

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA GAUTENG LOCAL DIVISION, JOHANNESBURG

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

15 May 2023
DATE


SIGNATURE

CASE NUMBER: A3040/2022

In the matter between:

AFRICA'S BEST FOODS (PTY) LTD

Appellant

and

TRANSPACO PACKAGING (PTY) LTD

Respondent

Neutral Citation: *Africa's Best Foods (Pty) Ltd v Transpaco Packaging (Pty) Ltd*
(Case No: A3040/2022) [2023] ZAGPJHC 474 (15 May 2023)

JUDGMENT

DOSIO J:

INTRODUCTION

[1] This is an appeal against the decision of the Randburg Magistrate Court. The Court *a quo* upheld the defendant's special plea in terms of which the defendant sought a stay of the plaintiff's action, pending the determination of the parties' dispute by the South Africa Bureau of Standards (SABS).

[2] For purposes of this appeal, the plaintiff will be referred to as the appellant and the defendant will be referred to as the respondent.

[3] The appellant requests this Court to set aside the order of the Court *a quo* and to replace it with an order that the respondent's special plea be dismissed with costs.

[4] The appeal is opposed by the respondent.

[5] The issues to be decided are firstly whether the order granted by the Court *a quo* is final in effect and therefore appealable and secondly, whether the determination of the matter by the SABS renders this matter moot.

BACKGROUND

[6] The appellant is an agri-processor specialising in the export of wild mushrooms. The respondent is a producer and supplier of packaging products to the food industry. In terms of the appellant's specifications, the cartons supplied by the respondent were required to comply with a particular size.

[7] On 31 October 2019 the parties entered into a contract whereby during the period November 2019 and December 2019 the appellant placed an order for the supply of 10 000 cartons from the respondent.

[8] The cartons were delivered to the appellant and its employees packed produce into the cartons. Upon arrival at the appellant's overseas client, the appellant was informed that the cartons were damaged. It is alleged by the appellant that the cartons were damaged as a result of them being 10mm larger and longer than the

required specifications. The appellant alleges that the respondent was aware of the specifications pertaining to the cartons, from the inception of the parties' business relationship.

[9] The appellant alleges that the respondent was negligent in failing to deliver cartons as per the appellant's specifications, resulting in a breach of the contract signed on 31 October 2019. Accordingly, the appellant seeks damages from the respondent in the amount of R250 000-00.

[10] The special plea filed by the respondent relies on clause 6.3 of the contract which states the following:

'The [appellant] will be obliged to accept goods manufactured by the [respondent] which do not strictly adhere to the [appellant's] specifications, provided the variation from the specifications does not exceed 10% of the [appellant's] specifications. In the event of a dispute arising as to whether the variation is within the 10% such dispute **will be** referred for determination by either the [respondent] or the [appellant] to a person employed by the South African Bureau of Standards ("SABS"), who is qualified to deal with the dispute. Such person will act as an expert and not as an arbitrator nor mediator. The determination will be final and binding upon the [respondent] and the [appellant] and may be made an Order of Court by either of them who hereby consent to such determination being made an Order of Court. The costs incurred in the resolution of the dispute by the SABS will be borne and paid for by the unsuccessful party.' [my emphasis]

[11] The respondent denies that it deviated from the appellant's specifications. It was furthermore contended that in the event that there was a deviation, it had to be referred to the SABS in terms of clause 6.3 of the contract and that is why the action needed to be stayed, with costs, pending the determination of the dispute by the SABS.

[12] The Court *a quo*'s order is as follows:

- '1. The Special plea of the defendant is upheld;
2. The defendant must within 30 days from the day judgment is handed down, refer for determination the dispute to a person employed by the South African Bureau of Standards ("SABS"), who is qualified to deal with the dispute;
3. If the matter is not referred within 30 days, as set out in clause 6.3 of the agreement as per

“POC2” the plaintiff may request a trial date to be allocated;

4. Costs in the cause.’

[13] The appellant contends that the Court *a quo* erred in upholding the respondent’s special plea, as the dispute between the parties concerns a breach of contract which can only be adjudicated and determined by the Court in terms of the law of contract and by the operation of law. It cannot be determined by the SABS in terms of clause 6.3 of the contract. As a result, the Court *a quo* erred in referring the dispute to the SABS. The appellant’s counsel contended that clause 6.3 of the contract merely relates to the obligation of the appellant to accept the goods and nothing more.

[14] The appellant contends that properly construed, clause 6.3 does not grant the expert at the SABS jurisdiction or authority to:

- (a) make a factual finding that the respondent breached the contract; or
- (b) try and determine the liability of the respondent for having breached the contract; or
- (c) fix the quantum of damages; and
- (d) that the expert may not reserve these issues for another forum to resolve, consequently, the person qualified to act, in terms of clause 6.3, will only act as an expert and not in a judicial capacity.

