

SOUTH AFRICA / JUDGMENT

Dainfern Square (Pty) Ltd v Dlamini NO and Other (4627/2021) [2021] ZAGPPHC 729 (8 November 2021) [2021] ZAGPPHC 729

COURT

North Gauteng High Court, Pretoria

BEFORE

Janse Van Nieuwenhuizen

CASE / FILE NUMBER

4627/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

REPUBLIC

OF SOUTH AFRICA

Case

Number: 4627/2021

NOT

REPORTABLE

In

the matter between:

DAINFERN
SQUARE (PTY)
LTD First
Applicant
And
MPILO
WINSTON DLAMINI
N.O. First
Respondent
DIS-CHEM
PHARMACIES LIMITED Second
Respondent
NOBLE
SPECTATUS FUNDS (PTY) LTD Third
Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

- [1] This application emanates from a ruling by the first respondent (“the arbitrator”) in an arbitration instituted by the second respondent (“Dis-Chem”) against the applicant (“Dainfern”). The ruling was in respect of the arbitrator’s jurisdiction to adjudicate an issue between Dainfern and Dis-Chem originating from a written lease agreement between them.
- [2] Dainfern asserted that the arbitrator does not have the necessary jurisdiction, whereas Dis-Chem contended that he had. The arbitrator ruled in favour of Dis-Chem which prompted the present application by Dainfern to set the ruling aside and for an order declaring that the dispute falls outside the scope of the arbitration clause in the agreement.
- [3] Only Dis-Chem opposes the relief claimed herein and any reference to “the parties” herein will refer to Dainfern and Dis-Chem.

BACKGROUND

- [4] During or about 18 June 2015 the parties entered into a written lease agreement in respect of which Dis-Chem leased Shop 27 in the Dainfern Square shopping centre from Dainfern.
- [5] The relevant portion of the lease agreement that led to dispute between the parties involves the payment of turnover rent and is contained in annexure “F” to the Agreement. The relevant portion reads as follows:

“Notwithstanding anything to the contrary contained in this Lease, the Tenant shall pay to the Landlord, within 2 (two) months from the end of each turnover period, in addition to the Gross Rental, the amount (if any) by which the turnover rental (described in this annexure) for every turnover period exceeds the Gross Rental for the same turnover period. The first turnover period begins when this Lease commences and terminates when the Tenant’s current financial year ends. Each subsequent turnover period coincides with the Tenant’s financial year. The last turn over period ends when this Lease terminates.

Turnover rental percentage: 1,75% of Nett Turnover.”

- [6] In its statement of claim in the arbitration proceedings, Dis-Chem with reference to the aforesaid clause, referred to three turnover rental invoices submitted by Dainfern to Dis-Chem in the total amount of R 4 199 624, 57 million. Dis-Chem states that the turnover rental was calculated on the basis of 1.75% of its nett turnover for each turnover period.
- [7] Dis-Chem then avers that it paid the invoiced amount and that the payments:
- “13.1 were made in the bona fide and mistaken belief that the amounts invoiced were due and payable when, in truth, they were not, in that turnover rental:*

13.1.1 ought to have been calculated as the difference (if any) between basic rental and 1.75% of the claimant's nett turnover; and

13.1.2 ought to have been payable only in the event and to the extent by which 1,75% of the claimant's nett turnover, over a turnover period, exceeded the basic rental for the same period;

13.2 were made in the bona fide (but reasonable and mistaken) acceptance of the correctness of the first defendant's invoices."

[8] Dis-Chem alleges that the payment of the invoices was an overpayment, because:

"15.1 1,75% of the claimant's turnover did not exceed the basic rental in any one of the turnover period to which the invoices... relate; and

15.2 no turnover rental was payable."

[9] In the result, Dis-Chem claims payment of the amount of R 4 199 624, 57 on the ground that Dainfern has been enriched by the payment.

[10] In respect of jurisdiction, Dis-Chem pleaded as follows:

"20. In terms of the agreement of lease any dispute inter alia regarding the interpretation and/or implementation of any provision of the agreement of lease is to be determined on arbitration. The claimant's overpayment (and the first defendant's corresponding enrichment and refusal to repay... constitutes such a dispute and it accordingly falls to be determined on arbitration."

