IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 26270/2021

DATE: 20-09-2023

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.
DATE: 6 NOVEMBER 2023

SIGNATURE

In the matter between

UNI-SPAN FORMWORK & SCAFFOLDING (PTY) LTD Plaintiff

and

SVK HOLDINGS (PTY) LTD and 3 OTHERS Defendant

J U D G M E N T

DAVIS, J:

I intend rendering an *extempore* judgment. As introduction, the following:

The applicant's cause of action is based on a contract. The applicant seeks to enforce the terms of a settlement agreement reached between the parties and, as a consequence, claimed payment of R8 655 000.00 The applicant alleges that this amount is due and payable in terms of a written settlement agreement.

The respondent opposes the matter, principally claiming that the settlement agreement came about as a result of undue influence and therefore should be unenforceable.

The second part of the applicant's claim relates to security furnished by way of moveable property, in particular a certain "Bruiser" armoured vehicle. In terms of a directive reached during case-management proceedings in May of this year, the issue regarding the security was separated from the payment claim and the parties thereafter proceeded with the payment claim which is currently before the Court.

As the dispute centres around the terms of the settlement agreement, it is apposite to start therewith. The settlement agreement is a written agreement. It was signed on 17 April 2021 by a Mr Marais on behalf of the applicant, by Mr Andre Brand Van der Merwe, both in his personal capacity and in representing the first respondent, SVK Holdings (Pty) Ltd and he warranted that he was duly authorised to do so.

The relevant terms of the settlement are the following, and I quote from the preambles and certain

clauses:

> *"WHEREAS the applicant and the first respondent concluded a rental agreement in which the applicant rented certain scaffolding equipment to the first respondent.*
>
> *AND WHEREAS a dispute arose between the applicant and the first respondent relating to the total tonnage of the scaffolding equipment at the Kusile site and rented by the first respondent.*
>
> *AND WHEREAS the applicant launched an urgent application under the abovementioned case number against the first, second, third, and fourth respondents in two parts, being Part A for the return of the scaffolding equipment in which applicant sought interim relief against the second, third, and fourth respondent, and Part B for an order against the first respondent of payment of outstanding rental due by the first respondent to the applicant.*

AND WHEREAS Part A of the application was settled between the parties by way of a settlement agreement which was made an order of court on 22 October 2019 in terms of which order, inter alia Part B, was postponed.

AND WHEREAS no further relief is claimed against the second, third, and fourth respondents in terms of Part B of the application.

AND WHEREAS Andre Brand Van Der Merwe, an adult male and sole director of the first respondent, agrees and consents to be joined through this application and to be bound by any judgment granted against him pursuant to this settlement agreement.

AND WHEREAS the applicant agrees to withdraw its opposition under case number 92558/2019 within two days from date of signature of this agreement.

AND WHEREAS the applicant, the first

respondent, and Van Der Merwe have come to an agreement to settle the application and wish to record the terms of the settlement in writing.

NOW THEREFORE the applicant, the first respondent, and Van der Merwe agree as follows:

2.1.3 "Claimed amount" shall mean the amount as set out in Part B of the notice of motion, being R8 965 916.40, plus interest at a rate of 2% above the prime overdraft interest rate per annum charged by Standard Bank of South Africa Limited from time to time.

2.1.4 Commencement date shall mean the date of signature of the last party signing this agreement.

2.1.5 Effective date shall mean the earliest of one year from the commencement date or the resolution of a pending dispute arbitration between the first respondent and

Alstom S&E Africa trading as GE Steam Power Systems (General Electric).

2.1.9 "Settlement amount" shall mean the amount of R4 500 000 plus the taxed and/or agreed costs in respect of the urgent applications launched by the first respondent and Van der Merwe under case number 92558/2019 on 5 March 2020 and 20 March 2020 respectively.

2.1.10 "The debtors" shall mean the first respondent and Van der Merwe jointly and severally."

3. ACKNOWLEDGMENT OF DEBT:

"The Debtors acknowledge that they are jointly and severally liable for payment of the settlement amount."

4. SETTLEMENT:

"4.1 The debtors undertake to make payment to the applicant of the settlement amount on or before the effective date in full

and final settlement of any and all claims the applicant has against the first respondent subject to Clause 8 below.

4.2 Payment of the settlement amount will be paid into the trust account of the Applicant's attorneys of record.

4.3 Upon payment of the settlement amount by the debtors will the applicant withdraw Part B of the application under case number 74295/2019 against the first respondent.