[15] The appellant contends that properly construed the respondent’s special plea can be nothing other than a jurisdictional objection, because the respondent sought a stay of the plaintiff’s action pending the determination of the parties’ dispute by the SABS, thereby effectively seeking to oust the jurisdiction of the Court *a quo* to hear and try the matter.

[16] The respondent on the other hand contends that the special plea is one in abatement in that it does not seek to defeat or dispute the appellant’s claim by way of the special plea, but seeks compliance with the terms of the contract, with specific reference to clause 6.3, which regulates the manner in which parties may approach certain disputes.

[17] In compliance with the Court *a quo*'s order, the respondent referred the matter to the SABS.

[18] Prior to this Court entertaining the appeal, a letter was forwarded by the respondent's attorneys to the appellant's attorneys dated 22 August 2022. The contents of the letter state as follows:

- '1. We refer to the above matter.
2. As per our previous correspondence, we have submitted our client's boxes, as supplied to your client, to the South African Bureau of Standards "SABS" for inspection.
3. We are now in possession of the SABS's report. This very fact not only renders your client's appeal moot (since the very basis for the special plea has now been fulfilled and dispensed with), but further legitimises our client's stance that the order was not of an appealable nature as it was not final in effect.
4. In order to avoid the incurrence of unnecessary costs, including briefing counsel to argue the appeal etc., we suggest that your client withdraw the appeal and tender the wasted costs of such withdrawal. Should your offices fail to withdraw the appeal as aforesaid by close of business Friday, 26 August 2022, our client will argue for punitive costs including a *de bonis propriis* cost order against your offices on the basis that this issue is of a legal nature, your client ought to be advised appropriately in the circumstances and should not bear the costs in the event that it is misguided in respect of legal issues.
5. This letter, written with prejudice, will be utilised in support of the aforementioned punitive costs order that will be sought.
6. We attach hereto the report for your perusal and consideration. It can be noted that it was found that our client's boxes adhered to your client's specification.'

[19] The above-mentioned correspondence also contained the report from the SABS dated 22 July 2022.

[20] The appellant's counsel did not take kindly to this and argued that the uploading of the document on the morning of the hearing was prejudicial and that this Court should have no regard to the document because it is not properly before this court and should be regarded as *pro non scripto*.

[21] The respondent's counsel stated that the correspondence is a report from SABS showing that an expert had looked into the situation and made a determination.

The respondent's counsel pointed out that the document is crucial because it is the very reason why this Court was entertaining the matter. It was argued that the report had a bearing, in that the respondent wanted to make this Court aware that the expert report exists and on that basis the matter is completely moot. Furthermore, it was argued that the merits of the report should be of no concern to this Court because the Court *a quo* will deal with the merits.

[22] It is worth noting that both parties were aware of this correspondence before the hearing of this matter. The merits of the report is of no concern to this Court, as the Court *a quo* will deal with the merits. However, this Court finds no prejudice to the appellant in having insight to the correspondence dated 22 August 2022.

Whether the order of the Court *a quo* is appealable

[23] Section 83 of the Magistrates' Courts Act 32 of 1944 allows a party to appeal to this Court against an order having the effect of a final judgment. Section 83 states as follows:

'83 Appeal from magistrate's court

Subject to the provisions of section 82, a party to any civil suit or proceeding in a court may appeal to the provincial or local division of the Supreme Court having jurisdiction to hear the appeal against —

- (a) any judgment of the nature described in section 48;
- (b) any rule or order made in such suit or proceeding and having the effect of a final judgment, including any order under Chapter IX and any order as to costs;
- (c) any decision overruling an exception, when the parties concerned consent to such an appeal before proceeding further in an action or when it is appealed from in conjunction with the principal case, or when it includes an order as to costs.'

[24] The referral in terms of clause 6.3 was mandatory, in that the clause says 'In the event of a dispute arising as to whether the variation is within the 10% such dispute will be referred for determination by either the [respondent] or the [appellant] to a person employed by the South African Bureau of Standards'. [my emphasis]

[25] An order is appealable if it is final in effect.¹

[26] In the matter of *Clipsal Australia (Pty) Ltd and Others v Gap Distributors (Pty) Ltd and Others*², the Supreme Court of Appeal stated:

'The order by the court below will only be appealable if it qualifies as a 'judgment or order' ... first, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings'³. The respondents submitted that the order by the court below was merely a procedural order, was not final, did not grant definite and distinct relief and did not dispose of a substantial portion of the relief claimed in the contempt application.'⁴ [my emphasis]

[27] This Court finds that a ruling on a special plea is merely a procedural order and even though the Court *a quo* cannot alter the order granted, the order in the Court *a quo* did not dispose of a substantial portion of the relief claimed in the main proceedings.⁵ The trial in the Court *a quo* has not taken place and the matter pertaining to whether the respondent has a valid defence has not yet been fully ventilated. As a result, there is no final or definitive order in respect of any issue pertaining to the main action.⁶ On this basis alone, the appeal should be dismissed.

