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DISPUTE RESOLUTION ALERT

IN THIS ISSUE

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The recent judgment of *KBV Group (Pty) Ltd v Univest Mining Group (Pty) Ltd and Others* [(23648/2020) [2020] ZAGPPHC 244] handed down on 23 June 2020, by the North Gauteng High Court, Pretoria highlights the court's interesting views relating to arbitration clauses, so called "self-help" by parties, and whether a dispute is contractual in nature or amounts to spoliation.

The spoliation

KBV Group (Pty) Ltd (KBV), the applicant in the matter, operated a crushing and washing operation on a property in respect of which it concluded a lease agreement. KBV remained in lawful possession of the property until the national COVID-19 lockdown (Lockdown) necessitated closure of the plant on 23 March 2020. Shortly before the Lockdown, KBV and Univest Mining Group (Pty) Ltd (Univest) entered into a confidentiality and non-circumvention agreement with the aim of conducting future business transactions to their mutual benefit. In essence, these agreements obliged both parties not to compete against one another and forbid the disclosure of any confidential information.

The second respondent, Jupiter Resources (Pty) Ltd (Jupiter) was the owner of the equipment which was used by KBV in its operations to their joint benefit. A clandestine meeting between employees of KBV and an employee of Univest resulted in independent contractors being informed that all of KBV's employees were now employed by Univest and a notice

being erected at the entrance to the property which read: "Jupiter Resources Mooinooi Chromite Processing Plant Operated by Univest Mining Group". It became evident that Univest and Jupiter had collaborated and taken over the running of the operations conducted on the property.

The defence

Univest and Jupiter (collectively, the "Respondents") conceded that KBV had been spoliated but raised numerous defences. The Respondents alleged that the matter was not urgent as KBV knew as early as 21 August 2019 that Jupiter was occupying the building in respect of its own lease agreement. A further allegation raised by the Respondents was that the court did not have jurisdiction to hear the matter as the non-circumvention agreement contained an arbitration clause. Lastly, the Respondents alleged, among others irrelevant for the current discussion, that KBV had brought a litigious application while simultaneously attempting to settle the matter.

Jurisdiction

In considering whether it had jurisdiction to hear the matter, the court rightly highlighted that the non-circumvention agreement had been concluded between KBV and Univest and that no similar agreement existed between KBV and Jupiter. Furthermore, the court found it necessary to consider the application of other considerations, as allowed per The Arbitration Act 42 of 1965.

The court highlights its displeasure of self-help by parties in the case of *KBV Group (Pty) Ltd v Univest Mining Group (Pty) Ltd...continued*

The court in this case therefore found that, considering the likelihood of a duplication of proceedings, the enormous financial burden flowing from multiple actions, and the fact that the issues between KBV and the respective respondents were inextricably intertwined, good cause was shown for the matter to be dealt with by the court.

The Act, in section 3(2)(b), provides that, in certain instances, a dispute would not be appropriately resolved by arbitration. The section grants the court discretion to, upon application of any party and good cause shown, order that any particular dispute not be referred to arbitration. The court further considered the judgment of *Pro-Khaya Constructions CC v Strata Civils and others* [2020 1 ALL SA 267 (ECG)] which provided guidance as to when the court would exercise this discretion afforded to it by the Act. The *Pro-Khaya* judgment held that the court should not and will not set aside an arbitration agreement in the absence of good cause shown and that the onus of demonstrating such good cause must be discharged by providing compelling reasons. The court further held that where some parties relevant to the dispute are not parties to the arbitration agreement, it may amount to good cause. Reference was also made to another judgment, *Welihockyj and others v Advtech Ltd and others* 2003 (6) SA 737 (W), in which the court held that, in certain circumstances, it may be more beneficial to allow a matter to be heard before court than in arbitration.

The court in this case therefore found that, considering the likelihood of a duplication of proceedings, the enormous financial burden flowing from multiple actions, and the fact that the issues between KBV and the respective respondents were inextricably intertwined, good cause was shown for the matter to be dealt with by the court.

Further argument presented by the Respondents contained an allegation that KBV had not disclosed the occurrence of settlement talks between the parties and, in doing so, KBV had not complied with its disclosure obligations and the application was consequently an abuse of the processes of the court. The court noted its confusion as to how this fact could potentially be offensive and, in contrast, found it improper of the Respondents to disclose the contents of settlement talks between the parties.