8 DEFAULT/ACCELERATION.

8.1 If the debtors fail to make due and timeous payment on the effective date and/or breach of any of the provisions of this agreement:

8.1.1 The entire balance of the claimed amount at that date shall be become due and payable forthwith, together with interest.

8.1.2 The applicant shall be entitled to

recover, in addition to the aforegoing, all costs disbursed by itself to [indistinct – 01:10:06] attorneys in securing the debtors' compliance with the provisions hereof on an attorney-and-client scale.

9.1 It is agreed between the parties that monthly updates will be provided to the applicant's attorneys of record in respect of the pending dispute between the first respondent and General Electric.

11 UNCONDITIONAL INDEPENDENT CAUSE. The debtors acknowledge and agree that this document, when signed by them, constitutes a firm and binding acknowledgment, undertaking and commitment assumed by them in terms hereof. The debtors' liability arising here from is not subject to any condition whatsoever and this document signed by it constitutes its own unconditional causa against the debtors independently of any other causa.

12.1 The debtors acknowledge and agree that:

12.1.1 No warranties or representations have been made by or on behalf of the applicant which may have had the effect of inducing the debtors to sign this document and assume obligations herein.

14.1 The parties hereby record and agree that the applicant shall be entitled to have this agreement made an order of court and the debtors hereby waive notice of application to make this an order of court. In the event of the debtors' failure to make payment in terms of this agreement the applicant shall be entitled to have a warrant of execution issued or proceed with any other legal proceedings.

14.2 Insofar as this agreement, or any portion thereof, are not, for any reason whatsoever, made an order of court, the parties record that it is nevertheless binding on themselves inter partes."

Now, how this settlement agreement came about is as follows: The applicant sought to recover what it thought was

due to it in terms of rental of scaffolding by the first respondent. The amount calculated was based on an alleged 1351 tons of scaffolding rented and utilised by the first respondent.

That amount was disputed and the first respondent, at some stage, averred that no amount can be determined unless a scaffolding audit had been conducted. The applicant instituted the application which was later referred to in the settlement agreement against the first respondent and certain other parties, including General Electric, as well as Eskom Holding SOC Limited where the scaffolding was utilised on one of its sites.

That application was launched as one of urgency on 8 October 2019 in case number 74295/2019. By agreement between the parties, an order was made by this Court on 22 October 2010. That order provided certain interim relief as claimed in Part A of the urgent application.

That order envisaged the return of the scaffolding dismantled by the first respondent and identified by the applicant. Further provisions were made for access to the site for the collection of the scaffolding by the applicant and of importance is paragraph 11 of the order, on which the

respondents now relied in this court.

It provided that in respect of identified scaffolding, the first respondent will be deemed to have returned the scaffolding and for purposes of further relief by the applicant, the applicant and the first respondent were directed to appoint representatives to record in writing the items of scaffolding returned to or collected by the applicant, and the fourth respondent to that application would have been a witness of such confirmation for purposes of removal of the items from the Kusile site. The fourth respondent was Alstom S&E Africa (Pty) Ltd trading as GE Steam Power Systems.

Subsequent to this order having been made an order of court, the first respondent was placed under business rescue on 14 November 2019. Shortly thereafter, on 17 December 2019, the business rescue was discontinued and converted in liquidation proceedings.

Whilst the first respondent was being wound up, it got wind of further tenders to be issued by Eskom at the Kusile site and Mr Van der Merwe, also representing the first respondent, contemplated that the first respondent might secure work in terms of those tenders in excess of R135

million. Such a windfall will, of course, assist the first respondent in extinguishing its debts, of which its principal creditor was the South African Revenue Services.

The securing of those tenders would not only constitute a lifeline of liquidity for the first respondent but would ensure its future existence and the retention of employee and the like.

On 20 March 2020, the first respondent and Mr Van der Merwe therefore launched an urgent application for the discharge of the liquidation order. This was done, of course, as aforesaid, with a view of securing the tenders. The applicant in this application sought to oppose the application for the discharge of the winding-up order.

During April 2020, one of the applicant's directors, a Mr Damant, received a call from Mr Van der Merwe requesting a possible settlement of the disputes between the parties in exchange for the applicant's withdrawal of its opposition to the application for the discharge of the winding-up order.

