HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 26270/2021

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 26 JANUARY 2024

SIGNATURE

In the matter between:

UNI-SPAN FORMWORK & SCAFFOLDING (PTY) LTD Applicant

and

SVK HOLDINGS (PTY) LTD First Respondent

ANDRE BRAND VAN DER MERWE Second Respondent

J U D G M E N T

(Application for Leave to Appeal)

This matter has been heard on a virtual platform and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

Introduction

[1] On 20 September 2023 this court granted an order enforcing a settlement agreement between the initial applicant, Uni-Span Formwork & Scaffolding (Pty) Ltd (Uni-Span) and SVK Holdings (Pty) Ltd (SVK) and its director, Mr Van der Merwe. SVK and Mr Van der Merwe now seek leave to appeal that order.

Ground for application for leave to appeal

[2] In their notice of application for leave to appeal, SVK and Mr Van der Merwe relied on four grounds, identified in their notice under the headings *Lis pendens*, Dispute of Fact, Shabangu Judgment and Status of SVK Holdings (Pty) Ltd.

Lis pendens

[3] In case no 74295/2019 Uni-Span sought to recover monies and/or scaffolding due to it in relation to the rental of certain scaffolding by SVK. The matter initially proceeded by way of an urgent application (Part A of the relief) which was settled between the parties. The settlement which was made an order of court on 22 October 2019 provided for a "scaffolding audit" in order to determine the repayment relief sought in PART B thereof.

[4] Subsequent to the above, the parties to that matter and under the same case number reached a further written settlement agreement with each other on 17 April 2020. In that settlement agreement and as part of an extensive preamble, the abovementioned prior litigation was explained. Thereafter the parties expressly agreed that the new settlement agreement would constitute an "Unconditional Independent Cause" (Clause 11 thereof). Mr Van der Merwe

provided certain warranties to the settlement agreement and expressly consented to be joined and to be bound "… *by any judgment granted against him pursuant to the settlement agreement*".

[5] The settlement agreement provided for payment of a "Settlement Amount" of R4, 5 million and, failing timeous payment thereof, payment of the "Claimed Amount" of R 8 965 916, 40. Certain securities were also contemplated.

[6] The *lis pendens* argument is simply this: Uni-Span should not be entitled to enforce the settlement agreement whilst the initial application in case 74295/2019 had not been withdrawn. There is no merit in this point. Once a settlement had been reached, the parties considered case no 74295/2019 to have been disposed of and no *lis* existed between them any longer. No withdrawal had been necessary. I find that there is no prospect of success on appeal in respect of this point.

Factual dispute

[7] The alleged factual dispute argument relates to the alleged undue influence exerted on SVK. This aspect has sufficiently been dealt with in the judgment. The settlement agreement was vetted by the attorney of SVK and Mr Van der Merwe (which attorney still represents them) prior to it being signed. No undue influence had been exerted which would have vitiated the agreement. SVK simply itself wanted to "be taken out of liquidation" so that it could secure new lucrative tenders. It settled its payment dispute with Uni-Span who in turn then withdrew its opposition to SVK's application to have the provisional winding up order discharged, opting to be paid as promised by SVK than share a dividend as a creditor in a winding-up process. These economic realities and

prospects did not amount to the type of undue influence in law which would negate a contract and I find no prospects of success on appeal in this regard.

The Shabangu judgment[1]

[8] In the matter before the Constitutional Court, an invalid loan agreement had been settled by a subsequent acknowledgment of debt. The Constitutional Court had found that an acknowledgement perpetuating an original invalidity would itself be invalid. Clearly, that case is distinguishable on the facts, not least of which is that it hasn't been found in the present matter that the original scaffolding rental and use agreement had been invalid. Therefore, no subsequent settlement agreement would be tainted by invalidity. There is according no merits in this point.

The status argument

[9] As a last-ditch attempt SVK and Mr Van der Merwe argued that they could never have entered into the settlement agreement with Uni-Span prior to the discharge of the provisional winding-up order without the consent or participation of the provisional liquidators.

[10] While it is open to a party to raise a new point of law on appeal, it can only be done on condition that all the relevant evidence has been led and that the other party would not be prejudiced thereby. This is not such a case: no factual allegations regarding this point had been made in the case a quo and Uni-Span was denied the opportunity to enquire from the liquidators whether they had knowledge of the agreement, had consented or acquiesced thereto, or whether, by the time the winding-up order was discharged in court, it was done with the liquidators' blessing or not. The "point" is therefore not a purely legal

[1] Being a reference to *Shabangu v Land and Agriculture Development Bank of South Africa* 2020 (1) SA 305 (CC).

point but has factual elements attached to it, which had not been placed in evidence.

[11] In fact, Mr Van der Merwe had, under oath, stated quite the opposite from the present contention. In his answering affidavit he stated: "*It was common cause that if the company was not taken out of provisional winding-up, it will not be able to tender for the contract which include the joint venture contract with Lesedi*".

[12] This "common cause" position also featured in SVK's separate application and what must be remembered, is that the withdrawal referred to in the settlement agreement, was not a withdrawal of the liquidation application by Uni-Span, it was the withdrawal of Uni-Span's opposition to SVK's application for the discharge of the provisional winding up order. In that application (in case no 92558/2019) all the erstwhile and later provisional liquidators had been joined and agreements had similarly been reached with all other creditors, including SARS. The settlement agreement with Uni-Span was just the last hurdle and the involvement of the various provisional liquidators therein (or not) is a factual question which SVK cannot now raise as a new and uncanvassed point on appeal.

Conclusion

[13] It follows that no grounds have been established which would satisfy the test prescribed by section 17(1)(a)(i) of the Superior Courts Act 10 of 2013. I further find no cogent reason why costs should not follow the event, on the same scale as in the main application.

[14] **Order**

The application for leave to appeal is refused with costs, such costs to be on the scale between attorney and client, including the costs of senior counsel.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 18 January 2024

Judgment delivered: 26 January 2024

APPEARANCES:

For Applicant:	Adv A Subel SC
Attorney for Applicant:	Ramsay Webber Inc., c/o Andrea Rea Attorneys, Pretoria
For Respondents:	Adv H Hansen
Attorneys for Respondents:	CJ Willemse & Babinszky Attorneys, Pretoria