

SOUTH AFRICA / JUDGMENT

## Adlam v Fabri South Africa (Pty) Ltd (A5009/2021;42702/2019) [2022] ZAGPJHC 206; [2022] HIPR 189 (GJ) (8 April 2022) [2022] ZAGPJHC 206

COURT

South Gauteng High Court, Johannesburg

BEFORE

Mdalana-Mayisela, Opperman, Meersingh

CASE / FILE NUMBER

A5009/2021;42702/2019

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, JOHANNESBURG

CASE NO: A5009/2021

COURT A QUO CASE NO: 42702/2019

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

8 April 2022

In the matter between:

ADLAM, ALOUISE

Appellant

and

FABRI SOUTH AFRICA (PTY) LTD

Respondent

### Judgment

Mdalana-Mayisela J (Opperman J and Meersingh AJ concurring)

## INTRODUCTION

[1] The appellant, Alouise Adlam, appeals against the whole of the

### judgment

and order handed down by Adams J on 23 November 2020. The subject matter of the judgment was an application instituted by the appellant for a refund of the deposit of R538 000 paid by her to the respondent pursuant to written agreements in terms of which the

respondent was to supply material and render related services to the appellant. Adams J dismissed the application with costs. The appeal is opposed by the respondent.

## BACKGROUND

### FACTS

[2] The background facts in this matter are by and large common cause and are summarised in the paragraphs which follow.

[3] The respondent is a private company, which is in the business of selling and installing premium custom-designed and tailor made-kitchens, bathrooms and closets. On or about 7 September 2015 and at Johannesburg, the appellant concluded an agreement with the respondent, duly represented by its director, Francisco SA Viera Mota Da Costa (“Francisco”) for certain kitchen improvements (“the first agreement”).

[4] The first agreement was for the following (excluding VAT and discounts):

- The kitchen “B” package, including the “Glossy Lacquered Doors” – R330,000.00;
- A “Caesarstone Shitake” Top – R68,000.00;
- 2 (two) “Blanco” dustbins (R4 000.00 each) – R8,000.00;
- LED Lights – R10 000.00;
- Cutlery Accessory “Orgaline Blum” – R3,600.00;
- Sink “BlancoSupra-400u” (prep) – R1,500.00;
- Sink “BlancoTipo 8S” (scullery) – R1,800.00;
- 2 (two) “BlancoLinus” Taps (R5,000.00 each) – R10,000.00; and
- “Kessebohmer Tandern” dispenser (pantry) – R12,000.00

(“the kitchen improvements”)

[5] The kitchen improvements amounted to R430,000.00. including VAT and a 10% discount.

[6] On or about 2 December 2015 and at Johannesburg, the appellant concluded a second agreement with the respondent, it again being represented by Francisco, for certain furniture (“the second agreement”). The second agreement was for the following (excluding VAT and discounts):

[6.1] Main bedroom:

- “Open doors Thermolaminated” – R118,568.74;
- Dresser – R47,800.00;

[6.2] Bedroom 2:

- “Open doors Thermolaminated”- R38,000.00;

[6.3] BigLinen:

- “Open doors Thermolaminated” – R72,000.00;

[6.4] Main Vanity:

- “Matte Lacquered Doors” – R25,000.00;
- A NeoLit Top – R25,850.00;

[6.5] Guest Vanity:

- “Matte Lacquered Doors” – R20,500.00;
- A NeoLit Top – R23,700.00;

[6.6] Study:

- “Thermolaminated Doors” – R68,500.00;

[6.7] TV Unit:

- “Matte Lacquered Doors”- R70,000.00;
- LED LIGHTS – R4,000.00;

[6.8] Bar:

- “Matte Lacquered Doors”- R19,000.00; and
- A NeoLit Top – R33,000.00.

(“the furniture works”)

[7] The furniture works amounted to R546,000.00 including VAT and a discount.