Urgency

The court provided comprehensive reasoning as to its views regarding the urgency of the application brought by KBV. It was cognisant of the fact that the Lockdown took effect a mere day after the independent contractors discovered that the Respondents had taken over the operation. KBV alleged that it only managed to secure permits and to access the property on 15 May 2020 and launched the application on 3 June 2020. The court once again acknowledged that “*the Covid-19 lockdown made it exceedingly difficult for persons to obtain permits for travel, and having closed the plant before the lockdown, it is not impossible that KBV only returned to site on 15 May 2020*”. The mere fact that the application was only launched two weeks later did not automatically detract from the urgency of the matter. The court held that in instances where there is an attempt to resolve the matter in a non-litigious manner prior to issuing the application, such delay can, in proper circumstances, be condoned.

The court highlights its displeasure of self-help by parties in the case of *KBV Group (Pty) Ltd v Univest Mining Group (Pty) Ltd...continued*

The Lockdown, as well as the urgent nature of spoliation in itself, provided good reason for the matter to be heard despite the delay in bringing the application.

The learned Judge did, however, concede that, under normal circumstances, the matter would have been struck from the roll. This was followed by an acknowledgement that circumstances were anything but normal and that the Lockdown brought many processes to a halt and resulted in unforeseen delays. The Lockdown, as well as the urgent nature of spoliation in itself, provided good reason for the matter to be heard despite the delay in bringing the application. Univest employees took control of the property a mere day before the Lockdown was to take effect and *"to add insult to injury, [the] Respondents have apparently been using KBV equipment to conduct the operation"*. The court subsequently concluded that the matter should be regarded urgent and that KBV's non-compliance with the rule of court should be condoned.

Mandament van spolie

The court, in examining the nature of the right that KBV sought to protect, distinguished between KBV's right to take possession of the property for purposes of running its operation, which right arose through contract, and its right as possessor not to be deprived of that possession. Once KBV had taken possession of the property, it acquired a real right through its possession which was capable of being protected by the *mandament van spolie*. Jupiter concluded a written agreement with the owner of the property which was dated 1 October 2019 but only signed much later. On this basis, the Respondents claimed that this agreement formed the legal basis of its continued occupation of the property and that KBV therefore had no contractual entitlement to occupation.

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The court highlights its displeasure of self-help by parties in the case of *KBV Group (Pty) Ltd v Univest Mining Group (Pty) Ltd...continued*

The court affirmed that the entire concept of and philosophy behind the *mandement van spolie* is to prevent self-help and to restore the *status quo ante* and on this basis, the court found that KBV was entitled to be reinstated in its possession of the property.

The court, however, held that KBV was not trying to enforce a contractually based personal right, but rather a real right arising from its possession of the property

The court affirmed that the entire concept of and philosophy behind the *mandement van spolie* is to prevent self-help and to restore the *status quo ante* and on this basis, the court found that KBV was entitled to be reinstated in its possession of the property.

Conclusion

The court, in a demonstration of its displeasure with the Respondents, granted a punitive costs order. It reasoned that Univest was party to a non-compete agreement with KBV in terms of which the parties undertook not to circumvent each other's business transactions. As Univest collaborated with Jupiter, it intentionally excluded KBV from the operation on the property and, in doing so, breached its agreement with KBV. Furthermore, an

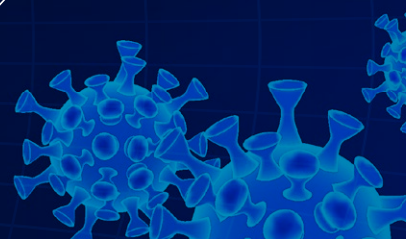
agreement existed between KBV and Jupiter in terms of which KBV operated the plant on the property to their mutual benefit. Both Respondents disregarded their contractual obligations and took over KBV's operations as well as its employees. The timing of these breaches placed KBV in an even more unfortunate position as the Lockdown came into effect a mere day later, robbing KBV of its ability to immediately enforce its rights.

The court concluded that this was a matter of "classic self-help which should not be allowed". This judgment clearly indicates the position of the courts when parties take matters into their own hands and disregard their contractual obligations. The judgment further provides insightful guidance as to when arbitration might not be appropriate or beneficial, providing a valuable reminder of the uses and process of the urgent remedy: The *mandement van spolie*.

Lucinde Rhoodie and Simone Nel

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