IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED
_____	_____
DATE	SIGNATURE

CASE NO: 57166/20

DATE: June 2022

In the matter between:-

NATURALLY AUSTRALIAN MEAT AND GAME (PTY) LTD Applicant

V

JH MEAT CC Respondent

JUDGMENT

KOOVERJIE J

[1] It is the applicant's case that the respondent be placed under business rescue supervision in accordance with Section 131 of the Companies Act 71 of 2008 ("the Act"), and that Mr Daniel Terblanche be appointed as business rescue practitioner in accordance with Section 131(5) of the Act.

[2] The respondent raised two main points *in limine* in its opposing affidavit, namely that the applicant does not have personal knowledge of the matter, and secondly, there are material disputes of fact which cannot be ventilated properly on the papers.

ISSUES FOR DETERMINATION

[3] Whether the respondent's points *in limine* has merit, namely:

(i) the applicant does not have personal knowledge of the matter;

(ii) whether there are material disputes of facts which cannot be dealt with properly on the papers.

[4] On a substantive basis the applicant submits that it has made out a case for business rescue proceedings to be instituted.

BACKGROUND

[5] The applicant and the respondent were in a business relationship since 2015. The nature of their business relationship was such that the applicant sold frozen boneless kangaroo meat to the respondent which was shipped from Australia to South Africa. The business relationship

continued until November 2018 when the respondent failed to pay for certain shipments of kangaroo meat. It is the respondent's case that these shipments were received by the applicant. The amount claimed for the shipments was an amount of USD $327,995.89 (hereinafter referred to as "the goods").

[6] The respondent disputed the fact that the said goods were delivered and received by the applicant. The respondent pointed out that:

(i) the goods (referred to in annexures "FA3" and "FA4.1" to "FA4.18" to the applicant's founding affidavit) were erroneously and/or fraudulently delivered by third parties and/or entities[1];

(ii) this caused the respondent to open a criminal case of fraud/theft against such third parties at the SAPS Table Bay Harbour on or about 19 May 2019;

(iii) thereafter, on 19 June 2019, it instituted civil proceedings for recovery of the damages (in the amount of R7,905,849.69) against the said third parties.

[7] The applicant, on the other hand, persisted with its argument that it has made out a case for the business rescue proceedings to be instituted. Under the circumstances there is a reasonable prospect that the respondent can be saved if it is placed under business rescue supervision.

POINTS *IN LIMINE*

[8] I am, firstly, required to make a determination on the points *in limine*. In the event that I find that there is no merit, I will proceed on the substantive issue pertaining to the business rescue application.

[1] Opposing affidavit, page 007-8

[9] On the issue of personal knowledge, the respondent contended that the deponent to the founding affidavit could not have personal knowledge of the issues in this matter. The deponent, Mr Asif Kaka, was a director of AK Collect. AK Collect only became involved in this matter subsequent to the respondent's account allegedly falling in arrears.

[10] Mr Kaka in his founding affidavit at paragraph [2] stated:

"I have personal knowledge of the applicant's claim against the respondent by virtue thereof and I, at all material times, personally dealt with the representatives of the respondent, except as otherwise stated herein and in possession of all the files, documents relating to the account of the respondent."

[11] It was pointed out that since Mr Kaka only became involved in 2019, he was not involved when the parties entered into agreement to do business, hence the contract. Nowhere in the founding affidavit or the replying affidavit does Mr Kaka state that he gained knowledge of the terms of such contract/agreement between the parties by having regard to documents or that he was informed of such agreement by Mr Gifford, the director of the applicant. He merely stated that he is in possession of the files and documents "relating to the account of the respondent".

[12] Mr Gifford, as the director of the applicant in all probability would have personal knowledge regarding the agreement/contract between the parties as well as various transactions between them, including the transactions relevant to the subject matter of the litigation.

[13] In my view, it was rightly pointed out that Mr Gifford's involvement was not set out in the founding affidavit. Mr Gifford goes on to confirm: *"I have read the founding affidavit deposed to by Asif Kaka and I hereby confirm all allegations and/or statements that relate to me."* However, Mr Kaka does not make mention of Mr Gifford's involvement in his affidavit.