The applicant's deponent, being one of its directors, Mr Marais, stated in the replying affidavit to the current

application that the applicant was willing to consider any settlement proposal by the respondents. I interject also to mention that Mr Damant furnished a confirmatory affidavit.

After having been approached by the respondents in this fashion on 16 April 2020, the respondents' attorney wrote a letter to the applicant's attorney. The attorneys representing the first and second respondents at that time had been their attorneys of record for more than a decade and they also feature as the current attorneys of record. The letter of 16 April 2020 refers to the furnishing of the vehicle being an armoured-personnel carrier to be provided as security (less the artillery).

The next day the applicant's attorneys responded by saying as follows, with reference to Mr Babinski:

> "*Dear Istvan, the above matter, as well as our conversation of earlier today as reference. Istvan, please find annexed hereto the settlement agreement as discussed. Kindly peruse the contents of same and provide us with your comments. Can we kindly request that any suggested changes in the settlement agreement be*

done by way of track changes? Looking forward to hearing from you."

Such changes were effected and later on the same day, Mr Babinski reverted as follows:

"*With reference to the abovementioned, as well as the proposed settlement, we wish to comment as follows:*

10

(a) The agreed settlement amount between our respective clients was the amount of R4.5-milliion in full and final settlement. Please amend same accordingly.

(b) The basis for the settlement is that Uni-Span would, upon Mr Van der Merwe personally taking responsibility
20 *for the settled debt of R4.5-million, support and consent to the application lodged in order to discharge the current liquidation status of the company. This seems to be absent from the settlement.*

(c) Our client has given security in the form of a Bruiser Model 112 APC armed-personnel-carrier vehicle. Our client will sign any and all documents to provide your client with the said security. However, if your client would like to register a material bond, such costs would be for your client's account.

(f) As mentioned, the entire agreement was reached on the basis that our client requires your client's support in order to discharge the current liquidation status. Only once same is done can the funds be generated in order to pay the settlement. As I understand, will your client not accept that this settlement is subject to our client being taken out of provisional liquidation, which is our instructions. However, then as an alternative, should Mr Van der Merwe still be afforded the period as per 2.1.5 irrespective if the liquidation status is discharged or not.

Please be so kind as to take instructions from your client on the aforementioned and revert back to us as soon as possible."

The comments were accepted and incorporated in the settlement agreement, in the terms as already referred to above, later on, on the same, that is 17 April 2020, whereafter the agreement was signed.

10 On 20 April 2020 the applicant, via its attorneys in compliance with its undertaking in terms of the agreement, forwarded the notice of withdrawal to the respondent's attorneys. For purposes of the special notarial bond, as envisaged in the agreement and in the correspondence, the particulars of Mr Van der Merwe relating to his identity document, proof of residence, proof of marital status, and the address where the moveable asset will be kept were required.

20 Subsequent to the notice of withdrawal of 20 April 2020, the liquidation application proceeded before Holland-Muter, then AJ, who in his judgment, in setting aside the winding-up proceedings, referred to the fact that the setting aside was supported by the South African Revenue Services as the largest preferent creditor and he also noted that the

applicant, having previously opposed that application, had withdrawn its opposition. Accordingly, the first respondent was “taken out of liquidation”.

Pursuant to that, the further steps subsequent to the settlement, apart from the withdrawal, leading to the setting aside of the liquidation on 28 April 2022, was that the applicant had requested powers of attorney on two occasions from the respondents for the registration of a notarial bond over their vehicle. Those powers of attorney were indeed furnished by Mr Van der Merwe on behalf of the first respondent and himself, and the notarial bond was indeed registered on 15 April 2021 with registration number BN00017457/2021 in the Deeds Office, Pretoria.

I mention these steps taken subsequent to the settlement agreement and in implementation thereof as at no stage had the respondents raised any objection against the settlement agreement or its validity or enforcement. In fact, they went further and kept the applicant updated as to the progress in the arbitration mentioned in clause 2.1.5 of the settlement agreement.

Once the time period for payment of the settlement amount of R4.5-million had come and gone and once no

payment had been made, the applicant proceeded in launching the present application wherein it then claims the agreed outstanding amount, as already referred to above, in excess of R8,965-million.