[8] On or about 23 March 2016 and at Johannesburg, the appellant concluded a third agreement with the respondent, it again being represented by Francisco, for certain extra work (“the third agreement”). The third agreement was for the following (excluding VAT and discounts):

[8.1] Kitchen:

- Difference of the “Thermolaminate” to the wood – R30,000.00;

[8.2] Bar:

- “2 Shelving in wood” – R10,000.00; and

[8.3] TV Unit:

- Difference of the “Thermolaminate” to the wood – R12,000.00

(“the extra works”).

[9] The extra works amounted to R50,000.00 including VAT and a discount. The sum of all the first, second and third agreements amounted to R1,026,000.00 (one million and twenty-six thousand Rand) (“the purchase price”).

[10] The terms of the first, second and third agreements (“the agreements”) were the same, and the salient terms were as follows:

[10.1] Included in the purchase price were provision for a final report, transport and installation (clause 1);

[10.2] If the agreed date of delivery be delayed:

[10.2.1] for any reason by the appellant, the respondent would not be held liable (clause 2(a));

[10.2.2] due to weather or if the container was stopped for inspection by Customs, the appellant was not to hold the respondent responsible for the delay (clause 2(b));

[10.3] The appellant was to be present on the day of delivery to sign acceptance of the delivery, after which she would take full responsibility (clause 2(c));

[10.4] The respondent undertook to deliver the goods ‘between’ 110 days after final measurement have been taken (clause 2(e));

[10.5] The respondent disclaimed responsibility for any damage caused by plumbing, sewage or light (clause 3);

[10.6] Once the agreement was concluded the appellant was not permitted to change or return any goods; and if she cancelled the agreement for any reason, she was liable for the full contract amount (clause 5);

[10.7] The payment terms were 50% (fifty percent) on conclusion of the agreement; 40% (forty percent) on the day before the delivery; and 10% (ten percent) on completion (clause 8) and refunds were only available in the event of the respondent breaching the agreements;

[10.8] Once production commenced, the appellant was to pay in full for any appliances to be ordered by the respondent (clause 9(b)).

[11] Pursuant to the conclusion of the agreements, and in compliance with her obligations in terms of the agreements, the appellant effected four payments (“the payments”) to the respondent as follows:

[11.1] R107,500.00 on September 2015 (“the first payment”);

[11.2] R273,000.00 on 3 December 2015 (“the second payment”);

[11.3] R107,500.00 on 23 January 2016 (“the third payment”); and

[11.4] R50,000.00 on 31 March 2016 (“the fourth payment”).

[12] The payments amounting to R538,000.00 (“the amount paid”) were applied as follows:

[12.1] the first to third payments were made in compliance with the appellant’s obligations of 50% (fifty percent) deposit required for the first and second agreements; and

[12.2] the fourth payment was made for the settlement of the full purchase price of the third agreement.

[13] On 2 April 2016, two days after the fourth payment was made, the appellant contacted the respondent and requested that it “hold off” on the project and that no work should be done, including that no production be done until she advises the respondent in writing otherwise. The reason for the holding off on the project was because of a dispute that arose between the appellant and the developer of her property. The respondent acknowledged the request and confirmed that no work would be done.

[14] On 24 April 2018, the appellant and her husband met with Francisco, to advise the respondent that the appellant was unable to continue with the agreements due to the reasons which were out of her hands. Francisco refused to assist relying on the agreement, nevertheless undertook to discuss the appellant’s request with his colleagues and revert back. On 30 April 2018 the respondent advised the appellant in writing that it would refund her half of the amount paid, being an amount of R269,000.00. The reason for the aforesaid was that work was done and materials ordered.

[15] The appellant rejected the offer made by the respondent of refunding half of the amount paid in writing, on the grounds that no work could have been done, nor materials ordered, as her request for cancellation was made two days after the fourth payment was made. She also claimed that the amount paid was kept in the business account as working capital or an investment for approximately 32 months, and the respondent failed to take into account the accrued interests of approximately R150,000.00. She accused the respondent of contravening the Consumer Protection Act 68 of 2008 (“the CPA”) and the Conventional Penalties Act, Act 15 of 1962.

