
SOUTH AFRICA / JUDGMENT

Canton Trading 17 (Pty) Ltd v Hattingh NO (1293/2018) [2019] ZAFSHC 250 (10 December 2019) [2019] ZAFSHC 250

COURT

Free State High Court, Bloemfontein

BEFORE

Naidoo, Daffue, Reinders

CASE / FILE NUMBER

1293/2018

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Appeal No: 59/2019

Case No: 1293/2018

In the matter between:

CANTON TRADING 17 (PTY) LTD

APPELLANT

and

FANTI BEKKER HATTINGH N.O.

RESPONDENT

CORAM: NAIDOO, ADJP et DAFFUE J et REINDERS J

JUDGMENT BY: NAIDOO ADJP

HEARD ON: 9 SEPTEMBER 2019

DELIVERED ON: 10 DECEMBER 2019

INTRODUCTION

[1] This is an appeal against the whole of the judgment of the court a quo, which refused the appellant leave to appeal. The appellant successfully petitioned the Supreme Court of Appeal for leave to appeal to the Full Court of this Division. The respondent initially brought an application in the court a quo for an order in the following terms:

“(a) That the Respondent be ordered to submit to arbitration to have the disputes as set out in the Arbitration Agreement which is attached to the Applicant’s founding affidavit as annexure “B” adjudicated;

(b) That the Respondent be ordered to pay the costs of this application”

The court granted the following order:

“1. The arbitration agreement, annexure B to the applicant’s founding affidavit, is amended by the deletion of the second paragraph on page 1 thereof as well as part A and the first sentence of part B on page 3 thereof.

2. The date of 10 March in paragraph 7.2 thereof is replaced by the date of 19 October 2018.

3. Prayer A of the notice of motion is granted subject to the amendments in paragraphs 1 and 2 above.

4. The respondent is ordered to pay the costs of the application, including the costs occasioned by the employment of senior counsel.”

Adv GF Heyns appeared for the appellant and Adv P Zietsman SC,

with Adv R Van Der Merwe appeared for the respondent in this

court. I will refer to the parties as they appear before us, but for the sake of clarity, I record that the appellant was the respondent in the court below and the respondent was the applicant.

BACKGROUND

[2] The background to this matter, briefly, is that the respondent is a trustee of the Qwaha Trust (the Trust) and is cited in that capacity. The Trust which conducts its business from Plot 46 and 47 Kwaggafontein, in the Free State, undertook certain expansion to buildings on its business premises (the project). For this purpose it entered into a contract on 5 February 2014 (the JBCC contract), with a building contractor called Royal Anthem Investments (the contractor). The appellant, a firm of architects, was appointed as the respondent’s principal agent in respect of the project and was given fairly wide ranging powers, including the duty to supervise and monitor the correctness and quality of the contractor’s work. The appellant acted as such until the

respondent instructed it to cancel the contract with the contractor, which the appellant duly did. The respondent alleges that the appellant failed to act in accordance with its contractual obligations to monitor the work of the contractor, causing it to

cancel the contract. A dispute, therefore, arose between the respondent and the appellant regarding the latter's performance

in relation to the project, leading to the application in the court a quo.

GROUND OF APPEAL

[3] The court a quo set out the facts in this matter in detail and it is unnecessary for me to repeat same here. The judgment of the court below was assailed on the following grounds:

3.1 The court entered the arena of conflict between the parties;

3.2 The court's unwarranted rejection of the appellant's version;

3.3 The court misdirected itself in respect of onus, a common-cause dispute of fact and the outcome of the application.

[4] The appellant states, in respect of the first ground of appeal, that the court incorrectly held that the respondent's stance was that the appellant's version on motion did not create a bona fide dispute, that it stands to be rejected as palpably untrue, implausible and clearly untenable, and that the respondent argued that the court should adopt a robust approach. The appellant asserts that the correct position in this regard is that the respondent, neither in its affidavits nor its heads of argument, called for a robust approach or rejection of the appellant's version. The respondent's stance was in fact that the appellant's version amounted to a factual dispute which is capable of being referred to arbitration for adjudication. The court, by erroneously finding to the contrary, entered into the arena of conflict between the parties. The appellant asserts, in addition, that the court, in its judgment in the application for leave to appeal, erroneously stated that the respondent argued, in the alternative that the court below should reject the appellant's version. This is factually incorrect, so it is argued, as the respondent did not argue for the rejection of the appellant's version, but attempted to argue the probabilities.