In the answering affidavit in the current application the respondents raised a dispute in the following terms, and I quote from Mr Van der Merwe's affidavit:

> "*Although a settlement was reached between the parties, it is submitted that the unfounded and malicious opposition by the applicant resulted in the applicant placing the respondents with their backs against the wall. It is submitted that the agreement was only entered into as a consequence of undue influence and pressure imposed by the applicant. The applicant, knowing that the fate of the company and its employees would be sealed should the respondents not settle the matter, held a position of substantial power over the respondents. Ultimately, the applicant used its position unscrupulously towards the respondents and subsequently resulted in the respondents,*

> *without any choice, entering into the said transaction. This transaction is nothing short of being prejudicial and, if the respondents had been exercising a normal and free will, the respondent would not have entered into the jural act or transaction*."

Insofar as the settlement agreement virtually halved the claimed amount and also terminated any dispute regarding the computation thereof, one would have expected the respondents to indicate their problem with the R4.5-million. The halving of the disputed amount was clearly to their advantage. Nothing was said about this.

Nothing was also said in the affidavit as to why Mr Van der Merwe then then bound himself to the agreement and what else he would have then agreed to or done had there not been the alleged undue influence.

Without abandoning this point, Mr Van der Merwe said that the amount of R4, 5-million was, and I quote again from his affidavit:

> *"...derived from the possible claim that the applicant might have against the first*

> *respondent. It is also submitted by the respondents that the amount of R4.5-million was to be a full and final settlement and that the respondents never agreed or acknowledged to be indebted to the applicant for an amount of R8 965 960.40*."

No answer was given as to why the R4.5-million as agreed to was then not paid timeously or at all. The allegation by Mr Van der Merwe that the respondents had not agreed or acknowledged an indebtedness to the applicant for the full amount is, of course, gainsaid by the expressed terms of the agreement themselves.

In respect of the defence of undue influence, the respondents conceded that they have an onus to prove that the applicant had influence over the respondents, that such influence had weakened the respondents' resistance, that the applicant used the influence unscrupulously, that the respondents were innocent parties, and that the transaction was prejudicial to the respondents and exercising normal free will the respondents would not have entered into the agreement.

This was made with reference to the judgment of

Davis J in *Advtech Resourcing (Pty) Ltd trading as Communicate Personnel v Kuhn* 2008(2) SA 375 (C) at [30]. Reference was also made to *Preller v Jordaan* 1956(1) SA 483(A) where a party has influenced another to such an extent that his will became weak and pliable and that the party exercising the influence brought a will to bear in an unprincipled manner.

It must also be mentioned that the respondents did not rely on the issues of duress or the threats of an improper nature as mentioned in *Arend and Another v Astra Furnishers (Pty) Ltd* 1974(1) SA 298 (K) at 306A - B, discussed in *BOE Bank Limited v Van Zyl* 2002(5) SA 165 (KPA), but only on the issue of undue influence as referred to above.

When one contemplates the full assistance of the respondents by their attorneys and the exchange of correspondence which I had referred to, it is difficult to match the allegations in the answering affidavit with the preceding facts. There was no indication in any of those interactions that any undue influence was exerted or, in fact, that any demand was made by the applicant.

In fact, the proposal for settlement came from the

respondents and was pursued through their attorney who had full and extensive time to consult with the respondents and to consider the matter.

It is apparent from the correspondence that they did so. This is apparent from the various comments made by Mr Babinski and those incorporated in the agreement. I find on these facts no substantiation of any alleged influence or weakening of the will as claimed by Mr Van Der Merwe in his affidavit.

Another weighty factor which weighs against this defence is the fact that after the settlement agreement had been entered into and after the first respondent had been "taken out of liquidation" in April 2020, nothing further was done in respect of the recent claim of invalidity of the agreement in the subsequent months, or any other months leading up to the due date of payment of the settled amount.

In fact, the opposite was apparent, namely that the respondents cooperated in the implementation of the agreement which they now claim that they had been unduly influenced into entering. It is only when the claim came for the payment of the full agreed amount that these allegations surfaced.

I find that in these circumstances the respondents have not raised a *bona fide* and real dispute of fact and that the allegations are such that they can be rejected out of hand on the papers. There is therefore also no need for any reference to oral evidence.

During argument today and as an apparent last resort, counsel for the respondents raised two new points which had not previously been canvassed in either the answering affidavit or heads of argument.

The first was the issue of *lis pendens*. As I understood the argument, it went like this: The urgent application in case number 74295/2019 was not or has not yet been withdrawn and it was in fact still alive and pending, and therefore a party should be precluded from enforcing a subsequent agreement and this Court should also preclude the applicant from proceeding with the settlement agreement. Once one has regard to the contents of the settlement agreement as quoted above, it becomes clear that the parties clearly intended that settlement agreement to be an end of the disputes in the preceding urgent application.

