parties were exchanged and the matter was subsequently referred to case management for a speedy resolution of the disputes between the parties.

[6] The basis of the claim brought by the plaintiff is contractual and in addition it seeks to hold the directors of the first defendant, both past and present liable for the repayment of the vendor loan based on various grounds as set forth in the particulars of claim.

[7] The first and eleventh defendants seek separation of the issues in order to determine whether the court has jurisdiction to entertain the litigation given that the BRP has not consented to the litigation as required by section 133 of the Act which deals with the general moratorium of litigation against a company in business rescue. The second ground advanced in support of the separation application is that the agreement concluded between the plaintiff, the first defendant and the seventh defendant makes provision for arbitration to resolve any dispute between the parties. The plaintiff has not invoked this arbitration provision as provided for in the agreement and consequently, the court does not have

jurisdiction to hear the matter. The defendants contend that it will be convenient to the Court and all the parties involved to separate the points of law raised as a defence to the claim. The separation application is opposed by the plaintiff.

[8] It should be mentioned at this point that as part of the case management, the parties were encouraged to agree on the separation of the points of law raised in the pleadings. An agreement could however not be achieved due to the opposition thereof by the plaintiff.

[9] The issue for determination is whether it will be convenient to the court and all the parties involved in the litigation that the separation of the issues identified by the first and eleventh defendants should be ordered as contemplated in Rule 33(4) of the Uniform Rules of Court ("the Rules").

[10] Rule 33(4) provides that:-

" If, in any pending action, it appears to the court mero motu that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on

the application of any party make such order unless it appears that the questions cannot conveniently be decided separately."

[11] The purpose of a Rule 33(4) separation application is to facilitate the convenient and expeditious disposal of litigation.[1] The court in these circumstances, is required to consider whether a preliminary hearing of the proposed separated issues will materially shorten the proceedings, and not cause a considerable delay in bringing the matter to finality.[2]

[12] To be successful in a separation application, the defendants are required to demonstrate that the separation will be convenient for all concerned, the court and all the parties involved in the litigation.[3] In *Blair Atholl*[4] the SCA endorsed what is stated in D E van Loggerenberg *Erasmus Superior Court Practice* (2016) 2 ed at D1-436, the author states the following:

"*The entitlement to seek the separation of issues was created in the rules so that an alleged lacuna in the plaintiff's case can be tested; or simply so that a factual issue can be determined which can give direction to the rest of the case and, in particular, to obviate the leading of evidence. The purpose is to determine the plaintiff's claim without the costs and delays of a full trial."*

[13] At D1-436 *op cit* the following is stated:

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[1] Denel (Edms) Bpk v Vorster 2004 (4) SA 481 (SCA) at 485A.
[2] Minister of Agriculture v Tongaat Group Ltd 1976 (2) SA (D) at 363A.
[3] The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association 2019 (3) SA 398 (SCA) at para 50.
[4] Supra at footnote

'*The procedure is aimed at facilitating the convenient and expeditious disposal of litigation. The word "convenient" within the context of the subrule conveys not only the notion of facility or ease or expedience, but also the notion of appropriateness and fairness. It is not the convenience of any one of the parties or of the court, but the convenience of all concerned that must be taken into consideration.'*

[14] In *Consolidated News Agencies (Pty) Ltd (In Liquidation) v Mobile Telephone Networks (Pty) Ltd & another*[5] paras 90-91, the court said the following:

"*This court has warned that in many cases, once properly considered, issues initially thought to be discrete are found to be inextricably linked. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing. A trial court must be satisfied that it is convenient and proper to try an issue separately."*

[15] The facts of this case do not justify the approach in terms of which all the disputes require to be resolved. The basis thereof is that not only will the litigation, as will be shown below, defeat the purpose of the business rescue. It should be remembered that there are claims of more than R354 million, majority of which have been proven. The business rescue plan as presented by the BRP was voted for and agreed to by most of the creditors. The plaintiff participated in the process and voted against the plan. It had not sought leave to institute the litigation against the first

[5] [2009] ZASCA 130; 2010 (3) SA 382 (SCA)

defendant in respect of the record of certain documents it required but instead instituted litigation based on the contract in terms of which its claim had been admitted as proven. The past and present directors of the first defendant as well as the seventh defendants have also been cited for various causes of action including declaratory orders on delinquency; damages claims and other unrelated relief to the contractual claims against the first and eleventh defendants.

[16] Section 133(1) of the Act provides that:-

" During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except—
(a) with the written consent of the practitioner;
(b) with the leave of the court and in accordance with any terms the court considers suitable; *"*

The provisions of this section are couched in discretionary terms. The import thereof is that during the rescue proceedings, no legal proceedings against the company may be commenced or proceeded with, except with the written consent of the business rescue practitioner or leave of the court.

