



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable

Case No: 648/2022

In the matter between:

**DIS-CHEM
APPELLANT**

PHARMACIES

LIMITED

and

DAINFERN SQUARE (PTY) LTD

FIRST RESPONDENT

MPILO WINSTON DLAMINI N O

SECOND RESPONDENT

NOBLE SPECTATUS FUNDS (PTY) LTD

THIRD RESPONDENT

Neutral Citation: *Dis-Chem Pharmacies Limited v Dainfern Square (Pty) Ltd & Others* (648/2022) [2023] ZASCA 115 (27 July 2023)

Coram: NICHOLLS, MOTHLE and MOLEFE JJA and KATHREE-SETILOANE and MALI AJJA

Heard: 15 May 2023

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via e-mail publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down are deemed to be 27 July 2023 at 11h00.

Summary: Alternative Dispute Resolution – jurisdiction of arbitrator – unjustified enrichment – whether an arbitrator has jurisdiction over the appellant’s unjustified enrichment claim – whether the application for an order declaring that the arbitrator did not have jurisdiction to determine a claim of unjustified enrichment was premature – whether the arbitrator erred in dismissing a special defence of jurisdiction as raised by the first respondent.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Janse van Nieuwenhuizen J sitting as court of first instance):

- 1 The appeal is upheld with costs, including costs of two counsel where so employed.
 - 2 The order of the high court is set aside and is substituted by:
 - ‘1 The application is dismissed with costs; and
 - 2 It is declared that the arbitrator has jurisdiction over the respondent’s claim.’
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JUDGMENT

Mothle JA (Nicholls and Molefe JJA and Kathree-Setiloane and Mali AJJA concurring)

[1] This appeal concerns a dispute between a tenant and a landlord over the interpretation of an arbitration clause in a written lease agreement. The crisp issue is whether, on a correct interpretation of the arbitration clause, the second respondent the arbitrator – Mr Mpilo Winston Dlamini SC – had the requisite jurisdiction to adjudicate an enrichment claim, essentially for a refund of excess payment of turnover rental, lodged by the appellant, Dis-Chem Pharmacies Limited (Dis-Chem) as the tenant, against the first respondent, Dainfern Square (Pty) Ltd (Dainfern), its erstwhile landlord.

[2] The background facts which are largely common cause are that during October 2016 and at Johannesburg, Dis-Chem entered into a written lease agreement with Dainfern, the owner of Dainfern Square Shopping Centre. In terms of the lease agreement, Dis-Chem took occupation of shop 27 in the business premises and was liable for payment of monthly rental and turnover rental to Dainfern. A formula for calculation of Dis-Chem's financial year-end turnover rental was expressed in annexure 'F' to the lease agreement.

[3] The full text of annexure 'F' to the written lease agreement is attached to Dis-Chem's claim. Since the merits of the claim are yet to be considered and decided on, it is unnecessary at this stage to refer to the full text of annexure 'F'. In this judgment, reference is made only to the material terms of the annexure as pleaded in the claim. These are:

'In terms of the agreement of lease [Dis-Chem] would let from [Dainfern] shop no 27 in the Dainfern Square shopping centre.

...

The agreement of lease had the following express *alternatively* implied further *alternatively* tacit terms (and the agreement of lease, properly construed, provided *inter alia* as follows):

...

The agreement of lease would commence on 1 June 2015 and [Dis-Chem's] rental obligations, from 23 July 2015;

Basic rental would be R115 p/m² (subject to escalation at a rate of 7%, on 1 May of every succeeding year);

In addition to basic rental [Dis-Chem] would be liable for payment of turnover rental calculated in accordance with annexure "F" to the agreement of lease;

Turnover rental (with annexure "F" to the agreement of lease properly construed);

would be payable within two months from the end of each turnover period;

would be payable in addition to the basic rental; and

would be calculated as the amount equal to the difference between the basic rental (referred to as "Gross Rental" in annexure "F") and 1.75% of nett turnover (if any) and accordingly, would be payable if and to the extent that 1.75% of nett turnover exceeds the basic rental;

...