[5] In respect of the second ground of appeal, the appellant states that, even if it is found, on appeal, that the court a quo was entitled to adopt a robust approach, although neither of the parties advocated such an approach, the court still erred in rejecting the appellant's version. The court failed to apply the trite legal principle that in motion proceedings the respondent's version can be rejected only if it can be said that, on the papers, such a version can be rejected as fictitious, far-fetched and clearly untenable. The court also did not say why it found the appellant's version fictitious, far-fetched and untenable.

- [6] With regard to the third ground of appeal, the appellant asserts that the court below erred in criticising/rejecting its denial that the parties had the necessary animus contrahendi in respect of the (Service Provider) agreement. The appellant asserts that the respondent bore the onus of proving the presence of animus contrahendi, and that, at best, the court should have found that there was uncertainty about whether there was animus contrahendi on the part of both parties.
- [7] I pause to mention that neither the record of proceedings, relating to the oral arguments in the court below, nor the Heads of Argument relating to proceedings in the court below form part of the appeal record. However the comments in the judgment of the court below, and the assertions by the respondent in its Heads of Argument give some insight into the nature of the arguments in the court a quo. I will return to this later.

THE LAW

- [8] Uniform Rule 6 (5)(g) gives the court a wide discretion to make an appropriate order, the ultimate aim being to achieve a fair and expeditious result. It is well established in our law that where, in opposed motion proceedings, the court is faced with a dispute of material facts, it would usually only grant a final order if the facts as stated by the respondent together with the facts alleged by the applicant that are admitted by the respondent, justify such an order. A bare denial by the respondent of the allegations in the applicant's affidavits will not generally be sufficient to generate a genuine or real dispute of fact. It is permissible and in fact advocated that courts must take a robust, common-sense approach to a dispute on motion and not hesitate to decide an issue on affidavit merely because it may be difficult to do so.

If the court is satisfied as to the inherent credibility of the applicant's factual averments, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief sought. [See Erasmus Superior Court Practice D1-69 and D1-70 and the cases cited therein].

- [9] The Arbitration Act 42 of 1965 defines an arbitration agreement as "a written agreement providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement, whether an arbitrator is named or designated therein or not" The interpretation of this clause gave rise to the dispute between the parties. I will deal more fully with this aspect later.
- [10] Both parties referred to a number of decisions in support of their various contentions. One such case pertinent to this matter is that of *Motswai v RAF* 2014(6) SA 360 at para 59, where the relevant portion of the court's dictum reads as follows:

"Through the authority vested in the courts by s 165(1) of the Constitution judges wield tremendous power. Their findings often have serious repercussions for the persons affected by them. They may vindicate those who have been wronged but they may condemn others. Their

judgments may destroy the livelihoods and reputations of those against whom they are directed. It is therefore a power that must be exercised judicially and within the parameters prescribed by law". This was said in the context of a finding of fraud by a judge on the part of the attorney for the plaintiff, without holding a proper enquiry into the matter before making such a finding. The parties in this matter relied on this dictum for their different contentions. This too, will be dealt with later.

- [11] In the case of *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* 2015 (5) SA 245 (CC), the court dealt with the ability of an appellate court to interfere with the decision of a lower court. It is perhaps useful to set out the relevant paragraphs of the judgment in order to contextualise this court's powers in the current matter:
- [83] In order to decipher the standard of interference that an appellate court is justified in applying, a distinction between two types of discretion emerged in our case law. That distinction is now deeply rooted in the law governing the relationship between appeal courts and courts of first instance. Therefore, the proper approach on appeal is for an appellate court to ascertain whether the discretion exercised by the lower court was a discretion in the true sense or whether it was a discretion in the loose sense. The importance of the distinction is that either type of discretion will dictate the standard of interference that an appellate court must apply.
- [85] A discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it. This type of discretion has been found by this court in many instances, including matters of costs, damages and in the award of a remedy in terms of s 35 of the Restitution of Land Rights Act. It is 'true' in that the lower court has an election of which option it will apply and any option can never be said to be wrong as each is entirely permissible.
- [86] In contrast, where a court has a discretion in the loose sense, it does not necessarily have a choice between equally permissible options...
- [87] ... An appellate court must heed the standard of interference applicable to either of the discretions. In the instance of a discretion in the loose sense, an appellate court is equally capable of determining the matter in the same manner as the court of first instance and can therefore substitute its own exercise of the discretion without first having to find that the court of first instance did not act judicially. However, even where a discretion in the loose sense is conferred on a lower court, an appellate court's power to interfere may be curtailed by broader policy considerations. Therefore, whenever an appellate court interferes with a discretion in the loose sense, it must be guarded.
- [88] When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised —

'judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles'

(Referring to *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs 2000(2) SA 1 (CC)*. All other case references and footnotes have been omitted).

EVALUATION

- [12] In its judgement the court a quo comments that “Initially the applicant sought an order compelling arbitration, including the question whether an arbitration agreement came into being. When the matter was argued however, it became clear and common cause that that issue should be decided by this court.” The appellant’s denial that an agreement was concluded by the parties, created a bona fide factual dispute, so it argued. The respondent clarified this in his Heads of Argument. The respondent points out that it was, in fact, the appellant who requested the court to consider its version with a view to establishing whether a factual dispute existed or not. The respondent, in reply, then argued that the dispute raised by the appellant did not create a bona fide dispute of fact, and requested the court to adopt a robust common-sense approach in deciding the issue.
- [13] It is trite that where a court, in motion proceedings, is faced with a factual dispute, it is required to exercise its discretion to determine if there is in fact a genuine and bona fide dispute of fact. In the present matter, the court dealt extensively with the appellant’s version as it emerged from the papers. The appellant in its papers was at great pains to point out and base its case on the allegation that the court below *meru motu* decided that it would decide whether there was a genuine dispute of fact or not, in spite of the respondent’s very clear stance that all it sought was an order compelling the appellant to submit to arbitration. The appellant made no mention that it was its counsel who requested the court below to consider whether there was in fact a bona fide dispute of fact. The appellant specifically denied the correctness of the statement in the judgment that respondent argued that the appellant’s version should be rejected. As I indicated the respondent confirmed that he did in fact do so, in reply to the appellant’s request that the court consider the question of the factual dispute.
- [14] In any event, where a party relies on the provisions of Rule 6(5)(g), as the appellant seems to have done, it is common sense, that the court is called upon to examine the very dispute in order to determine whether it creates a genuine dispute of fact or not. The argument that the court entered the arena of conflict under such circumstances is misguided and unsustainable. The respondent also confirms that in requesting the court to reject the appellant’s version, it also requested the court to adopt a robust common-sense approach. This accords with the statement of the court, which I alluded to above, and is evidenced by the court’s subsequent approach to the evidence in this matter. What is clear is that the court determined whether the appellant’s version regarding the coming into existence of the agreement was true and credible. It found that such version was not, and as such was

entitled to reject such version.

[15] At paragraph 54 of the judgment of the court below, the court records that the appellant conceded that a signed agreement was not a prerequisite for a written document to have binding effect. This concession was properly made, as it is evident from the provisions of the Arbitration Act that it does not call for a written agreement to be signed in order for it to be valid and binding. The court undertook an extensive examination of the respective versions of the parties as they appear in the papers and found that the appellant's denial of the existence of an agreement was palpably untrue and not worthy of credence, warranting the rejection of its version. I am unable to fault the reasoning or the conclusion of the court in this respect.

[16] I align myself with the reasoning and dicta of the court in *Trencon*, regarding the relationship between an appeal court and a court of first instance. In the present case the court had a variety of equally permissible options with regard to the order it should make. It elected to deal with the dispute and pronounce upon the veracity of the dispute and whether it created a genuine dispute of fact. It was entirely permissible for the court a quo to have done so, and it cannot be held that it was wrong to have done so, unless the court did not exercise its discretion 'judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles'. As I indicated, I am unable to find any such misdirection on the facts or the applicable legal principles in the present case. The power of this

court to interfere in the judgment and order of the court a quo is therefore limited and, in my view, inappropriate.