- [16] On 17 May 2018 the respondent advised the appellant that the CPA does not apply to the agreements as they consist of special order goods; and that the respondent dedicated approximately 64 (sixty four) hours to the project at a rate of R2,000.00 plus VAT, amounting to R145,920.00.
- [17] On 4 June 2018 the appellant requested the respondent to indicate if any goods were ordered, if so, when such orders were placed; and if any goods were ordered and received, if these goods could be delivered to her to recoup costs. The respondent replied and advised that it does not owe the appellant any explanation.
- [18] On 6 August 2018, the appellant lodged a complaint with the Consumer Goods & Services Ombud (“CSGO”) claiming a full refund of the amount paid relying on section 17 of the CPA. She asserted that the goods were not special-order goods and were ordered from a catalogue, and the specifications of the standard goods were not altered or requested by her to be altered.
- [19] After the investigation, on 6 February 2019, the CSGO provided its recommendation to both parties in which the respondent was notified, in terms of section 65 of the CPA, that the respondent “... may not treat the complainant’s money as belonging to you and not provide her with any goods or services to the value of that money. In the circumstances, we should recommend that you supply her with the kitchen materials, to the value of the amount that she paid to you.”
- [20] On 11 March 2019, the CSGO sent a contravention notice to the respondent and provided it until 13 March 2019 to respond to the recommendation. On 12 March 2019 the respondent responded to CSGO contending that (1) section 65 of the CPA does not apply to the agreement, (2) section 17 of the CPA does not apply to the agreement,
- (3) the respondent needs to account for designing and project management costs, (4) the no-refund clause is clear, (5) the tender of 50% of the amount paid is generous, and (6) the recommendation is flawed and biased.
- [21] On 14 March 2019 the CSGO referred the matter to the National Consumer Commission (“the NCC”) in terms of section 70(1) of the CPA. On 18 October 2019 the NCC issued a notice of non-referral, advising that the matter has prescribed and that it cannot award compensation.
- [22] After exhausting all the remedies available to her, on 3 December 2019 the appellant brought an application in the court a quo for payment of the sum of R538,000.00 plus interest a tempore morae calculated from 24 April 2018 to date of final payment, and costs on an attorney and own client scale.
- [23] On 23 November 2020 Adams J found that the appellant failed to make out a case – whether it be in contract or based on statute- for the relief sought by her in this application, and dismissed the application with costs.

## APPELLANT'S GROUNDS OF APPEAL

[24] The appellant in her rule 49(2) notice, appeals against the whole of the judgment and order of Adams J, including the order as to costs. She further seeks the setting aside of the judgment and order, and the substitution thereof with an order that (1) the respondent is to pay the appellant the amount of R538,000.00 plus interest thereon calculated at 10.25% from 24 April 2018 to date of payment in full,

(2) the respondent is to pay the costs of the application.

[25] In the heads of argument, she submits that her appeal is premised on the following:

*“20.1 The appellant’s cancellation of the order was lawful being permissible in terms of the CPA. It consequently did not give rise to a damages claim;*

20.2 The respondent’s redress was limited to a reasonable cancellation charge as per section 17(3)(b) of the CPA;

20.3 The contractually agreed cancellation charge contained in clause 5(c) of the contract did not become due or payable since the conditions to such charge were not fulfilled;

20.4 Insofar as a cancellation charge became payable in terms of clause 5(c), the respondent failed to prove that such a charge is within the scope of charges allowed by the CPA;

20.5 In the event that the appellant acted unlawfully in purporting to terminate the contract, the respondent’s subsequent election to enforce the contracts deprives it of relief herein in the absence of performance by the respondent.”

[26] The appellant in her founding affidavit, asserts that the purpose of the application is to enforce a recommendation made by the CGSO on 6 February 2019, which was in her favour. Although the appellant in her notice of appeal is appealing against the whole judgment and order of Adams J, in her heads of argument she has not dealt with the finding

made by Adams J regarding the enforcement of the CGSO recommendation. In our view the court a quo correctly dealt with the enforcement of the recommendation made by CGSO and we find no reason to interfere with its decision in that regard.