[14] At paragraph 17, Mr Kaka only refers to Mr Gifford's confirmatory affidavit[2].

[15] I have further noted that Mr Kaka, a collections agent, was authorised via a resolution to act on behalf of the applicant *"to do all such things and to sign all legal and/or necessary documents pertaining to the company"*. However, the resolution does not state that Mr Kaka was authorised to institute proceedings and prosecute same[3]. There is considerable amount of authority for the proposition that where a company commences proceedings by way of petition, the person who makes the petition on behalf of the company must state that he/she is duly authorised to institute the proceedings. In this instance, I find that there is insufficient evidence placed before the court to show that the applicant was authorised to institute these proceedings.

[16] At paragraph [2] of Mr Kaka's founding affidavit he stated that he has personal knowledge of the applicant's claim by virtue of the fact that he had at all relevant times dealt with the representatives of the respondent and had sight of the relevant documents. However, it cannot be disputed that he has personal knowledge pertaining to the oral/written contract entered into between the parties.

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[2] 001-9 to 001-12

[3] Erasmus, Superior Court Practice, D1-55. See also Mall (Cape) (Pty) Ltd v Merino Ko-operasie BPK 1957 (2) SA 347 (C) at 351 H

[17] Furthermore, in making reference to “except as otherwise stated herein”, he was expected to identify who held knowledge of aspects which he did not.

MATERIAL DISPUTES OF FACT

(a) Applicant’s case

[18] The parties argued at length as to whether the disputes of fact could be resolved on the papers. The disputes identified pertained to the terms of the agreement, the amount ($327,995.89) being claimed, and whether or not the goods were received by the respondent.

[19] The applicant argued that there are no disputes regarding the fact that:

(i) the goods were delivered to the respondent;

(ii) the respondent is in financial distress and unable to pay its debts; and lastly,

(iii) the documentation supporting the applicant’s claim was provided to the respondent.

[20] The applicant placed emphasis on the respondent’s reply that it will negotiate that some compensation be paid to the applicant once it recovers the damages from the third parties.

[21] It was further pointed out that the respondent failed to disclose relevant information such as fixed assets, bank balances, debtors and creditors and stock in hand, as well as the updated relevant financial information and financial statements. Hence the only inference which could be drawn is that the respondent is in financial distress and unable to pay its debts.

[22] It was also pointed out that during settlement negotiations the applicant's attorneys, in fact, requested the respondent to provide more recent financial statements to determine the respondent's financial position and solvency[4].

[23] By placing the respondent under business rescue, a business rescue practitioner would be able to investigate the business of the respondent and the circumstances that led to the failure by the respondent to pay its debts.

[24] The applicant pointed out that on the respondent's own version it acknowledged that it had received four shipments of goods. The fact that the respondent's business associates and the partners allegedly stole from the respondent and/or defrauded the respondent is not relevant as ultimately the goods were delivered to the respondent. To demonstrate the said fact, the applicant relied on the affidavit of Mr Jansen van Rensburg, deposed to in the proceedings before the Western Cape High Court, where the respondent confirmed that it received at least four shipments.

[25] Regarding the terms of the agreement, it was pointed out that material, express, implied and/or tacit terms of the agreement were, *inter alia*, as follows:

(i) the delivery terms would be subject to the Incoterms 2010; and

(ii) payment would be due within 45 days after the date on the bill of lading[5].

[26] The respondent cannot deny that it was not aware of the specific terms of the Incoterms 2010. The sale confirmations were signed on behalf of the respondent and no issue was raised of the applicability to the transactions at the time[6]. It was pointed out that by virtue of the

[4] 001-19 founding affidavit, para 46
[5] Founding affidavit page 001-8 paragraph 11
[6] Annexure "FA4.1" (page 001-29), Annexure "FA4.8" (page 001-36), Annexure "FA4.11" (page 001-39), Annexure "FA4.14 (page 001-42) and Annexure "FA4.17 (page 001-45)

Incoterms 2010, the Costs, Insurance and Freight (CIF), *inter alia*, the following terms were applicable, namely:

