

SOUTH AFRICA / JUDGMENT

## Howick Retirement Villages (Pty) Ltd v Lafarge Industries South Africa (Pty) Ltd (AR 493/09) [2010] ZAKZPHC 7 (11 March 2010) [2010] ZAKZPHC 7

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Swain, Murugasen, Nicholson

CASE / FILE NUMBER

AR 493/09

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

CASE NO. AR 493/09

In the matter between:

HOWICK RETIREMENT VILLAGES

(PTY) LIMITED

APPELLANT

and

LAFARGE INDUSTRIES SOUTH AFRICA

(PTY) LIMITED

RESPONDENT

APPEAL JUDGMENT Delivered on 11 March 2010

SWAIN J

- [1] The appeal before us is directed at a Judgment of Skinner A J upholding a special plea filed by the respondent (plaintiff in the Court a quo) in response to the claim-in-reconvention of the appellant (defendant in the Court a quo).

- [2] The special plea to which Skinner A J gave effect sought a stay of the appellant's claim-in-reconvention, pending the final determination of the issues raised therein by way of arbitration in accordance with the Rules of the Arbitration Foundation of Southern Africa.
- [3] The demand by the respondent that the claim of the appellant be referred to arbitration, finds its origin in Clause 18 of the agreement concluded between the parties. In terms of this agreement the respondent agreed to supply readymix concrete to the appellant. The respondent sued in the Court a quo, for the balance of the purchase price it alleged was due owing and payable by the appellant, in respect of readymix concrete sold and delivered in the sum of R548,972.92. The appellant's response was to deny the claim, allege an over payment to the respondent in the sum of R368,428.61 and by way of the said claim-in-reconvention, advance a claim for damages in the amount of R7,205,265.53, on the basis that the readymix concrete supplied was defective.
- [4] At the heart of the dispute lies an interpretation of the provisions of Clause 18, which provides as follows:

*"18. RESOLUTION OF TECHNICAL DISPUTES*

18.1 In the event of a dispute arising between the Company and the Customer, the basis of which dispute is the quality, quantity or performance of the Product supplied by the Company, such dispute shall initially be referred to the Company's local plant manager and the Customer's site manger, who shall, within 7 days after such referral, meet and use commercially reasonable endeavours to resolve such dispute.

18.2 If they are unable to resolve the dispute then the matter shall be referred to the Company's and the Customer's Regional General Managers, who shall likewise meet within 7 days after such referral and use commercially reasonable endeavours to resolve the dispute.

18.3 If the dispute is still not resolved, then the matter shall be referred, at the Company's election, to:

18.3.1. an independent expert appointed by the Cement and Concrete Institute; or

18.3.2. arbitration in accordance with the Rules of the Arbitration Foundation of Southern Africa; or

18.3.3. proceed directly to the Jurisdiction of the Courts in terms of Clause 5.

18.4 Neither the Company nor the Customer may resort to the jurisdiction of the Courts in terms of Clause 5 without first following the procedure in Clauses 18.1 and 18.2".

- [5] It was common cause that the claim-in-reconvention of the appellant was a dispute which concerned "the quality, quantity or performance of the Product" supplied by the respondent and fell within the provisions of Clause 18. It was also common cause that the parties, in an unsuccessful attempt to resolve the dispute, had complied with the provisions of Clauses 18.1 and 18.2.

