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

- (1) REPORTABLE: YES/~~NO~~
- (2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
- (3) REVISED

**Case No.: 64593/2017
17/5/2019**

In the matter between:

AMALGAMATED METALS RECYCLING (PTY) LTD **Applicant**

and

LIMPOPO SCRAP METALS CC **1st Respondent**
JACOBUS FREDERICK KRITZINGER **2nd Respondent**

JUDGMENT

MNGQIBISA-THUSI, J

[1] The applicant seeks the following relief:

- 1.1 that the respondents be ordered to pay the sum of R1, 618, 336.46, jointly and severally, the one paying the other to be absolved;
- 1.2 interest on the amount of R1, 618, 336.46 at the rate of 10.15% per annum from date of application to date of final payment;
- 1.3 costs of the application jointly and severally the one paying the other to be absolved.

- [2] In 2017, the applicant, Amalgamated Metals Recycling (Pty) Ltd, had instituted proceedings against the first respondent, Limpopo Scrap Metals CC (under case number 49343/2013), for payment of the amount of R2, 424, 093.36 (inclusive of interest). The applicant alleged that the amount owed was loan advances it had given to the first respondent over a period of time. On the day the action was set down for hearing (being 6 July 2017) and before the matter could be heard, the applicant and the first respondent concluded a settlement agreement.
- [3] It is apposite to set out the terms of the settlement agreement. The settlement agreement provides that:

"1.

Defendant to pay to the Plaintiff an amount of R 800, 000.00 plus R 150, 000.00 as a contribution towards the Plaintiff's costs (R 950, 000.00, hereinafter referred to as the "settlement amount") in full and final settlement of all disputes between the parties under this case number.

2.

The settlement amount shall be extinguished by the Defendant through payment in cash or through the delivery and supply of gas to the value of R 50, 000.00 per month, on the terms set out hereafter:

- 2.1 Should the Plaintiff need/or require Oxygen, LPG gas and/or related products it must place an order for such supply and delivery with the Defendant or the defendant's nominee. Plaintiff cannot however guarantee the need therefor on a monthly basis;"
- 2.2 Should the order for any particular month be less than R 50,000.00, or, if no order is placed, the difference shall be paid by the Defendant in cash, before the 7th day of the following month;

- 2.3 Should the monthly order exceed the amount in paragraph 2.2, above, the Plaintiff shall pay the difference to the Defendant or his nominee on or before the 7th day of the following month;
- 2.4 The aforementioned gas supply shall include delivery to an address as nominated by the Plaintiff from time to time within the Gauteng Province, and shall not exceed "unit price currently" paid by the Plaintiff to its existing supplier or as far as it is regulated, at the prescribed price.

3.

- 3.1 In the event of any default by the Defendant, the full amount claimed by Plaintiff under the above case number for the sum of R1, 618,336.46, shall be repayable together with interest thereon and costs.
- 3.2 Jacobus Frederick Kritzinger, ID [...], by appending his signature hereto, personally binds himself as surety and co-principal debtor in solidum for any outstanding amount as set out above.

4.

The parties agree that this order be made an order of court".

- [4] The second respondent, Mr Jacobus Frederick Kritzinger, is the sole member of the first respondent.
- [5] The settlement agreement was signed on behalf of the first respondent by the second respondent.
- [6] On 7 March 2017, the settlement agreement was made an order of court.
- [7] The applicant alleges that between April and July 2017 the first respondent failed to make payment in terms of the settlement agreement and was

therefore in breach of the agreement.

