



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No. **49562/2010**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED:
..... SIGNATURE
.....07 JUNE 2024 DATE

In the matter between:

PS SOFTWARE CONTRACTING CC

Plaintiff

and

**BRIGHT ALLOYS (PTY) LTD
(formerly MOGALE ALLOYS (PTY) LTD)**

Defendant

This judgment is prepared and authored by the Judge whose name is reflected as such, and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for handing down is deemed to be 07 June 2024.

JUDGMENT

RETIEF J

INTRODUCTION

[1] The defendant, Bright Alloys (Pty) Ltd [BA] raised an amended special plea [special plea] as against the plaintiff's particulars of claim on 12 September 2023. The plaintiff, PS Software Contracting CC [PS] instituted action against BA in August 2010, this is more than a decade ago. PS claims, *inter alias*, consequential contractual damages from BA arising from a breach and subsequent cancellation of an alleged agreement concluded between them. PS's claim exceeds R2.5 million.

[2] The facts of this matter are of minor significance as to why PS has failed to prosecute its claim to finality. However, as a result of the effluxion of time and on 3 May 2020 the defendant commenced business rescue proceedings by board resolution as contemplated in chapter 6 of the Companies Act, 71 of 2008 [Companies Act].

[3] The nub of the special plea for adjudication is whether PS has an enforceable claim against BA as a result of the adopted and implemented Business Rescue Plan [BR plan].

Material facts

[4] On 15 May 2020, notice was given to affected persons as contemplated in terms of section 128(1)(a) of the Companies Act. On 16 September 2020, BA's creditors adopted a business rescue plan [BR plan] as contemplated in terms of section 152 of the Companies Act. On 15 May 2020 notice was given to certain affected persons as contemplated in section 128(1)(a) of the Companies Act and on 1 September 2020, the creditors adopted the BR plan as contemplated in terms of section 152 of the Companies Act.

[5] On 10 May 2022 BA's attorneys at the time, Werksmans informed PS's attorneys that their claim against BA was no longer enforceable by virtue of the fact that the 30-day period contemplated in paragraph 32.2 of the adopted BR plan had already expired on 9 June 2022. On 30 May 2022, PS's attorneys rejected Werksmans' stance on the basis that BA had relied on the moratorium in terms of

section 133 of the Companies Act to stay PS's pending legal proceedings against them and that PS had not been notified of the implemented BR plan.

[6] On 25 April 2023, BA's attorneys again implored PS to withdraw their action, failing which they held instructions to deliver an amendment to raise a special plea as to the enforceability of the claim, warning of seeking a punitive cost order. This is just what BA has done.

[7] Against this backdrop the special plea is to be considered. PS whilst under bar replicated by filing an answer. The parties notwithstanding, requested that the application proceed and that PS be granted condonation. PS has brought an application for postponement which was granted.

[8] This Court then had regard to the replication which unfortunately was not helpful.

THE SPECIAL PLEA

[9] Having regard to the special plea, BA regards PS as possessing a contingent claim. This premise was not confined to the pleading but echoed in correspondence sent to PS after the BR plan was implemented.

[10] In terms of paragraph 2.25 of the BP plan, a "*Contingent Claim*" means those claims, which may arise (own emphasis) against the company in respect of a liability which is dependent upon a contingent event, which event has not arisen (own emphasis) prior to the publication date.

[11] In terms of paragraph 2.5.3 of the BR plan "'*Publication Date*' means the date of publication of the proposed business rescue plan, being 07 September 2020".

[12] And for completeness sake reference to the word '*Claims*' expansive in the BR plan is confined in paragraph 2.19 of the BR plan to mean secured,

preferent, or concurrent claims as envisaged in the Insolvency Act, against the company.

[13] As a critical point of departure is the basis relied on by BA namely, the allegations at paragraph A.9.2 and A.9.3 of the special plea which state:

“A.9.2 By operation of law and in terms of the adopted BR plan, the plaintiff is deemed to have waived its claim because it failed to submit a claim in time, alternatively, the plaintiff failed to submit a claim in accordance with the provisions of the adopted BR plan, further alternatively the plaintiff failed to submit any dispute in respect of its claim to arbitration contemplated in paragraph 34 of the adopted BR plan.

A.9.3 By operation of section 154(1) and 154(2) of the Companies Act, the plaintiff’s claim has been extinguished, alternatively waived, further alternatively the plaintiff lost the right to enforce its claim (as a relevant debt) or part of it.”

[14] On the facts, and applying the definition of a contingent claim and BA’s reliance on that premise, the basis in A.9.2 must fail for failure of relevance and application. PS’s claim arose before the date of publication. PS’s claim not waived as pleaded.

[15] The Court then moves on to the applicability of A.9.3 and applying section 154 of the Companies Act. In this regard the Court was invited by BA’s counsel to have regard, in particular to, the matter of Eravin Construction CC v Bekker NO and Others,¹ in which Plasket AJA, as he then was, dealt with the applicability of section 154 of the Companies Act which is of assistance. In particular, the learned Judge pointed out that section 154 does not concern itself with when debts are due and can be claimed, but when they are owed.²

¹ 2016 (6) SA 589 (SCA).

² Footnote 1, *Supra*, par [20].

[16] Section 154(2) in of the Act is clear: if a debt was owed by a company “*before the beginning of the business rescue process,-*”. Before the filing of the resolution when a company places itself under business rescue then the creditor “*is not entitled to enforce*” the debt. The question then to be answered in this particular matter is when was the debt owed? Applying the common cause facts no determination has been made in respect of whether a debt is owed. An allegation of a debt and a claim for consequential damages not proven. In consequence no debt due and payable.

[17] Applying the interpretation, the provisions then of section 154(2), the fact that PS’s claim is not due and payable and that the word ‘Debt’ is not defined in the BR plan to attract another meaning other than as applied by the Supreme Court of Appeal in the Eravin matter,³ PS’s claim is not a ‘*relevant debt*’ as referred to by BA in A.9.3 of the amended plea. In consequence, it has not been extinguished, nor waived, nor has PS lost its right to enforce such claim at the relevant time. This ground too must fail.

[18] There is no reason why the costs should not follow the result, but this Court exercises its discretion with regard to the scale having regard to the fact of the complexity of the matter and PS’s papers and the inability of its counsel’ to present argument which was of any assistance to this central issue.

In the premises, the following order:

1. The plaintiff is granted condonation for the late filing of its answer to the defendant’s special plea.
2. The defendant’s special plea is dismissed.
3. The defendant to pay the plaintiff’s party and party costs on Scale “A”.

³ See footnote 1.

**L.A. RETIEF
JUDGE OF THE HIGH COURT
GAUTENG DIVISION,
PRETORIA**

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Matter heard: 03 June 2024

Date of judgment: 07 June 2024