[28] The SABS has not made any finding that the respondent did or did not breach the contract, or that the claim of the appellant is finalised. It has merely given an expert opinion as to the specifications of the cartons in accordance with the contents of the contract. The Court *a quo*, with the information received from the SABS will make a

¹ *Mathale v Linda* 2016 (2) SA 461 (CC) at 464B)

² *Clipsal Australia (Pty) Ltd and Others v Gap Distributors (Pty) Ltd and Others* (657/08) [2009] ZASCA 49; 2010 (2) SA 289 (SCA) ; [2009] 3 All SA 491 (SCA)

³ *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532J to 533A.

⁴ *Clipsal* (note 2 above) para 8

⁵ *Zeem v Mutual and Federal Insurance Co Ltd* 1996 (4) SA 476 (W) at 483G, *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 (A) at 8700

⁶ *SA Motor Industry Employers' Association v SA Bank of Athens Ltd* 1980 (3) SA 91 (A) at 96H; *Zweni* (note 3 above) page 532H-I; *Trakman NO v Livschitz* 1995 (1) SA 282 (A) at 289E; *Jones v Krok* 1995 (1) SA 677 (A) at 684B-C; *Wellington Court Shareblock v Johannesburg City Council* 1995 (3) SA 827 (A) at 834A; *De Vos v Cooper and Ferreira* 1999 (4) SA 1290 (SCA) at 1297A-C; *Metlika Trading Ltd v Commissioner, South African Revenue Service* 2005 (3) SA 1 (SCA) at 12F-G).

decision as to whether the respondent is liable or not for the damages sustained by the appellant. The purpose of the referral was never to place the expert from the SABS in the position of a final adjudicator. According to the agreement, the SABS cannot act as an arbitrator or mediator.

[29] A ruling that costs will follow the decision in the main case is similarly not appealable.⁷

[30] The distinction between the matter of *Clipsal*⁸ and the matter *in casu*, is that in the former, the stay of the contempt application disposed of a substantial portion of the relief claimed in that application, which is not the situation in the matter *in casu*.

[31] Even if this Court is wrong in this regard, and the order of the Court *a quo* is appealable, a Court of Appeal may only interfere when:

- (a) it appears that the lower court has not exercised its discretion judicially, or,
- (b) that it had been influenced by wrong principles or a misdirection on the facts, or,
- (c) 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.

[32] As stated in the matter of *Kathu Solar Park (RF) (Pty) Ltd v Mahon*⁹

‘To refer a dispute for determination, there must be a particular live controversy between the parties...’

[33] In the matter *in casu*, this Court finds there was a live controversy between the parties pertaining to the specifications of the cartons which triggered clause 6.3. The Court *a quo* merely gave effect to clause 6.3 of the contract in that the order facilitates the procurement of invaluable evidence in respect of issues in the main action, as contractually agreed upon. The decision to stay the proceedings is within the discretion

⁷ *Commissioner for Inland Revenue v Niemand* 1965 (4) SA 780 (C)

⁸ *Clipsal* (note 1 above)

⁹ *Kathu Solar Park (RF) (Pty) Ltd v Mahon* 2020 JDR 1204 (GJ)

of the Court *a quo* and this Court finds the Court *a quo* exercised this discretion judicially.

[34] This Court finds no capriciousness on the part of the Court *a quo*, or the application of a wrong principle. Accordingly, this Court finds no misdirection or unreasonableness on the part of the Court *a quo* in declining to hear the matter, or upholding the special plea and staying the appellant's action.

[35] This Court is not in agreement with the appellant's counsel that the special plea is a jurisdictional objection ousting the Court *a quo*'s jurisdiction. The respondent instituted a counterclaim and admitted to the Court *a quo*'s jurisdiction in its plea at paragraph 22.1, resulting in the appellant's claim and the respondent's counterclaim being adjudicated upon simultaneously. This Court does not find that the respondent's special plea contradicts the respondent's counterclaim or that by raising the counterclaim it was mutually exclusive to the special plea. The respondent was entitled to raise the counterclaim and the special plea.

Whether the matter is moot

[36] During the deliberations before this Court, the issue of mootness was raised, however, neither party addressed this Court fully in regard to the decided cases in respect thereof.