- [8] On 19 July 2017 the applicant sent a letter of demand to the respondents' attorneys, Bosman Attorneys, for payment in the amount of R1, 618, 336.46, to which no response was received.
- [9] The respondents have denied that they are in breach of the agreement.
- [10] The respondents have raised two points *in limine*, namely, that this court does not have jurisdiction to hear the matter. It is the respondents' contention that since they are outside the jurisdiction of this court, the application should be dismissed. Secondly, the respondents raised the issue of misjoinder by alleging that the second respondent should not have been cited as a respondent as he was not party to the settlement agreement.
- [11] With regard to the first preliminary point, it was submitted on behalf of the applicant the complaint is baseless. It is the applicant's contention that the cause of action arose within this court's jurisdiction as the settlement agreement was concluded in Pretoria and that performance under the settlement agreement has to be effected within this court's area of jurisdiction.
- [12] Section 21(1) of the Superior Courts Act¹ provides that:

"Persons over whom and matters in relation to which Divisions have jurisdiction

- (1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising .. . within, its area of jurisdiction and all other matters of which it may according to law take cognisance, ...
- (2) A Division also has jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause in relation to which such court has jurisdiction ... , if the said person resides or is within the area of jurisdiction of any other Division".

¹ Act 10 of 2013.

[13] It is common cause that the settlement agreement made an order of court on 7 March 2017, was entered into within this court's area of jurisdiction. The purpose of this application is the enforcement of that court order. Therefore the cause of action arose within this court's jurisdiction and there is no reason why the applicant should be non-suited on the basis that this court does not have jurisdiction.

[14] With regard to the joinder of the second respondent, there is no dispute that he bound himself as surety and co-principal debtor with the first respondent under the settlement agreement. Nothing turns on the fact that the second respondent was not party to the original agreement pertaining to the loan advances the applicant made to the first respondent. Once the settlement agreement was entered into all obligations and rights the parties had with regard to the original agreement are extinguished as the parties have reached a compromise. In *Eke v Parsons*² the court stated that:

"[31] The effect of the second order is to change the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the *lis* between the parties; the *lis* becomes *res Judicata* (literally, 'a matter judged'). It changes the terms of a settlement agreement to an enforceable court order. The type of enforcement may be execution or contempt proceedings. Or it may take any other form permitted by the nature of the order. That form may possibly be some litigation, the nature of which will be one step removed from seeking committal for contempt; an example being a mandamus.

[32] Litigation antecedent to enforcement is not necessarily objectionable. That is so because ordinarily a settlement agreement

² 2016 (3) SA 37 (CC) 2016 (3) SA 37 (CC).

and that resultant settlement order will have disposed of the underlying dispute. Generally, litigation preceding enforcement will relate to non-compliance with the settlement order, and not the merits of the original underlying dispute. That means the court will have been spared the need to determine that dispute, which - depending on the nature of the litigation - might have entailed many days of contested hearing"³.

- [15] As indicated above, it is the applicant's contention that between April and July 2017 the respondents failed to comply with the terms of the settlement agreement by paying the monthly instalment as per the court order.
- [16] The respondents oppose the granting of the main relief sought by the applicant on the ground that it is the applicant, and not the first respondent, that has not complied with the terms of the settlement agreement. It was submitted on behalf of the respondents that the applicant breached the agreement by, contrary to the terms of the agreement, ordering gas from other suppliers other than from the first respondent, as stipulated in clause 2.1 of the settlement agreement. However, as correctly pointed out by counsel for the applicant, even though clause 2.1 of the agreement envisaged the applicant either paying an instalment of R50, 000.00 per month or supplying the applicant with an equivalent amount of gas, if necessary or required, clause 2.2 provides that the applicant does not guarantee that it would need that amount of gas per month. If no gas was ordered by the applicant during a particular month, the first respondent was obliged to pay the prescribed monthly instalment. It was further submitted that since prior to the conclusion of the settlement agreement the applicant had replenished its gas stock, it was not necessary to order gas it did not need.