A "turnover period" would be the period that commenced at the date of commencement of the agreement of lease and ended at [Dis-Chem's] financial year-end (and thereafter, on every anniversary of [Dis-Chem's] financial year-end).'

[4] In May 2020, Dis-Chem lodged a claim with the arbitrator in which it alleged that on 20 May 2016, 19 May 2017 and 22 May 2018, Dainfern claimed payment of turnover rental by issuing invoices in the amounts of R646 258.26, R1 543 300.34 and R2 010 065.97 on those dates. Dis-Chem further alleged in the claim that it paid those amounts as they were requested on 1 June of three consecutive years - 2016, 2017 and 2018 respectively. The payments made:

'13.1 [W]ere 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 [Dis-Chem'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 Dis-Chem's nett turnover, over a turnover period, exceeded the basic rental for the same period'.

[5] Dis-Chem alleged that when it paid the invoices, it made a *bona fide* (but reasonable and mistaken) acceptance of the correctness of Dainfern's invoices. No turnover rental was payable in circumstances where 1.75% of Dis-Chem's turnover in any one of the relevant periods did not exceed the basic rental. Consequently, the total amount invoiced in the three years, being R4 199 624.57 was an overpayment. Therefore, Dainfern has been enriched and Dis-Chem impoverished to the extent of the total amount, and despite demand, Dainfern has refused to repay the excess amount. Dis-Chem specifically made an allegation in its claim that Dainfern was unjustifiably enriched.

[6] It is apposite to mention that at the time Dis-Chem lodged the claim, Dainfern had sold the property to the third respondent, Noble Spectatus Funds (Pty) Ltd (Noble Spectatus Fund). Dis-Chem included an alternative claim against Noble Spectatus Fund as successors in title. Consequently, Noble Spectatus Fund, as well as the arbitrator, cited as the third and the second respondents respectively, did not participate in this appeal. The dispute in this appeal is thus primarily between Dis-Chem and Dainfern.

[7] Dainfern entered two special pleas to the claim: one on jurisdiction and the other on prescription. It, however, did not plead over. In relation to the special plea of

jurisdiction, Dainfern contended that since Dis-Chem had sought an award for payment on the basis of a *condictio*: (a) the claim is one in unjustified enrichment, and not grounded in contract; and (b) the dispute does not pertain to the interpretation of any provision of the agreement of lease or the implementation thereof. Dainfern accordingly pleaded that the dispute fell beyond the ambit of the parties' terms of the arbitration agreement and consequently the arbitrator had no requisite jurisdiction to determine the dispute in relation to the plea of prescription.

[8] Dainfern pleaded in the alternative (and only in the event that the first special plea is not upheld), that in paragraph 12.1 of the statement of claim, Dis-Chem claimed that on or about 1 June 2016, it paid to Dainfern an amount of R646 258.26 from the invoice received in May 2016. Dainfern also pleaded that Dis-Chem 'had knowledge of the identity of the debtor, [Dainfern], and the facts from which the debt in the amount of R646 258.26 allegedly arose, [which] is more than three years prior to the referral of the dispute to arbitration, *alternatively* Dis-Chem could have acquired such knowledge by exercising reasonable care. Dis-Chem's claim has accordingly prescribed to the extent of R646 258.26'. Significantly, Dainfern did not plead-over in respect of the allegation that it applied an incorrect interpretation in generating the invoices in the course of implementing the formula in annexure 'F', for collection of turnover rental.

[9] Dis-Chem submitted the matter to the arbitrator who ruled that the central dispute was one of interpretation of annexure 'F' to the lease agreement and consequently he had jurisdiction to determine the claim. The arbitrator dismissed Dainfern's special plea. Dainfern applied to the Gauteng Division of the High Court, Pretoria (the high court), which declared (per Janse van Nieuwenhuizen J) that the dispute did not fall within the provisions of clause 33.1 of the lease agreement and was accordingly incorrectly referred to arbitration by Dis-Chem. Dis-Chem sought and successfully obtained leave to appeal the judgment and order of the high court, to this Court.