The agreement, particularly insofar as it relates to an initial halving of the amount claimed without any further dispute about the computation thereof, clearly amounts to a compromise. A compromise has defined as an agreement between two or more persons for the purpose of preventing, avoiding, or terminating a dispute. The *locus classicus* confirming this is *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Company (Pty)* Ltd 1978(1) SA 914 (A) at 921 A – D.

10

Even if by some notion the urgent application in case number 74295/19 might still be pending insofar as it has not been formally withdrawn, this Court has a discretion to uphold a plea of *lis pendens.* In the circumstances of this case and having regard to the parties' express clear intention set out in the settlement agreement and in the exercise of that discretion, this Court declines to uphold the plea of *lis pendens.*

20 The second point raised was slightly dissimilar from a plea of *lis pendens* simpliciter. It was this. In clause 11 of the order in case 74295/2019, it was envisaged that there would be a recordal of scaffolding returned or collected and that the fourth respondent would have witnessed that removal and confirmed it.

The argument went that insofar as that had not taken place or insofar as there is no evidence that that clause had been fulfilled and no confirmation thereof by the fourth respondent, the order still remained alive and cannot otherwise be enforced. That argument, of course, ignores what the parties had expressly subsequently agreed, and that is that despite the terms of paragraph A they have agreed on a settlement of everything claimed by the applicant in Part A of the notice, and that application and the settlement involved a payment of a fixed amount and by default then the total amount claimed. I find that this point, belatedly raised as it was, also has no weight.

As a last-gasp defence, Mr Du Toit, appearing for the respondents, relied on the judgment of the Constitutional Court in *Shabangu v Land and Agricultural Development Bank of South Africa and Others* reported as 2020 (1) SA 305 (CC). The argument was that insofar as the initial agreement or dispute had not yet been concluded or Part A of the initial order had not yet been enforced or finally dealt with, a subsequent settlement agreement cannot be enforced.

This argument was preceded not on the basis that

the prior agreement which constituted the order by consent of Part A in case number 74295 was invalid, but that the performance in respect thereof was uncompleted. As debated with counsel, the judgment of the Constitutional Court is completely distinguishable on the facts in that case. In a similar manner as in the case of *Panamo Properties 103 (Pty) Ltd v Land and Agricultural Development Bank of South Africa* 2016 (1) SA 202 (SCA), the issue therein was whether a subsequent agreement, undertaking or surety could be afforded validity if it was based on a preceding invalid agreement. Clearly the facts are different and distinguishable.

I do not find that the judgment in *Shabangu* has direct application in this matter and even if it did have some merit, it is clear that the parties intended that any and all of the terms of Part A in the preceding application had been terminated and settled by agreement and as if by a novation by way of the settlement agreement. In short, there is nothing left of Part A which the parties contemplated should be a bar to the settlement agreement being implemented. I therefore find that the respondent's defence should fail, and that the applicant should be entitled to the order as claimed in the first part of its notice of notion, which has been incorporated into a draft order, which appears on E13 on the

Caselines records.

The only outstanding issue is then that of costs. In the settlement agreement it was agreed that should the applicant have to enforce the agreement, it would be entitled to cost on an attorney-and-client scale. Mr Subel also urged the Court if the Court is mindful of granting cost in favour of the applicant that such cost should include the cost of two counsel where employed. The amount is substantial. The disputes have a long history, and the determination thereof is clearly of importance to the parties and, in particular, the applicant. I find that the employment of two counsel was justified and that such costs should be included in the costs order.

I also find no cogent reason why the customary principle that costs follow the event should not also find application herein. Accordingly, there shall be an order in terms of the draft, which for good order I shall read out. It is as follows:

1 The first and second respondents jointly and severally, the one paying the other to be absolved, are ordered to make the following payment to the plaintiff:

1.1 Payment in the sum of R8 965 916.14.

1.2 Interest on the aforesaid sum at the rate of 2% above prime overdraft rate charged by Standard Bank of South Africa from 18 April 2020 to date of final payment.

1.3 Costs on an attorney-and-client scale, including the costs of two counsel where employed.

……

DAVIS, J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

DATE JUDGMENT DELIVERED: 20 SEPTEMBER 2023