(i) costs, insurance and freight means that the seller delivers the goods on board of the vessel;

(ii) the seller must provide the goods with a commercial invoice in conformity with the contract of sale;

(iii) the seller must deliver the goods by placing on board the vessel;

(iv) the seller bears all risk of loss of damage to the goods until they have been delivered on board on the vessel in accordance with clause A4 of CIF;

(v) the buyer must pay the price of the goods as provided in the contract of sale;

(vi) the buyer must take delivery of the goods where they have been delivered as envisaged in clause A4 of CIF and receive them from a carrier at the main port of destination[7];

(vii) the buyer bears all risk of loss or damage to the goods from the time they have been delivered as envisaged in clause A4 of CIF.

[27] This meant that the respondent particularly assumed the risk of damage or loss to the goods when same was put on board of the respective vessels from Australia and received here in South Africa. Furthermore, payment had to be effected within 45 days after the bill of lading date.

[28] It is the applicant's case that the respondent received the goods. I was referred to the DHL delivery notes, namely Annexure "RA2.1 to RA2.6" to the replying affidavit[8] in this regard.

[7] Annexure "RA1, page 006-0079
[8] Replying affidavit, RA 2.1 page 008-82 to 008-87

(b) Respondent's case

[29] The respondent, on the other hand, argued that it was clearly foreseeable that due to the material factual dispute, proper adjudication was not possible on the papers. For instance, the respondent denied that it received the goods and moreover in the amount of $327,995.89 from the applicant. It was pleaded that these shipments were erroneously delivered and/or fraudulently received by third parties, persons or entities.

[30] The applicant alleged that the agreement between the parties was based on a partly oral and partly written agreement. It was, however, pointed out that such terms of the said agreement were not properly pleaded in the founding affidavit. The respondent particularly denied that the Incoterms 2010 was applicable.

[31] It was argued that the dispute as to whether there was delivery of the goods cannot be resolved on the papers. To date the respondent has not seen the delivery notes to establish who received the goods, and/or who allegedly received it on behalf of the respondent.

[32] It was further pointed out that, in fact, the applicant conceded (in reply) that it was possible that the respondent may not have received the seven shipments of meat[9].

[33] During the hearing it became evident that the applicant was unable to illustrate that all seven shipments were received by the respondent. In the absence of signed delivery notes the respondent argued that it was unable to establish to whom the relevant shipments were delivered. It was pointed out that Annexure 'RA2.1' to 'RA2.6' reflected the delivery of the import documentation and not the goods.

[9] Paragraph 9.7, replying affidavit

[34] In exercising my discretion, I am required to consider the alleged facts in dispute and see whether real disputes of fact exist which cannot be satisfactorily determined without the aid of oral evidence.

[35] The law pertaining to how courts should approach matters where disputes of fact are raised has been settled by our authorities. I am mindful that vague and insubstantial allegations are insufficient to raise the kind of dispute that should be referred for oral evidence. The respondent will certainly not succeed if there are bare denials on the part of the respondent to the applicant's allegations in its affidavit, or if denials are so farfetched and clearly untenable. A real genuine or *bona fide* dispute of fact must exist[10].

[36] Often in motion proceedings the court is required to take a robust commonsense approach to a dispute and should not hesitate to decide an issue on an affidavit merely because it is difficult to do so[11]. However, this approach must be adopted with caution. The court should not be tempted to settle disputes on fact solely on the probabilities emerging from the affidavits without giving due consideration to the advantages of oral evidence[12].

[10] South African Veterinary Council and Another v Szymanski 2003 (4) SA 42 SCA at paragraph 24
[11] Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 N at 634 and 635
[12] Erasmus, Superior Court Practice at D1-74

[37] In the ***Khumalo***[13] matter the court indicated, *inter* alia, that there should be reasonable grounds for doubting the correctness of the allegations raised.

[38] I also find it apt to highlight what the court stated in ***Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd 2011 (1) SA 8 SCA at 14 D-E***:

"In deciding disputed facts in application proceedings a court should always be cautious about deciding probabilities in the face of conflict of facts in the affidavits. This is so because affidavits are settled by legal advisors with varying degrees of experience, skill and diligence and a litigant should not pay the price for an advisor's shortcomings. Judgment on the credibility of the deponent, absent direct and obvious contradictions, should be left open. Nevertheless the courts have recognised reasons to take stronger line to avoid injustice.[14]."