[27] Further, the appellant in her heads of argument has not dealt with a finding of the court a quo on the claim based on the Conventional Penalties Act. We also find no reason to interfere with the court a quo’s decision in that regard.

[28] We deal with each of the grounds mentioned in the appellant’s heads of argument in more detail below.

FIRST & SECOND GROUNDS OF APPEAL: CANCELLATION OF THE ORDER WAS LAWFUL BEING PERMISSIBLE IN TERMS OF THE CPA; THE RESPONDENT’S REDRESS WAS LIMITED TO A REASONABLE CANCELLATION CHARGE AS PER SECTION 17(3)(b) OF THE CPA

- [29] There is a dispute between the parties on whether the CPA is applicable or not in this matter. This dispute became clear when the appellant lodged a complaint with the CSGO. The court a quo assumed that the application was also based on the provisions of the CPA, and it found that ‘the respondent, when acting in accordance with its agreement with the applicant, also acted in compliance with the provisions of the CPA – the respondent is withholding payment of deposit as representing its liquidated damages or, as the CPA puts it, ‘a reasonable charge for the cancellation of the order’. The parties did not address this issue in their heads of argument. We afforded them an opportunity to file supplementary heads of argument dealing with this issue. Both parties filed the supplementary heads of argument and we are grateful
- [30] The appellant in her founding affidavit asserts that she is entitled to a full refund of the amount paid, in terms of section 17 of the CPA. In her heads of argument she submits that she cancelled the order in terms of section 17 of the CPA, and the respondent’s redress is limited to a reasonable cancellation charge as per section 17(3)(b) of the CPA.
- [31] The respondent contends that the appellant is not entitled to rely on section 17 of the CPA because the goods involved are special-order goods. It asserts that the parties spent numerous hours designing the special-order goods in accordance with the appellant’s specifications and requirements, which special-order goods were designed to accommodate the structure and floorplan of the appellant’s property.
- [32] The appellant asserts that the goods in question are not special order goods and were ordered from a catalogue and the specifications of the standard goods were not altered or requested by her to be altered. The order was based on a modular system where she could choose how to put the modules together. She had no idea whether the modules are pre-manufactured or manufactured on order, as they are standard for the kitchens supplied by the respondent.
- [33] The question for determination under this ground of appeal is whether the appellant is entitled to rely on section 17 of the CPA. In order to determine this, we have to consider whether the agreements entered into between the parties were for special-order goods.
- [34] Section 17 of the CPA affords the consumer a right to cancel a reservation, booking or order for goods (other than special-order goods) and a reasonable cancellation fee may be imposed by the supplier. The section provides as follows:
- ’17. (1) This section does not apply to a franchise agreement, or in respect of any special-order goods. (our own emphasis)
- (2) Subject to subsections (3) and (4), a consumer has the right to cancel any advance booking, reservation or order for any goods or services to be supplied.
- (3) A supplier who makes a commitment or accepts a reservation to supply goods or services on a later date may -

- (a) require payment of a reasonable deposit in advance; and
- (b) impose a reasonable charge for cancellation of the order or reservation, subject to subsection (5).
- (4) For the purposes of this section, a charge is unreasonable if it exceeds a fair amount in the circumstances, having regard to –
  - (a) the nature of the goods or services that were reserved or booked;
  - (b) the length of notice of cancellation provided by the consumer;
  - (c) the reasonable potential for the service provider, acting diligently, to find an alternative consumer between the time of receiving the cancellation notice and the time of the cancelled reservation; and
  - (d) the general practice of the relevant industry.
- (5) A supplier may not impose any cancellation fee in respect of a booking, reservation or order because of the death or hospitalisation of the person for whom, or for whose benefit the booking, reservation or order was made.’