[37] The doctrine of mootness prevents courts from deciding legal disputes when the underlying issue or dispute has been resolved or when it is too late. A case is considered moot and therefore not justiciable if it no longer presents an existing or live controversy or when the prejudice, or threat of prejudice, no longer exists. It is based on the notion that judicial resources ought to be utilised efficiently and not be utilised on issues that are abstract.¹⁰

¹⁰ *Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation (SOC) Limited and Others* [2020] ZACC 5; 2020 (6) BCLR 748 (CC); 2020 (4) SA 409 (CC) at para 47

[38] Section 16(2)(a)(i) of the Superior Courts Act 10 of 2013 ('Superior Courts Act') further states that 'when at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.'

[39] In relation to section 16(2)(a) of the Superior Courts Act, the Supreme Court of Appeal in the matter of *Chairperson of the Municipal Appeals Tribunal City of Tshwane and Others v Brooklyn and Eastern Areas Citizens Association*¹¹ stated that, notwithstanding the mootness of the issue between the parties, Courts have a discretion in terms of s16(2)(a) of the Superior Court Act to deal with the merits of an appeal. Similarly, in the matter of *Kruger v Joint Trustees of the Insolvent Estate of Paulos Bhekinkosi Zulu and Another*¹², the Supreme Court of Appeal held that the merits of an appeal can be entertained even in cases that are moot. The Supreme Court of Appeal stated that:

'...where questions of law, which are likely to arise frequently, are in issue, the court of appeal has a discretion, and may hear the merits of an appeal and pronounce upon it. The test is whether, notwithstanding that the issues between the parties have become moot, there remains a discrete legal issue of public importance that will affect matters in future. Where the decision contested on appeal will influence future litigants, this court has generally exercised its discretion in favour of considering the appeal even when consideration of the issues will have no practical effect.'

¹³ [my emphasis]

[40] In the matter of *Independent Electoral Commission v Langeberg Municipality*¹⁴, the Constitutional Court stated that the discretion to decide issues on appeal where they no longer present existing or live controversies must be exercised according to what the interests of justice require.'¹⁵ In determining whether it is in the interests of

¹¹ *Chairperson of the Municipal Appeals Tribunal City of Tshwane and Others v Brooklyn and Eastern Areas Citizens Association* [2019] ZASCA 34; [2019] 2 All SA 644 (SCA).

¹² *Kruger v Joint Trustees of the Insolvent Estate of Paulos Bhekinkosi Zulu and Another* [2016] ZASCA 163; [2017] 1 All SA 1 (SCA).

¹³ *Ibid* para 15

¹⁴ *Independent Electoral Commission v Langeberg Municipality* ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC).

¹⁵ *Ibid* para 11

justice to hear a matter that is moot, the Constitutional Court lay down the following guidelines, namely:

- (a) whether any order which it may make will have some practical effect either on the parties or on others;
- (b) the nature and extent of the practical effect that any possible order might have;
- (c) the importance of the issue;
- (d) the complexity of the issue;
- (e) the fullness or otherwise of the arguments advanced; and
- (f) resolving the disputes between different courts.

[41] The matter *in casu* is not complex in nature and neither does it resolve the dispute between the parties. In addition, it does not deal with a legal issue of such public importance that it will affect future litigants. Although this Court has not had insight into the merits of the report obtained from the SABS, the report has now been obtained, rendering this matter moot.

[42] This Court finds no reasons to uphold the appeal.

COSTS

[43] The respondent's counsel during argument abandoned the request for a *de bonis propriis* cost order, but persisted in seeking a punitive costs order against the appellant on the attorney and client scale.

[44] Cost orders are within the discretion of the Court.

[45] The appellant was advised as far back at 22 August 2022 to withdraw the appeal, as the matter had become moot, failing which the respondent would seek a punitive cost order against the appellant.

[46] The appellant persisted in placing this matter down on the Court roll, fully aware that the SABS report had been obtained. There was no reason to place this matter on the Court roll. Accordingly, this Court finds that costs on the punitive scale as between attorney and client is warranted.

ORDER

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

1. The appeal is dismissed and the matter is remitted back to the Court *a quo* for the trial to proceed.
2. Costs on the attorney and client scale to be awarded to the respondent.



D DOSIO
JUDGE OF THE HIGH COURT

I agree, and it is so ordered



B WANLESS
ACTING JUDGE OF THE
HIGH COURT

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand- down is deemed to be 10h00 on 15 May 2023

Appearances:

On behalf of the Appellant:

Instructed by:

On behalf of the Respondent:

Instructed by:

Adv. W.S Britz

C&O INCORPORATED

Adv. R Blumenthal

NVDB ATTORNEYS

c/o STEINERT

MOODLEY

ATTORNEYS