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[13] Khumalo v Director General Cooperation and Development and Others 1991 (1) SA 158 A at 167 G to 168 A where the court cited with approval the conclusions of Kumleben J in ***Moosa Brothers and Sons (Pty) Ltd v Rajah 1975(4) SA 187 D at 93 E-H*** regarding the approach adopted in applications for referral to oral evidence in terms of Rule 6(5)(g). The passage is worthy of repetition:

"(a) As a matter of interpretation there is nothing in the language of Rule 6(5)(g) which restricts the discretionary power of the court to order the cross-examination of a deponent to cases in which a dispute of fact is shown to exist.

(b) The illustrations of genuine dispute of fact given in the Room Hire case at 1163 do not and did not purport to set out circumstances in which cross-examination under the relevant Transvaal law a court could be authorised. They a fortiori do not determine the circumstances in which such a relief should be granted in terms of Rule 6(5)(g).

(c) Without attempting to lay down any precise rule, which may have the effect of limiting the wide discretion implicit in the rule, in my view, oral evidence is one or other form envisaged by the rule should be allowed if there are reasonable grounds for doubting the correctness of the allegations concerned.

(d) In reaching the decision in this regard facts peculiarly within the knowledge of the applicant which for that reason cannot be directly contradicted or refuted by the opposite party, are to be carefully scrutinized." (my emphasis).

[14] Van Loggerenberg page D-76

[39] As alluded to above, a dispute regarding Mr Kaka's personal knowledge exists. I am of the view that reasonable grounds have been proffered doubting the personal knowledge of the deponent to the affidavit. In this case Mr Gifford's testimony is necessary as he would be able to confirm: firstly, what the terms of the contract between the parties were; secondly, that he was involved in the transactions regarding the goods in issue, and lastly, whether the goods were delivered and received by the respondent.

[40] On the issue as to whether the respondent was in financial distress, it is evident that this fact remains disputed and can only be resolved by virtue of oral evidence. I deem it necessary to highlight the discrepancies as they stand on the papers on the said issue:

The applicant's version:

(i) In the founding affidavit, at paragraph [22][15] the applicant alleges:

"22. Joggie informed me that the Respondent was not in a position to settle the indebtedness, however, suggested that the indebtedness be paid over a term by way of monthly instalments…"

(ii) At paragraph [31][16]:

"31. Joggie, on 11 October 2019, indicated that he would be willing to meet with our offices to discuss the indebtedness as well as the conclusion of a payment plan in terms of which the indebtedness may be settled."

(iii) At paragraph [32] the applicant makes reference to the respondent's correspondence (dated 11 October 2019) where the respondent contended that it did not receive the containers. The relevant extract reads:

[15] Page 001-13 of the record
[16] Page 001-15 of the record

"32.1 That the Respondent did not receive the containers of the meat ordered by the Respondent and supplied by the Applicant, in that same had been taken by a third party;

32.2 The Respondent was in the midst of a forensic audit and that a case of theft and fraud and been opened at the Table Bay Harbour, Cape Town Police Station;

32.3 As a result, the Respondent was unable to enter into any form of settlement or admit any liability pending the ongoing investigations and that any legal action taken against the Respondent would be defended." (Annexure "FA8" of 001-16)

(iv) Then at paragraph [39][17] the applicant avers:

"39. Joggie once again informed our offices that he did not have the funds to settle the indebtedness, however, when questioned on this aspect, due consideration to the payment terms of 45 days from the date of the Bill of Lading, Joggie and Grobler could not provide clarity. It was rather reiterated that the goods were not received.".

(v) The respondent in its papers denied its indebtedness to the applicant. The response was at paragraph [21]:

"I deny informing the deponent to the Applicant's Founding Affidavit that the Respondent was not able to settle its indebtedness. I informed him about the aforesaid theft and/or fraud, the- criminal investigation and the civil action in respect thereof, and I committed to negotiating a form of compensation to be paid to the Applicant by the Respondent, once the Respondent has succeeded in recovering damages from the defendants in the pending civil action."[18].