[35] Section 1 of the CPA defines ‘goods’ to include-

- (a) anything marketed for human consumption;
- (b) any tangible object not otherwise contemplated in paragraph (a), including any medium on which anything is or may be written or encoded;
- (c) any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written or encoded on any medium or licence to use any such intangible product;
- (d) a legal interest in land or any other immovable property, other than an interest that falls within a definition of ‘service’

in this section; and

- (e) gas, water and electricity.

[36] Special-order goods are defined in section 1 as ‘goods that a supplier expressly or implicitly was required or expected to procure, create or alter specifically to satisfy the customer’s requirements.’

[37] Section 2(1) of the CPA provides that ‘this Act must be interpreted in a manner that gives effect to the purposes set out in section 3.’ The Act is a piece of consumer-protection legislation, having its purpose to promote and advance the social and economic welfare of consumers in South Africa. It promotes a fair, accessible and sustainable marketplace for consumer products and services and establishes national norms and standards relating to consumer protection, to provide for improved standards of consumer information, to

prohibit certain unfair marketing and business practices, to promote responsible consumer behaviour, to promote consistent legislative and enforcement framework- relating to consumers.

[38] The appellant submits in her supplementary heads of argument that the purpose, words, and context of the CPA indicate that the provisions thereof must be interpreted in favour of the consumer. This means that where a provision limits the rights of a consumer, the provision must be interpreted restrictively. Further, that the definition of ‘special-order goods’ is extremely broad, and that if a literal interpretation is adopted, the result will go against the spirit and purport of the CPA. Further, that too literal an interpretation of the definition of ‘special-order goods’ will render section 17 by and large irrelevant to the ordinary course of trade between customers and suppliers, and this will negate the protection the section affords a consumer. Further, that the definition needs to be interpreted purposively in the context of the CPA being an instrument for fairness and equity, and that the application of the term ‘special-order goods’ should be limited to ‘goods that are of use only to that particular consumer’.

[39] On the other hand, the respondent submits in its supplementary heads of argument that the purpose of section 17 is to protect the consumer in circumstances where the consumer made an advance payment for goods or services to be supplied; and to protect the supplier in instances where the goods to be supplied are special-order goods. Further, that the term ‘special- order goods’ are goods that a supplier:

[a] Was required to import as it does not ordinarily stock such goods unless specifically ordered by the consumer (Naude and Eislelen: Commentary on the Consumer Protection Act 17-2>), and will qualify as “the procurement of goods to satisfy the consumer’s requirements” as envisaged in the definition of special-order goods of the CPA; and

[b] was asked to make specifically for a consumer (Understanding the Consumer Protection Act, JUTA’s Pocket Companions; Ina Opperman and Rosalind Lake

2012) and will qualify as goods which the supplier was expected to create on behalf of the consumer.

[40] The respondent has referred us to two relevant cases on the question of the interpretation of statutes. First, *Cool Ideas 1186 CC v Hubbard 2014 (8) BCLR 869 (CC)*, where the Constitutional Court stated as follows:

*“A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:*

- (a) The statutory provision should always be interpreted purposively;
- (b) The relevant statutory provision must be properly contextualised; and

- (c) All statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive

approach referred to in (a).”

- [41] Second, the case of *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13 para 16 where the SCA stated that:

*“Judges must be alert to, and guard against the temptation to substitute what they regard as reasonable, sensible, or business-like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In the contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point’ of departure is the language of the provision itself, read in the context and having regard to the purpose of the provision and the background to the preparation and production of the document.”*

- [42] I agree with the respondent’s submission that the text of section 17, read with the definition of ‘special-order goods’, is clear and unambiguous.