³ See also *Ex parte: PJLG and another; In re: PJLG and another* r[2013] 4 All SA 41 (ECG) where the court stated that: "[14] ... Once the parties to a civil action have reached agreement in relation to the issues raised by the action, and elected not to seek the relief claimed therein, the mandate of the court determine those issues and to grant the relief claimed by the respective parties, is terminated. Any order which is then granted by the court is simply made with a view of assisting the parties in resolving the disputes and facilitating the enforcement of the terms of their

- [17] I do not read any obligation imposed on the applicant to order gas from the first respondent each month even if it does not require it. In terms of the agreement, there is an express disclaimer by the applicant, guaranteeing ordering gas each month from the first respondent.
- [18] It is further the contention of the respondents that first respondent has complied with the terms of the settlement agreement in that, as envisaged in clause 2.1 of the settlement agreement, the first respondent has, through an entity known as Eco-Oxy, has supplied gas to the applicant's proxy, an entity known as Insimbi Aluminium Alloys ("Insimbi"), which gas has not been paid for. According to the respondents, Insimbi is a branch of the applicant.
- [19] The applicant has denied that Insimbi is its branch and submits that it is a totally separate entity. The respondents have not shown proof that Insimbi was the applicant's nominee to receive the alleged supplied gas. Even if it was proven that Insimbi is a branch of the applicant, as appears from the invoices attached to the answering affidavit relating to this transaction, the gas supplied to Insimbi amounts to R6, 498.80 which is far less than the agreed instalment of R50, 000.00. The respondents have not shown that they have paid the shortfall to the applicant.
- [20] Further, the respondents deny that the applicant made any loan advances to the first respondent. The respondents allege that the advances were made to an entity known as PRM, a company in Botswana. The respondents do not, however, provide any proof of any link, which is denied by the applicant, between the applicant and PRM.
- [21] The duplicating affidavit filed by the respondents does not take the matter any further as the applicant has attested to the fact that before trial it had replenished its stock and it was not necessary for it to order any gas from the first respondent.
- [22] In their heads of argument the respondents raised the issue that the application should be dismissed because of the existence of a dispute of fact which cannot be resolved on paper. The respondents allege that it is

in dispute whether or not at any stage the applicant could need of gas each month to the value of R50, 000.00 for its operations.

[23] Motion proceedings are decided on the papers filed by the parties. In case where there is a factual dispute that can only be resolved through oral evidence,⁴ action proceedings are appropriate unless the factual dispute is not real and genuine.⁵ In *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd*,⁶ the court held that where there is a dispute of facts final relief should only be granted in notice of motion proceedings if the facts as stated by the respondent together with the admitted facts in the applicant's affidavit justify such an order.

[24] I am of the view that no dispute of fact exists which cannot be resolved on the papers. In its replying affidavit the applicant does not deny that it uses gas but states that it had sufficient stock of gas prior to the trial hence the settlement agreement provides that it does not guarantee the need for gas on a monthly basis.

[25] It is common cause that in terms of the settlement agreement the first respondent had an obligation to pay a monthly instalment amount of R 50, 000.00 or supply the applicant with an equivalent amount of gas, if needed. Further, it is not in dispute that the first respondent has failed to pay any of the prescribed instalment. The first respondent is therefore in breach of the agreement and is liable to pay the full amount of its debt, including interest in terms of clause 3.1 of the agreement.

[26] Further, there is no dispute that the second respondent bound himself as surety and co-principal debtor together with the first respondent. On failure by the first respondent to meet its obligations in terms of the agreement, the second respondent becomes liable.

[27] In the result the following order is made:

1. The respondents are ordered to pay the sum of R1, 618, 336.46, jointly and severally, the one paying the other to be absolved;

⁴ *Plascon - Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd*[1984] 2 All SA 366 (A).

⁵ *Soffiantini v Mould* [1956] 4 All SA 171 (E).

⁶ 1957 (4) SA 234 ((C) at 235 E-G. See also *Joh-Air (Pty) Ltd v Rudman* 1980 (2) SA 420 (T) at 428- 429; *Santino Publishers CC v Waylite Marketing CC* 2010 (2) SA 53 (GSJ) at 56F-578.

2. The respondent are to pay interest on the amount of R1, 618, 336.46 at the rate of 10.15% per annum from date of application to date of final payment;
3. The respondents to pay the costs of the application jointly and severally the one paying the other to be absolved.

NP MNGQIBISA-THUSI
Judge of the High Court

For Applicant Adv JC Viljoen (instructed by Liebenberg Malan Liezel Horn Inc)
For Respondents Adv M Snyman (instructed by Bosman Attorneys)