[11] Dainfern filed a statement of special defence in which it pleaded that Dis-Chem's claim is based on unjustified enrichment and not a claim based on the contract. In the result, the claim does not fall within the ambit of the arbitration clause contained in the written agreement between the parties and the arbitrator lacks the requisite jurisdiction.

ISSUES

IN DISPUTE

[12] In opposing the relief claimed herein, Dis-Chem contends that the application is premature. As a result, two issues arise for

determination:

12.1 Is the application premature?

12.2 Does the arbitrator have the requisite jurisdiction?

Is the application premature?

[13] Dis-Chem contends that only an “arbitration award” may be set aside by a court in terms of section 33(1) of the Arbitration Act, 42 of 1965. A “ruling” as the one in casu does not fall within the ambit of section 33(1) of the Act, because all the issues submitted to the arbitrator has not been disposed of in a manner that achieves finality and certainty, i.e. no final award has been made.

[14] In support of the aforesaid contention Dis-Chem relies on the authority of *Termico (Pty) Ltd v SPX Technologies (Pty) Ltd and others* 2020

(2) SA 295 SAC at paragraph 13, to wit:

“In SA Breweries Limited v Shoprite Holdings Limited,[1] this court considered the issue of finality in the context of an expert determination. Albeit not in the context of an application for review under s 33 of the Act, the dicta in that matter are relevant as this court held that the requirements for a valid arbitral award are equally applicable to an expert determination. Scott JA stated (at para 22):

‘In summary, what is required is that all issues submitted must be resolved in a manner that achieves finality and certainty. The award or determination may therefore not reserve a decision on an issue before the arbitrator or expert for another to resolve. It must also be capable of implementation. On the other hand, what must be determined are the matters submitted and no more. Depending on the questions, therefore, the determination may not necessarily result in a final resolution of a dispute between the parties. Generally, a court will be slow to find non-compliance with the substantive requirements and an award or determination will “be construed liberally and in accordance with the dictates of common sense” A court will, therefore, as far as possible construe an award or determination so that it is valid rather than invalid. It will not be astute to look for defects.’”

[15] The issue in the *Termico* case was whether the arbitrators could leave an issue for adjudication by another forum. It is against the aforesaid background that reference was made to the desirability for an arbitrator to resolve all issues submitted to it. The question whether a declarator that an arbitrator lacks jurisdiction may be sought while the arbitration proceedings are still pending was not an issue in the appeal and was consequently not decided on.

[16] Dis-Chem submitted that the Supreme Court of Appeal in *Vidavsky v Body Corporate of Sunhill Villas* 2005 (5) SA 200 SCA at paragraph 17, made it clear that the jurisdiction point may only be raised once an arbitration award has been made. The relevant portion of paragraph 17 reads as follows:

“It is true that in England ‘insufficiency or want of hearing must be urged as a ground for setting aside the award on motion and cannot be set up as a bar to an action on it’: Tornburn v Barnes (1867) LR 2CP 348 at 402; Oppenheimer v Mohammed Haneef [1922] 1 AC 482; Russel on Arbitration 22ed para 8-008. This rule does however not apply to a defence of want of jurisdiction in the arbitrator which results in total or partial voidness of the award and the complaining party may in such in such cases wait for the application to enforce the award and then raise the objection: Mustill & Boyd Commercial Arbitration, 2ed 554. In this regard at least English practice accords with our own.” (own emphasis).