- [43] In interpreting the contracts between the parties we need to look at all documents. The respondent is a Portuguese based company with one production unit, three showrooms in Portugal and two showrooms in South Africa. The respondent’s mission is providing residential custom-made solutions, packed with elegance, functionality and innovation. The goods in question are mentioned in annexures FA2.1, FA 2.2 and FA 2.3. (the first, second and third agreements). They are also stated in paragraphs [4], [6] and [8] hereof. The agreements do not expressly state that the goods are ‘special- order goods’. However, the words ‘FABRI: Kitchens and Closets, tailor made in Portugal’ appear on top of the page marked FA 2.1. The address for Fabri’s factory is stated on the aforesaid page as ‘Estrada Cabeco do Cacao, 1096, Trajouce, 2785-038 Sao Domingos de Rama, Cascais, Lisboa, Portugal’. On top of FA 2.2 and FA 2.3 documents the words ‘African Corporate Awards 2015 Fabri South Africa Best Built-in Furniture Design Company-Gauteng’ appear. The aforesaid gives an indication that the respondent sells custom-designed and tailor-made kitchens, closets and furniture. The description of the goods ordered by the appellant and prices per item give an indication that the respondent caters for the high end market. In our view, considering the ordinary meaning of the words that appear in the agreements, the goods in question are ‘special-order goods’ as defined in section 1 of the CPA, in that they are designed and created specifically to satisfy the appellant’s requirements.

- [44] In addition to the words used in the agreements, we also look at the context, having regard to the purpose of the relevant provisions and the background to the preparation and production of the agreements. We look at the business model of the respondent and the process followed in preparing the order.

- [45] The respondent asserts that as a recognition of its uniqueness, it was considered one of the 2016's Most Innovative Companies in South Africa within the 2016 African Business Awards, and was awarded with the 2017 Global Excellence Awards by Lux Lifestyle Magazine as the Best Custom Kitchen Designers in South Africa. These assertions have not been disputed by the appellant.
- [46] The respondent asserts that it uses a Work Management Platform application named Asana to capture each client and project. Its procurement department, production unit as well as management all have access to Asana and uses it to procure materials, record clients' designs and manage each project. Screenshots of certain of the pages relating to the appellant's project in Asana are attached to the respondent's answering affidavit as annexures 'FC 1.1 to FC 1.3'.
- [47] The respondent asserts that the appellant approached it during August 2015 to design and install a kitchen and other closets. The appellant's project was registered on Asana on 8 August 2015. The appellant provided it with floor plans and the respondent prepared different types of designs for her. The respondent named the designs, Kitchen A and Kitchen B and the remaining designs had various names relating to the room. The respondent has attached the relevant floor plans and 3D renderings of the designs to its answering affidavit as annexures 'FC2.1 to 'FC 2.9', 'FC3.1' to 'FC3.5'; 'FC4.1' to 'FC4.19'.
- [48] After the respondent presented the designs to the appellant, she requested changes to be made to the designs. The respondent changed the designs and presented the floor plan and 3D renderings relating to Kitchen A, attached to the answering affidavit as annexures 'FC5.1 to 'FC5.8'; as well as the 3D renderings relating to Kitchen B, attached as annexures 'FC6.1' to 'FC6.2' to the appellant to choose and approve. The screenshots from Asana which shows the interaction between the appellant and respondent as well as the work that went into designing the appellant's special order are attached as annexures 'FC7.1 to 'FC7.12'.
- [49] The appellant eventually settled on the designs as per the design titled 'Kitchen B' as well as other designs. The parties then entered into agreements based on the chosen designs, and the appellant made payments accordingly. The project was set to be completed by mid June/ July 2016 as the final payment for the kitchen was made on 23 January 2016. Keeping in mind that the units are manufactured in Portugal based on the specific designs created for the appellant and that the materials are being procured in various countries. Upon receipt of the first payment the respondent in line with its business practice started ordering the materials. Throughout September 2015 to December 2015 the respondent had numerous meetings

with the appellant relating to the different contracts and designs, the respondent attached annexures 'FC7.6 to 'FC7.12 in that regard.