[10] Central to the crisp issue of the arbitrator's jurisdiction, is the interpretation of the arbitration clause 33.1 of the lease agreement, which provides:

'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 arbitrator/s or the umpire as the case may be, shall be final and binding upon the parties.'

[11] In addition, and read with the arbitration clause, is clause 24 of the lease agreement, which deals with the issue of jurisdiction and costs. It provides thus: 'Should there be a breach of this agreement by the defaulting party then the aggrieved party shall choose whether the dispute is to be brought in the Magistrate's Court or by way of arbitration as set out in clause 33 below.'

[12] In making his ruling, the arbitrator concluded that: 'Dis-Chem's claim for the turnover rental allegedly paid over to Dainfern, although not specifically envisaged in the arbitration clause since the clause is silent about overpayment or enrichment, it is in actual fact a claim relating to the lease agreement because it involves the interpretation of annexure "F".' and ... therefore [it is] referable to arbitration.'

[13] The high court in accepting Dainfern's argument, similarly confined its remarks and findings to the question of interpretation of clause 33.1. The learned Judge at the outset, correctly held, with reference to the matter of *Hos + Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd and Others*¹ that the source of the arbitrator's power is the agreement between the parties. She, however, summarily concluded that since the arbitration clause 'does not make provision for a claim based on unjustified enrichment [it] does not find application.'

[14] On a proper construction of the text of the arbitration clause 33.1 of the lease agreement, 'any disputes or differences, doubts or question arising between the parties', may be categorised as either an *interpretation* of any provision of the agreement of lease; or *the implementation* of the lease agreement. The phrase may

¹ *Hos+Med Medical Aid Scheme v Thebe ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd and Others* [2007] ZASCA 163; 2008 (2) SA 608 SCA; [2008] 2 All SA 132 (SCA).

also be construed as including both interpretation and implementation as referenced above.

[15] The high court adopted Dainfern's approach, which essentially implies that the claim by Dis-Chem should be viewed as consisting of two parts. The one component is where Dainfern's application of the formula to calculate turnover rental and issuing the inflated invoices, is raised. Dainfern concedes that this part of the claim relates to the interpretation of annexure 'F'. It falls within the arbitrator's jurisdiction. There is thus no dispute in this regard.

[16] The disputed part of the claim relates to the relief sought by Dis-Chem, should it succeed, on its interpretation, to prove that the invoices were incorrect. Dainfern contends that the relief or award sought by Dis-Chem is in the form of unjustified enrichment; which is a separate course of action that may raise 'other requirements'. It is this part of the claim, so continues Dainfern's argument, which falls outside of the agreement and beyond the terms of the arbitration clause 33.1 of the lease agreement. The contention is that the arbitrator has no jurisdiction to make an award based on unjustified enrichment. This is the nub of the objection to jurisdiction, on which the high court also based its conclusion.

[17] The high court held that since the claim was one of enrichment, it contemplated 'other requirements' of enrichment, beyond the interpretation which would have to be considered. It held that:

"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 Ponnau JA: "[t]he award or determination may therefore not reserve a decision on an issue before the arbitrator or expert for another to resolve."

The quoted text attributed to Ponnau JA was extrapolated from *Termico (Pty) Ltd v SPX Technologies (Pty) Ltd & Others (Termico)*². I will return to this aspect later in the judgment.

² *Termico (Pty) Ltd v SPX Technologies (Pty) Ltd and Others; SPX Technologies (Pty) Ltd v Termico (Pty) Ltd* [2019] ZASCA 109; 2020 (2) SA 295 (SCA).