- [17] The passage cited from the Vidavsky is, in my view, no authority for Dis-Chem's contention that the lack of jurisdiction defence may only be tested once the arbitration proceedings has been finalised. All that the Supreme Court of Appeal confirmed in paragraph 17, is that a finding of jurisdiction does not need to be set aside by motion proceedings, but may (not must) be raised when there is an application to enforce the award.
- [18] The Dainfern relied on the judgment of Van Zyl AJ in Tzaneng Treated Timbers (Pty) Ltd v Komatiland Forest SOC Limited and another (43966/2020) [2021] ZAGPPHC 376 (22 June 2021) in support of the principle that a declarator in respect of jurisdiction may be sought during the arbitration proceedings. In paragraph 32 Van Zyl AJ held as follows:
- "32. I was referred to no judgments which pronounces expressly on the power of a South African court to grant declaratory relief on whether there was an arbitral dispute or on the jurisdiction of an arbitrator while an arbitration was in media res. There are, however,*
- ample examples in our jurisprudence of where our courts have granted such relief or taken no issue when it was asked for (but declined on other grounds)."
- [19] Van Zyl AJ proceeded to refer to various authorities in which declaratory relief was sought in circumstances where the arbitration proceedings was not yet finalised and with reference to section 21(1)(c) of the Superior Court Act, held that a court does have the power to grant declaratory relief in respect of ongoing arbitration proceedings.
- [20] The judgment is well reasoned and I could not find any reason not to associate myself with the finding. It is illogical to place the financial and time-consuming duty on parties to first finalise all the issues in an arbitration, which might at the end of the day proven to have been futile, prior to deciding the jurisdictional point.
- [21] Should the defence of lack of jurisdiction favour the defendant, all the expenses, time and effort expended in the arbitration will once again need to be expended in a trial. The dispute does not disappear; it was simply adjudicated in the incorrect forum.
- [22] In the result, I find that the application is not premature and proceed to deal with the merits of the application.

Does the arbitrator have jurisdiction?

- [23] Is trite that the source of an arbitrator's power is the agreement between the parties. [See: Hos + Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd and others

[2007] ZASCA 163; 2008 (2) SA 608 SCA]

- [24] The arbitration clause in casu reads as follows:

"33. ARBTRATION

33.1 In the event of any dispute or difference or doubt or question arising between the parties as to the interpretation of any provision of this Agreement of Lease or the implementation thereof, and the parties being unable to resolve the issue, then in the discretion of either party, the issue shall be submitted to arbitration in accordance with the provisions of this clause and the decision of the arbitrators of the Umpires as the case may be, shall be final and binding upon the parties.”

- [25] As stated aforesaid, Dainfern submits that Dis-Chem’s claim is not based in contract but in unjustified enrichment. The arbitration clause does not make provision for a claim based on unjustified enrichment and does not find application.
- [26] Dis-Chem agrees that it seeks to recover payment from Dainfern on the basis of unjustified enrichment, but contends that the dispute relates to the interpretation and implementation of annexure “F” to the lease agreement.
- [27] In view of the concession, the principle applied in the Termico case *supra* comes into play. In order to issue a valid arbitral award, the arbitrator must have the requisite jurisdiction to deal with all the issues before him/her. This is necessary because “all issues submitted must be resolved in a manner that achieves finality and certainty.”
- [28] It is clear that Dis-Chem’s statement of claim requires the arbitrator to determine, not only the interpretation of annexure “F” to the lease agreement, but also all the other requirements to sustain an enrichment claim.
- [29] These other requirements are not expressly mentioned in clause 33.1. This would entail that the arbitrator may only adjudicate on the interpretation of annexure “F” to the agreement and the remainder of the issues in dispute will need to be determined by another forum. This an arbitrator may not do. In the words of Ponnan JA: “The award or determination may therefore not reserve a decision on an issue before the arbitrator or expert for another to resolve.”

ORDER

[30] In the premises, I grant the following order:

1. It is declared that the dispute between the second respondent and the applicant does not fall within the provisions of clause 33 of the lease agreement concluded between the parties on 18 June 2015 and was accordingly incorrectly referred to arbitration by the second respondent.
2. The second respondent is ordered to pay the costs of the application, which costs include the costs of two counsel.

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE HEARD PER COVID19 DIRECTIVES: 2 September 2021

(Virtual hearing.)

DATE DELIVERED PER COVID19 DIRECTIVES: 8 November 2021

APPEARANCES

For the Applicant: Advocate

E. Fagan S.C. And Advocate S. Mathiba

Instructed by: GVS Law

Counsel for the Second Respondent: Advocate A.J. Daniels S.C. And J. M. Hoffman

Instructed by: Saltzman Attorneys

[1] SA Breweries Ltd v Shoprite Holdings Ltd [2007] ZASCA 103; 2008 (1) SA 203 (SCA); [2008] 1 All SA 337 (SCA).

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