- [6] The next step in the procedure to resolve the dispute vests in the respondent an election to refer the dispute, either to an independent expert appointed by the Cement and Concrete Institute, or arbitration in accordance with the Rules of the Arbitration Foundation of Southern Africa, or directly to the jurisdiction of the Courts in terms of Clause 5 of the agreement.
- [7] A determination of the manner in which the respondent was obliged to exercise its election in terms of Clause 18.3, in my view, also requires a consideration of the provisions of Clause 18.4. A prohibition imposed upon the appellant and the respondent to proceed to Court to resolve a technical dispute, unless the provisions of Clauses 18.1 and 18.2 have been complied with, has as a necessary corollary, that the appellant has the right to do so, provided it has complied with the provisions of Clauses 18.1 and 18.2. The exercise of such a right by the appellant, is of course, subject to the exercise by the respondent of the election it possesses in terms of Clause 18.3. Consequently, the right of the appellant to proceed to Court, to resolve a technical dispute in terms of Clause 18.4, is held in abeyance pending the exercise by the respondent of the election it possesses, in terms of Clause 18.3.
- [8] Mr. Broster S C, who appeared for the respondent, submitted that on a correct interpretation of Clause 18.3, read together with Clause 18.4, there was no obligation upon the respondent to exercise its election in terms of Clause 18.3 at all. He submitted that what was required was a demand by the appellant that the respondent exercise its election within a specified time. Only in the event of the respondent failing to do so, after such demand, would the appellant be entitled to exercise its right to have the dispute determined in the Courts, in terms of Clause 18.4.
- [9] It seems to me however, that the intention of the parties in terms of Clause 18 was to have any technical disputes resolved as expeditiously as possible. This is illustrated by the seven day time limit imposed in both Clause 18.1 and 18.2. In addition, the right of the appellant to have the technical dispute resolved by the Courts, is precluded pending the exercise by the respondent of its election. To find that the respondent is entitled in these circumstances to do nothing and refrain from exercising an election would be contrary to the aim and object of the Clause as a whole. To require of the appellant that it demand of the respondents that it make an election, would place an unwarranted obligation upon the applicant, not justified by the terms of Clause 18. In this regard Skinner A J remarked that there was no suggestion that the respondent had declined, or failed to respond to any invitation to make the election as to whether to proceed to arbitration. For the reasons set out above I, with respect to the learned Acting Judge, do not agree that there was any obligation upon the appellant to issue such an invitation to the respondent.
- [10] What is required of the respondent is that it makes an election within a reasonable time, failing which the right it possesses to refer the dispute to an independent expert for arbitration, as opposed to the Courts, is lost.

[11] I wish to stress that this view is based upon what I perceive to be the intention of the parties, as expressed in the provisions of Clause 18. This is so, because as stated by Hefer J A in

Mahabeer v Sharma N.O.

1985

(3) SA 729 (A) at 735

*“Apart from the law relating to prescription, there is no principle of South African Law of which I am aware that justifies a conclusion that a right may be lost through mere delay to enforce it and no reason exists for holding otherwise in the case of the right to cancel an agreement”.*

[12] The issue then remains, when did a reasonable period elapse for the exercise by the respondent of the election it possessed in terms of Clause 18.3? As pointed out above, it is common cause that the provisions of Clauses 18.1 and 18.2 had been satisfied. Consequently, the respondent was well aware, when it issued summons for payment of the balance of the purchase price, in respect of the delivery of readymix concrete, that the appellant contended that some of the product delivered was defective, resulting in loss to the appellant. The respondent must have contemplated the possibility that the appellant would wish to advance its claim for damages by way of a claim in reconvention, which counterclaim was of course subject to the election the respondent possessed to effectively prevent its advancement by the appellant in this Court.

[13] In all of these circumstances, in my view, a reasonable time elapsed for the exercise by the respondent of its election, when the respondent issued summons in this Court. A failure by the respondent to do so, resulted in a loss by the respondent of its right to make such election.

[14] In this regard, Mr. Hartzenberg S C, who together with Mr. Joubert appeared for the appellant, submitted that the issue by the respondent of the summons in this matter, constituted an election by the respondent to submit the technical dispute to determination by this Court. In this regard, I agree with the view of Skinner A J that the issuing of proceedings by the respondent did not in itself constitute an election. All that the respondent was seeking to advance was its claim for payment of the purchase price, and not a resolution of the dispute concerning the quality of the product delivered, albeit that the respondent must have appreciated that the appellant would seek to advance its claim in this regard, by way of a counterclaim.

[15] A finding that the respondent, after issue of summons, no longer possessed its right of election, in terms of Clause 18.3 to refer the appellant's counterclaim to arbitration, has as its consequence that the special plea must fail.

[16] It is however, necessary to consider an additional argument raised by Mr. Broster, S C, because it was on the basis of this argument, that Skinner A J upheld the special plea of the respondent.

[17] Mr. Broster S C submitted that the delivery of the special plea constituted an election by the respondent that the claim-in-reconvention be referred to arbitration. As pointed out by Skinner A J, and confirmed by Mr. Broster S C in argument before us, at no time had the respondent advised the appellant that it was making an election that the dispute regarding the quality of the concrete, be referred to arbitration.

[18] A consideration of this argument requires that the terms of the special plea, as pleaded, be fully set out:

*“SPECIAL PLEA*

1.

The agreement in terms of which the Plaintiff supplied concrete to the Defendant was reduced to writing and is annexure “A” to the Plaintiff’s particulars of claim.

2.