[17] 001-16 of the record
[18] 007-11 to 12 of the record

(vi) Further at paragraph [38] of the answering affidavit the respondent avers:

"I deny that the Respondent is not profitable or in financial distress that could justify the Respondent being placed under business rescue."[19]

[41] On the said discrepancies, Mr Jansen van Rensburg's (Joggie's) testimony is necessary. His evidence should be tested, particularly in cross-examination. He would be required to clarify what was relayed to the applicant, and explain his responses, namely whether there was an intention to pay the applicant for the goods or whether the respondent merely intended to compensate the applicant due to the theft. There are these variables and the court cannot conclusively draw an inference based on the different interpretations which appear both in the founding and the answering affidavits.

[42] With regard to the provisions of Section 131(4) of the Act, I am mindful that this court has to be satisfied that: the company is financially distressed or that the company has failed to pay over an amount in terms of an obligation in terms of a contract, and secondly, if it is just and equitable to do so for financial reasons and there is a reasonable prospect of rescuing the company. At this point, even the contractual terms remain in dispute. The applicant's contention that the respondent failed to pay the amount owing in terms of the contract between the parties cannot, in my view, be resolved on the papers.

[43] In the pleadings before me, I am unable to determine if the said requirements have been met. I have only been privy to the financial position of the respondent in the 2014 year (hence the 2015 financial statements). I have not been placed in a position to determine the status of the respondent at the time the debt became due.

[19] 007-17 of the record

[44] The phrase "financially distressed" is defined in Section 128(1)(f) of the Companies Act to include two distinct concepts. It is defined as follows:

"Financially distressed – in reference to a particular company at any particular time, means that:

(i) it appears to be reasonably likely that the company will be unable to pay all of its debts as they become due and payable within the immediately ensuing six months; or

(ii) it appears to be reasonably likely that the company would become insolvent within the immediately ensuing six months."

[45] In light of the disputes raised, it is not possible to determine as to whether the respondent is "financially distressed". More importantly, a mere speculative suggestion that the entity is "financially distressed" is not sufficient. One needs to establish more than a mere *prima facie* case or an arguable possibility[20].

[46] This court is required to adjudicate matters in a fair and full manner. Often courts have to decide where the truth lies between two conflicting versions. In this instance, where the said

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[20] In ***Oakdene Square Properties Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others 2013 (4) SA 539 (SCA) at para 29*** the Supreme Court of Appeal concluded that the phrase of a reasonable prospect should be understood as follows:

"This leads me to next debate which revolve around the meaning of a reasonable prospect. As the starting point it is generally accepted that it is a lesser requirement than a reasonable possibility which has a yardstick for placing a company under judicial management in terms of Section 427(1) of the 1973 Companies Act ... On the other hand, I believe it requires more than a mere prima facie case or an arguable possibility. Of even greater significance, I think, is that it must be a reasonable prospect, with emphasis on reasonable – which means that it must be a prospect based on reasonable grounds. A mere speculative suggestion is not enough. More, because it is the applicant who seeks to satisfy the court of the prospect, it must establish that these reasonable grounds in accordance with the rules of motion proceedings which generally speaking, require that it must do so in its founding papers."

disputes of fact exist, it would not be possible to make a determination on the matter without subjecting the parties to cross-examination. A court may, of course, after cross-examination still be unable to decide where the truth lies. However, that possibility does not entitle the court to decide the matter without allowing cross-examination[21].

[47] In the premises I make the following order:

1. This matter is referred to trial for oral evidence.
2. Costs of the application are reserved.

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H KOOVERJIE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the plaintiff/respondent:	*Adv IM Lindeque*
Instructed by:	*O'Connell Attorneys*
Counsel for the defendant/applicant:	*Adv JJ Greeff*
Instructed by:	*Hendrik Grobler Attorneys*
Date heard:	*6 June 2022*
Date of Judgment:	*June 2022*

[21] Freedom Under Law v Acting Chair Person; Judicial Service Commission 2011 (3) SA 549 SCA at 564 F-H