[17] It is also trite that although there is an automatic moratorium on legal proceedings against the company in rescue, this is not an absolute bar and

it merely serves as a procedural limitation on a party's rights of action[6]. This is understandable as the business rescue practitioner ("the BRP") needs to focus on coming up with a turnaround plan for the business in rescue and need not have a distraction based on a multitude of litigation mounted against the company in rescue by a multitude of creditors with proven claims against the company.

[18] A party seeking the upliftment of the moratorium must make out a case for such upliftment.

[19] The purpose of separation is to make a speedy determination of the plaintiff's claim without more costs of hearing the evidence on merits and the points identified to be separated.[7] The separation application should not be used as a method to delay the litigation. It is important for the Court seized with the application for separation to consider the full spectrum of the pleadings before it in order to determine whether separation will be for the convenience of all the parties and the Court itself.

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[6] Commissioner for the South African Revenue Services v Louis Pasteur Investment (Pty) Ltd (in provisional liquidation) and Others (2022) jol 53784; 2022 (5) SA 179 (GP) at paras 54-56.

[7] Rauff v Standard Bank Properties 2002(6) SA 693(W) at 703I-J; Transnet Soc LTD V Regiments Capital (Pty) Ltd: In re: Transnet SOC Ltd v Trillian Asset Management (Pty) Ltd and Others: In re: Transnet SOC Ltd v Trillian Capital Partners (Pty) Ltd and Others; In re: Transnet SOC Ltd v Regiments Capital (Pty) Ltd and Others [2022] ZAGPJHC 702(19 September 2022)

[20] It is common cause that the plaintiff lodged its claim and voted against the plan proposed by the BRP. It is also common cause that it launched its litigation after failing to secure enough votes to reject the BRP plan. It is also common course that the litigation ensued without the permission of the BRP and that the BRP was asked to provide certain documents to the plaintiff. The plaintiff's claims are based on the first defendant's alleged breach of contract in repaying the vendor loan . The contract relied upon by the plaintiff makes provision for arbitration in the event of a dispute arising between the contracting parties. It is also common cause that the plaintiff claims damages against the individual directors of both EF and SPFC. More importantly, the documents discovered between the parties run into more than five thousand pages.

[21] Critically, it is also common cause that with regards to some of the former directors cited in the action, the delinquency declaratory orders are not sought against them and yet they are nevertheless cited.

[22] Having regard to the pleadings and the facts of this litigation, I hold the view that the issues identified by the first and the eleventh defendants if proven in their favour, will be dispositive of the matter. Accordingly, it is convenient for all the parties that separation should be ordered.

ORDER

[23] The order is made in the following terms:-

(a) It is directed that the issue of whether the temporary moratorium on the rights of the claimants against the first defendant in terms of section 133(1) (a) and (b) of the Act ought to be upheld pursuant to the plaintiff's failure to act in accordance with such provision is hereby separated in the matter contemplated in terms of Rule 33(4) of the Uniform Rules;

(b) It is furthermore directed that the issue of whether the Court holds the necessary jurisdiction, to entertain the plaintiff's claim premised upon certain contractual provisions of the parties in so far as the provisions provided for the mandatory mediation or arbitration of disputes in terms of clause 35 of annexure **"POC2"** and clause 14 of annexure **"POC4"** to the particulars of claims is hereby separated in the matter as contemplated in terms of Rule 33(4) of the Uniform Rules;

(c) The separated issues shall be determined first, with the outstanding issues to stand over for later determination, if required;

(d) The legal proceedings in this matter are hereby stayed until such time the separated issues have been determined; and

(e) The plaintiff is ordered to pay the costs of the application including costs occasioned by the employment of counsel.

ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Delivered: This Judgment was handed down electronically by circulation to the parties/ their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be **9 October 2023**.

APPEARANCES

For the Plaintiff: Adv. JPV Mc Nally SC
Adv SL Mohapi
Instructed by: Webber Wentzel

For the First and Eleventh Defendants: Adv. FJ Nalane SC
Adv S Magxaki
Instructed by: Crafford Attorneys

For the Fourth Defendant: Mr S Swiegers
Instructed by: Berinato at Law

For the Fifth Defendant: Adv. K Phuroe
Instructed by: Dinana Reid Inc

For the Sixth Defendant: Adv. JJ Rebello

Instructed by: Smith Attorneys

Date of Hearing: 04 September 2023

Date of Judgment: 9 October 2023