[18] In the present case, by concluding as it did, the high court erred in overlooking the nature of the dispute. Central to Dis-Chem's claim, as described by the arbitrator in his award, is the determination of the dispute as to the correct interpretation in the course of the implementation of annexure 'F' of the lease agreement, relating to turnover rental. Until that determination is made, the issue as to whether any party was unjustifiably enriched or impoverished, does not arise. Less so 'other requirements' that would go with enrichment which, as it turns out, do not appear anywhere in the pleadings. Dainfern, in its response to Dis-Chem's claim, had not pleaded any 'other requirements' of unjustified enrichment and how 'the other requirements' find application to exclude the jurisdiction of the arbitrator. Equally so, the high court has not attempted to identify or define the 'other requirements' alluded to.

[19] The conclusion of the high court based on these unnamed 'other requirements' amounts to speculation as to what may or may not arise in the course of the arbitration of the dispute. Therefore, the high court's reasoning is grounded on conjecture. Over the years, the courts in South Africa, including this Court, relying on cases decided in England, have developed the approach and principles applicable to the determination of the scope of jurisdiction of an arbitrator. The following are some of the authorities relevant to the issue in this appeal.

[20] In *North East Finance v Standard Bank (North East Finance)*,³ this Court held: 'In addition, a contract must be interpreted so as to give it a commercially sensible meaning: *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund*.⁴ This is the approach taken to considering the ambit of an arbitration clause adopted in *Fiona Trust*. We must thus examine what the parties intended by having regard to the purpose of their contract.'

In adopting the approach of the courts in England, the court in *North East Finance* referred to an address by Lord Hoffman in *Fiona Trust*, and held:⁵

³ *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76; 2013 (5) SA 1 (SCA); [2013] 3 All SA 291 (SCA) para 25.

⁴ *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* [2009] ZASCA 154; 2010 (2) SA 498 (SCA); [2010] 2 All SA 195 (SCA) para 13. See also *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA); [2012] 2 All SA 262 (SCA) para 18.

⁵ Fn 5 above para 21.

'It was necessary, therefore, Lord Hoffman said, to have regard to the purpose of the agreement as a whole and of the arbitration clause in particular. In doing so, the court would assume that generally parties intended to have all their disputes under an agreement determined by the same tribunal – not some disputes by an arbitrator and others by a court. If the parties intended otherwise, it was easy enough for them to say so.'

[21] In *Fili Shipping Co Ltd v Premium Nafta Products and Others*,⁶ Lord Hoffmann, delivering the speech with which all their lordships concurred, said:

'In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are inclined to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.'

[22] The essence of Dis-Chem's objection is that when Dainfern generated the invoices it interpreted the calculation clauses incorrectly. There is no doubt that even on a narrow construction, the objection to the invoices arises first, during the course of the implementation of the calculation clause in annexure 'F' of the lease agreement; and second, Dainfern applied a wrong interpretation of the calculations in annexure 'F' to the lease agreement. Therefore, the objection falls squarely within the ambit of clause 33.1 and it is within the arbitrator's jurisdiction.

[23] Dis-Chem submits, and correctly so, that the arbitration clause does not refer to any course of action or any claim. It refers to 'any dispute or difference or doubt or question'. The entitlement it may have to recover from Dainfern depends entirely on the determination of a dispute as to the correct interpretation and the implementation of certain provisions of the lease agreement, in this case annexure 'F'.

[24] In *Zhongji Development Construction Engineering Company Limited v Kamoto Copper Company Sarl (Zhongji)*,⁷ this Court, with reference to the seminal case in England, stated as follows:

⁶ *Fili Shipping Co Ltd v Premium Nafta Products and Others* [2007] UKHL 40; [2007] Bus LR.

⁷ *Zhongji Development Construction Engineering Company Limited v Kamoto Cooper Company Sarl* [2014] ZASCA 160; 2015 (1) SA 345 (SCA); [2014] 4 All SA 617 (SCA) para 32.