The Defendant’s claim-in-reconvention raises a dispute of a technical nature concerning the quality of the concrete supplied by the Plaintiff to the Defendant. Such a dispute, in terms of clause 18.3.2 of annexure “A” to the Plaintiff’s particulars of claim is one which falls to be decided by arbitration in accordance with the rules of the Arbitration Foundation of Southern Africa.

3.

The Defendant has not referred this technical dispute to arbitration as it is obliged to do in terms of clause 18.3.2.

4.

The Plaintiff consequently prays that the Defendant’s claim-in-reconvention be stayed pending the final determination of the dispute by arbitration in accordance with the rules of the Arbitration Foundation of Southern Africa”.

[19] In the Court a quo and before us, Mr. Broster S C conceded that the allegations made in paragraph 3 were incorrect. He conceded before us that there was no obligation upon the appellant to refer the technical dispute to arbitration in terms of Clause 18.3.2. In the Court a quo however, Skinner A J agreed with the submission of Mr. Broster S C that because the allegation was incorrect it could and should be regarded as pro non scripto as it was superfluous to the contention raised in the special plea, that the present dispute fell under Clause 18.3.2 and therefore had to be decided by arbitration.

[20] In my view, this approach by the learned Acting Judge, was, with respect, incorrect. The enquiry is directed at determining whether an election was made by the respondent, to refer the technical dispute advanced in the counterclaim, to arbitration. In order to do so, all of the allegations made in support of the prayer contained in paragraph 4 have to be considered. That the prayer asks for a referral to arbitration does not in itself constitute an election by the respondent. It is these allegations which obviously form the basis for the

prayer for relief. In this regard, I disagree with the learned Acting Judge's view that the averment in paragraph 3 of the special plea was unnecessary and did not detract from the issue raised by the special plea. The averment made in paragraph 3, albeit erroneous, formed the only basis for the relief sought in terms of the special plea.

- [21] Conspicuously absent in the special plea is any allegation that the respondent exercises its election, in terms of Clause 18.3.2 to refer the dispute to arbitration. Instead there is an allegation that the appellant has not referred the technical dispute to arbitration as it was obliged to do in terms of Clause 18.3.2. Indeed, Mr. Broster S C fairly and frankly conceded before us, that in pleading the special plea in the terms that he did, as a result of the erroneous view he

held as to the terms of the contract, he never intended to allege an election on behalf of the respondent, to refer the dispute to arbitration. His submission however was that the prayer, in its terms, was a sufficient election. For the reasons set out above, I disagree with this view and the special plea must accordingly, on this additional ground, fail.

- [22] In this regard Skinner A J held in addition, that the appellant in its replication had failed to raise any issue of estoppel, in the sense of respondent being estopped from electing to refer the matter to arbitration in the light, either of any conduct by it, or of any unreasonable delay by it, in making an election. In the light of the fact that the respondent failed to allege any election to refer the matter to arbitration and instead alleged that the appellant was obliged to do so, there was no basis for the appellant to plead an estoppel.

- [23] In the Court a quo, Skinner A J held that because the defence of the respondent to the claim by the appellant was, to a large extent, dependent on succeeding in its counterclaim, if the counterclaim was stayed because the special plea was upheld, the claim should also be stayed pending the outcome of the arbitration on the counterclaim. In the light of the conclusion I have come to on the special plea, it is no longer necessary for the claim-in-convention to be stayed.

The order I propose is the following:

- a) The appeal succeeds, the Judgment of the Court a quo is set aside and replaced with the following:

*"The special plea of the plaintiff is dismissed and the plaintiff is ordered to pay the costs of the defendant, occasioned by the special plea, including the costs of the hearing of the opposed motion".*

- b) The respondent is ordered to pay the appellant's costs of the appeal, including costs of the application for leave to appeal, such costs to include the costs of two Counsel.

I agree

MURUGASEN J

I agree and it is so ordered

NICHOLSON J

Appearances: /

Appearances:

For the Appellant

: Adv. C. J. Hartzenberg S.C. with

Adv. D.B. Joubert

Instructed by

: Randles Incorporated Pietermaritzburg

For the Respondents

: Adv. L.B. Broster S.C.

Instructed by

: Cox Yeats

C/o Stowel & Co.

Pietermaritzburg

Date of Hearing

: 05 March 2010

Date of Filing of Judgment :

11 March 2010

---

### Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE      <https://www.saflii.org/za/cases/ZAKZPHC/2010/7.html>

CASE PAGE              <https://chat.esheria.ai/case-law/south-africa/howick-retirement-villages-pty-ltd-v-lafarge-unknown-topic-akzphc-2010>

Prepared on 12 October 2026 · Esheria