[17] Having dealt with and having found, permissibly so, that there was no genuine dispute of fact regarding whether the agreement between the parties came into existence, the court a quo was then entitled to refer the dispute regarding the performance of the appellant in terms of the Service Provider Agreement to

arbitration. The Supreme Court of Appeal (SCA) dealt with the issue of referral to arbitration of disputes between contracting parties in *North East Finance (Pty) Ltd v Standard Bank of South Africa (Pty) Ltd* 2013 (5) SA 1 (SCA) and in *Zhongji Development Construction Engineering Co Ltd v Kamoto Copper Co Sarl* 2015 (1) SA 345 (SCA). In both cases the SCA referred to English case law. In *North East Finance*, certain general principles emerged regarding the existence

of a dispute between contracting parties as to whether there was agreement to refer to arbitration, specific disputes, including

whether they were bound by the arbitration clause in such agreement. The court in the *North East* case referred to the English case of *Heyman v Darwin* [1942] AC 356 (HL) ([1942] 1 All ER 337): dictum at 357B – D, where the English court held as follows:

“I think it essential to remember that the question whether a given dispute comes within the provisions of an arbitration clause or not primarily depends upon the terms of the clause itself. If two parties purport to enter into a contract and a dispute arises as to whether they have done so or not, or as to whether the alleged contract is binding upon them, I see no reason why they should not submit that dispute to arbitration. Equally, I see no reason why, if at the time when they purport to make the contract they foresee the possibility of such a dispute arising, they should not provide in the contract itself for the submission to arbitration of a dispute as to whether the contract ever bound them or continues to do so”.

- [18] The court in North East also referred to the English case of *Fiona Trust & Holding Corporation and Others v Privalov and Others* [2007] UKHL 40 ([2007] 4 All ER 951 (HL)). The general principle is thus that where a dispute exists regarding the obligation to submit to arbitration, the agreement itself will determine which disputes the parties intended to refer to arbitration. The appellant alleged that the agreement between the

parties did not come into existence by virtue of it not having been signed by either party, not that it was void or invalid for whatever reason. The court therefore, had the discretion to determine the dispute itself and exercised such discretion.

- [19] With regard to the third ground of appeal, the court a quo dealt with the evidence presented by both parties, and determined that the appellant’s denial of animus contrahendi was not true or tenable, in that it made the bald allegation without presenting anything further to substantiate that allegation. The respondent on the other hand, was able to show that there was a written Service Provider Agreement presented to it by the appellant’s attorney, that this was done after the signing of the JBCC agreement in terms of which the appellant was appointed as the respondent’s principal agent. It was also common cause that the appellant acted as such in terms of the JBCC agreement. The respondent was able to show that the parties acted in accordance with the arbitration clause in the Service Provider Agreement, and that the respondent’s attorney was even requested by the appellant’s attorney to draft the pre-arbitration agreement. The dispute arose only after the pre-arbitration meeting, and it seems that the court a quo considered this to be a contrived and opportunistic dispute, and rejected it accordingly. I cannot fault the reasoning of the court below in accepting (although it did not say so in such words) that the respondent had proved the terms of contract and that the parties had acted in accordance with such contract.

- [20] I return to the case of *Motswai supra*. The appellant’s reliance on this case is to support its view that the court a quo did not exercise its discretion “judicially and within the parameters prescribed by law”. The respondent, on the other hand, relied on *Motswai* to support his argument that the court acted “within the parameters prescribed by law”. As indicated earlier, my view is that the court a quo, acting in terms of Rule 6(5)(g), reasoned the matter correctly, and exercised one of the permissible options that it was allowed in terms of the applicable law. The court thus acted within the parameters prescribed by law.

[21] I am therefore, of the view that the appellant has not made out a case for the relief it seeks.
With regard to costs, the respondent

seeks costs of two counsel. I am in agreement with the view of the court a quo that neither the complexity nor the importance for the parties warrants the cost of two counsel.

[22] In the circumstances I make the following orders:

22.1 The appeal is dismissed with costs.

22.2 The order of the court a quo is confirmed, save that the date of 19 October 2018 in paragraph 2 thereof is amended to read 10 January 2020.

22.3 The appellant is ordered to pay the costs of the appeal, including the costs occasioned by the employment of senior counsel.

NAIDOO ADJP

I concur

DAFFUE J

REINDERS J

On behalf of Appellant: Adv GF Heyns (Pretoria)

Instructed by: VDT Attorneys

c/o Honey Attorney

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