'In *Fiona Trust* (which the House of Lords upheld in *Fili Shipping*), decided in the English Court of Appeal, Longmore LJ, delivering the court's unanimous judgment, said:

"As it seems to us any jurisdiction or arbitration clause in an international commercial contract should be liberally construed. The words 'arising out of' should cover 'every dispute except a dispute as to whether there was ever a contract at all'."

And

"One of the reasons given in the cases for a liberal construction of an arbitration clause is the presumption in favour of one-stop arbitration. It is not to be expected that any commercial man would knowingly create a system which required that the court should first decide whether the contract should be rectified or avoided or rescinded (as the case might be) and then, if the contract is held to be valid, required the arbitrator to resolve the issues that have arisen."

[25] Also in *Termico*, this Court determined two principles relevant and applicable to the present appeal. There, this Court dealt with an arbitration award that did not include relief in the form of money. The arbitrators had refrained from including a monetary value in the award, for the reason that it was not part of the claim. In acquiring the shares, the claimant had received a loan from the respondent, whose value, at the time of the arbitration, was not as yet determined. The high court concluded that by failing to make an award for the value of the shares, the arbitrators committed an irregularity. On appeal, this Court first held that the decision of the arbitrators did not constitute any irregularity, as that case was not one where an '*arbitrator neglected to determine all the disputes that had been referred to arbitration, he/she in doing so, [would] commit a reviewable irregularity*'. Here Dainfern went to court to seek a review and declaratory relief in circumstances where there was no misconduct or gross irregularity. In *Termico*, the second principle was that, a party can only apply to review an arbitration award if all the disputes submitted to the arbitrator have been disposed of in a manner that achieves finality and certainty.⁸

[26] Therefore Dis-Chem submits, correctly so, that Dainfern prematurely approached the high court to seek a review against what it perceived to be a 'wrong' decision of the arbitrator. It couched the review in the form of declaratory relief,

⁸ Fn 2 above para 13.

despite being aware that the arbitration had not reached finality and certainty on the merits of the claim. In *Zhongji*,⁹ this Court stated as follows:

‘Zhongji Construction’s application to the high court was accordingly premature and perhaps unnecessary. In *Geldenhuys and Neethling v Beuthin*, Innes CJ said:

“Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important. And I think we shall do well to adhere to the principle laid down by a long line of South African decisions, namely that a declaratory order cannot be claimed merely because the rights of the claimant have been disputed, but that such a claim must be founded upon an actual infringement.”

Thus, the reliance on the decision in *Tzaneng Treated Timbers (Pty) Ltd v Komatiland Forest SOC Limited and another*¹⁰ that it was permissible for a court to grant declaratory relief against a ruling of an arbitrator, before the arbitration had reached finality and certainty on the merits, was clearly misplaced. The high court therefore, erred in granting a declaratory order in circumstances where the merits of the claim had not reached finality and certainty. The high court’s order must thus be set aside and the appeal in this Court must succeed. I see no reason why the costs should not follow the result.

[27] In the result, the following order is made

- 1 The appeal is upheld with costs, including those of two counsel where so employed.
- 2 The order of the high court is set aside and is substituted by:
 - ‘1 The application is dismissed with costs; and
 - 2 It is declared that the arbitrator has jurisdiction over the respondent’s claim.’

SP MOTHLE
JUDGE OF APPEAL

⁹ *Zhongji* fn 9 above para 38.

¹⁰ *Tzaneng Treated Timbers (Pty) Ltd v Komatiland Forest Limited and Another* (A3966/2020) [2021] ZAGPPHCSOC 376 (22 June 2021).

Appearances

For the appellant: A J Daniels SC
Instructed by: Saltzman Attorneys, Johannesburg.
EG Cooper Madjiedt Inc, Bloemfontein.

For first respondent: E Fagan SC and S Mathiba
Instructed by: GVS Law, Durbanville.
Symington & De Kok, Bloemfontein.