- [50] The above assertions made by the respondent in relation to the process that was followed before the agreements were signed are not disputed by the appellant in the replying affidavit, save for the contention made that the respondent did not incur expenses during this process. The appellant also disputes that the respondent started ordering the material upon receipt of the first payment.
- [51] The appellant contends that the goods in question are not 'special order goods' and were ordered from a catalogue and the specifications of the standard goods were not altered or requested by her to be altered. This contention is disputed by the respondent, and it attached annexures 'FC.6 to 'FC7.12, which show that the initial designs were altered according to the appellant's specifications on her request. Further, the appellant does not give the details of the ordered goods on the alleged catalogue. The respondent asserts that the appellant could not give such details because her specific designs could not be included in the respondent's magazine as the goods were specifically designed for and chosen by her. In applying the Plascon Evans rule, we accept the version of the respondent.
- [52] Considering the process that was followed before the agreements were concluded and the terms of the agreements, it is our view that the agreements were for the design, procuring, manufacturing and installation of various cupboards and accessories in various rooms in the applicant's house to be built, and fall within the section 1 definition of 'special-order goods'. The appellant states that as the house could not be built, the cabinetry could not be installed. We are of the view that the ordered goods were only of use to the appellant.
- [53] With regard to the accessories included in the order in question amounting to less than R50,000.00, the respondent submits that the entire contract in the context of section 1 of the CPA relates to the 'special order goods' as a whole and not in part. It contends that when reading the contract in context and taking into consideration the circumstances under which the agreements were concluded, that the agreements relate to 'special-order goods' and thus cannot be broken down in parts. Further, the appellant in her pleadings before the court a quo did not make out a case that the amount paid was for goods that could be regarded as non-special-order goods or for special-order goods, and the respondent was not required to meet such case, and accordingly there is no evidence before us to the effect that the amount paid was partially for non-special-order goods. The evidence before us, is that the 25% of the monies was payable on approval of contract, and a further 25% payable in terms of the contract to start production. We are therefore not in a position to make a determination that the payment in question was partially made for non-special-order goods.
- [54] We conclude that section 17 of the CPA is not applicable and the appellant was not entitled to rely on it in cancelling the agreements and claiming refund of the amount paid. Likewise, the argument by the appellant that the respondent is entitled to charge a reasonable cancellation fee in terms of the section 17 of the CPA is not sustainable as we find that this section is not applicable.

[55] The court a quo erred in finding that the respondent was entitled to retain the amount paid as a reasonable cancellation charge in terms of section 17 of the CPA, as this section is not applicable. Therefore, we are entitled to interfere with the findings and order made by the court a quo and substitute it with our own.

THIRD AND FOURTH GROUNDS OF APPEAL: THE CONTRACTUALLY AGREED CANCELLATION CHARGE CONTAINED IN CLAUSE 5(c) OF THE CONTRACT DID NOT BECOME DUE OR PAYABLE SINCE THE CONDITIONS TO SUCH CHARGE WERE NOT FULFILLED; INsofar AS CANCELLATION CHARGE BECAME PAYABLE IN TERMS OF CLAUSE 5(c), THE RESPONDENT FAILED TO PROVE THAT SUCH CHARGE IS WITHIN THE SCOPE OF CHARGES ALLOWED BY THE CPA

[56] The point of departure should be what is the status of the agreements if the CPA is not applicable. The appellant contends that she cancelled the agreement lawfully on 24 April 2018 (relying on her statutory right to do so), however the evidence shows that the respondent considered the appellant's purported cancellation unlawful and contended that it amounted to a repudiation of the contract. The court a quo accepted the respondent's version and found that the appellant unlawfully repudiated the contract. We have now also found that the appellant was not entitled to cancel the agreement in terms of the CPA and thus that the purported cancellation was unlawful. The respondent had elected to keep the agreement in force and not to cancel it.

[57] Judge Adams, in paragraph [9] of his judgment, referred to the decision of *Royal Anthem Investments 129 (pty) Ltd v Lau and Another*[1] in support of the proposition that the failure of an agreement generally obliges parties to restore each other to the position they were in immediately before the conclusion of the agreement. This obligation can, he found, be excluded by agreement which is what he said the import of clause 5(c) is. He held that clause 5(c) did not entitle the appellant to a refund – it entitled the respondent to claim the full contract price.

[58] Clause 5(c) of the agreement provides as follow:

*“Once the agreement is approved and ordered, the client may not change or return the furniture or accessories. If the client cancels for any reason, the client will be liable for the full amount due (our own emphasis). Should the legal action need be taken and the client be found guilty of breach of contract, the client will pay the legal fees in full for FABRI.”*

[59] What the appellant argued on appeal and which was not argued before Adams J was that the agreement had not been ‘approved or ordered’ and that clause 5(c) had thus not been triggered. We find that there is no merit in this contention. 4 payments were made starting on 8 September 2015, with the last one being made on 31 March 2016. On the 2nd of April 2016, the Appellant requested that the respondent ‘hold off’ which the respondent agreed to with the qualification that the appellant should understand that no monies would be refunded.

[60] There was some debate as to whether clause 5 is triggered only if the agreements are in fact cancelled (objectively and lawfully) or also if, as is the case here, the purported cancellation is correctly viewed as a repudiation but the innocent party elected to keep the agreements in force. (It bears mentioning, that clause 5 is very specific. It provides that if the appellant cancels 'for any reason', thus even for a lawful reason, such as the impossibility of performance which arises during the agreements, then the respondent would be entitled to withhold the deposit.)

[61] Judge Adams opted for the latter construction which interpretation is supported by the content of Clause 8 – Payment terms, which reads:

'Refunds are only available in case of a breach of contract by FABRI'.

[62] We find that it is unnecessary to make a definitive finding on which construction is correct as Clause 8 provides a total answer to what the parties had agreed upon.

[63] Having found that the CPA is not applicable and that the appellant's purported cancellation constituted a repudiation of the agreements, we have found that it is the appellant who breached the agreements and not the respondent. In our view, that is the end of the enquiry. If 'Refunds are only available in case of a breach of contract by FABRI (the respondent)', they are NOT available in case of a breach by the appellant. We thus find that the clear wording of the clause disentitles the appellant to a refund.

FIFTH GROUND OF APPEAL: IN THE EVENT OF A FINDING THAT THE APPELLANT ACTED UNLAWFULLY IN PURPORTING TO TERMINATE THE CONTRACT, THE RESPONDENT'S SUBSEQUENT ELECTION TO ENFORCE THE CONTRACT DEPRIVES IT OF RELIEF HEREIN IN THE ABSENCE OF PERFORMANCE OR A TENDER OF PERFORMANCE BY THE RESPONDENT

[64] The appellant purported to cancel the agreements. We have found that such conduct was unlawful and that it constituted a repudiation. The respondent elected to keep the agreements in force. The provisions of the agreements entitled the respondent to retain the amounts paid up until 31 March 2016 and imposed no obligation to perform or tender performance.

[65] It should be remembered that the agreements were repudiated at a time well before delivery was to take place. Having regard to, particularly, clauses 2 and 8, production had to be completed and 40% of the purchase price had to be paid a day before delivery. It is common cause that production was not completed because the appellant had requested that it be held off. It is also common cause that the 40% of the purchase price had not been paid. In our view there exists no basis in law to require performance or a tender of performance of the special-ordered goods having regard to the timing of the repudiation of the agreements.

## CONCLUSION

[66] It follows that the appeal falls to be dismissed. Regarding the issue of costs, the general rule is that the costs follow the event and we see no reason to deviate from this general rule.

## ORDER

[67] In the premises the following order is made:

The appeal is dismissed with costs.

MMP Mdalana-Mayisela J

Judge of the High Court

Gauteng Division

I agree

I Opperman J

S Meersingh

Acting Judge of the High Court

(Digitally submitted by uploading on Caselines and emailing to the parties)

Date of hearing:

11 October 2021

Date of delivery:

8 April 2022

Further heads of argument: 11 November 2021

Appearances:

On behalf of the Appellant: Adv H M Viljoen

Adv S J Martin

Instructed by:

Ramsay Webber

On behalf of the Respondent: Mr Jaco Hamman

Instructed by:

Hahn & Hahn Attorneys

[1] 2014

(3) SA 626 (SCA)

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