IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Reportable

CASE NOs: AR 31/2021 and AR 32/2021

In the matter between: -

THE SPAR GROUP LIMITED	First Appellant
THE SPAR GUILD OF SOUTHERN AFRICA NPC	Second Appellant
(Registration No. 1962/004186/08)	
SPAR SOUTH AFRICA (PTY) LTD	Third Appellant
and	
TWELVE GODS SUPERMARKET (PTY) LTD	First Respondent
MONOTHENDRE TRADING (PTY) LTD	Second Respondent
VAMVAKOU SUPERMARKET (PTY) LTD	Third Respondent
TRIGONA SUPERMARKET (PTY) LTD	Fourth Respondent
ELENA SUPERMARKET (PTY) LTD	Fifth Respondent
EUROTAS (PTY) LTD	Sixth Respondent
MYSTRA (PTY) LTD	Seventh Respondent
TAYEGATOS SUPERMARKET (PTY) LTD	Eighth Respondent
VRESTHENA (PTY) LTD	Ninth Respondent

MELISANDRE TRADING (PTY) LTD	Tenth Respondent
ONEIROI (PTY) LTD	Eleventh Respondent
PARNONA (PTY) LTD	Twelfth Respondent
ZANELA INVESTMENTS (PTY) LTD	Thirteenth Respondent
KLEOMENIS GIANNACOPOULOS	Fourteenth Respondent
CHRISTOS GIANNACOPOULOS	Fifteenth Respondent
YIANNI GIANNACOPOULOS	Sixteenth Respondent
HARALAMBOUS GIANNACOPOULOS	Seventeenth Respondent

This judgment was handed down electronically by transmission to the parties' representatives by email. The date and time for hand down is deemed to be 13h00 on 7 July 2022

ORDER

The following order shall issue:

The appeal against the orders of Barnard AJ issued on 17 July 2020 in Case Number 8280/19P and Case Number 9215/19P is dismissed with costs, such costs to include costs of all senior and junior counsel, where so employed.

JUDGMENT

Delivered 7 July 2022

Moodley J (Hadebe and Bezuidenhout JJ concurring)

Introduction

[1] This is an appeal against the orders in two related applications under case numbers 8280/19P ('the termination application') and 9215/19P ('the drop-shipment

application'). Both applications were brought by the respondents in this appeal against the appellants, and in the termination application, the appellants and twenty two other parties were cited as respondents.[1] Although not formally consolidated, the two applications were heard together by Barnard AJ because the parties were effectively the same and the issues for determination were interrelated. The issues arose from the dispute between the parties about the terms and conditions which regulated their relationship and the respondents' membership of the Spar Guild.

[2] In the termination application, the issue was whether the appellants had validly terminated the membership of the respondents from the Spar Guild in 2019 and/or 2020, and whether the credit terms of the Spar Group with the respondents, in respect of the time allowed for repayment and the quantity they could purchase, were validly amended in accordance with the terms of the approved credit facilities. In the drop-shipment application, the issue was whether the imposition of limits on the quantity of goods the respondents could purchase from the Spar Group and its drop-shipment suppliers was valid and reasonable and in accordance with the approved credit application.

[3] Judgments in both applications were delivered on 17 July 2020. In his judgment in the termination application, Barnard AJ found that the terminations in 2019 and 2020 of the membership of the respondents from the Spar Guild were invalid because there was an agreement that the respondents would be afforded a hearing prior to a decision being made about whether the respondents' membership of the Guild should be terminated. He held that it was in fact 'the Guild that chose to move outside the boundaries of the MOI when it reached an agreement with the Applicants'.[2] Barnard AJ rejected the averment that the respondents had repudiated the agreement by their conduct and in particular, through their demands in the letter dated 17 September 2019 from their attorney to the Chairman of the Spar Guild. Having applied the legal test for repudiation, he found that the respondents' conduct and the impugned letter did not constitute repudiation of the agreement to participate in the hearing prior to any

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[1] In the drop-shipment application the first respondent was the SPAR Group, the second respondent was SPAR SA and the third respondent was the SPAR Guild. The fourteenth to seventeenth respondents in the termination application were not parties to the drop-shipment application.
[2] Paragraph 70 of the court a quo judgment in case number 8280/19P

decision about termination. He also noted that SPAR did not communicate its acceptance of the alleged repudiation, but led the respondents to believe the hearing would proceed in due course.

[4] Barnard AJ held that the 2020 termination was also invalid because the agreement to hold a hearing at which the respondents would be allowed to make representations, also rendered invalid any termination based on the relevant termination clauses in the SPAR Guild's Memorandum of Incorporation ('MOI'), specifically clause 4.10(2)(a)(ii), and without a hearing. Therefore, SPAR's attempt to rely on a ground for termination separate from those in the 2019 notices, did not avail them. He held further that, pursuant to a proper interpretation of the MOI, even if there was no binding independent agreement to convene a hearing, SPAR was required to afford the respondents an opportunity to make representations prior to termination, regardless of the grounds for termination, which SPAR failed to do.

[5] In respect of the unilateral amendment to the terms of credit granted to the respondents, Barnard AJ found that, despite the provisions of clause 5 of the credit agreement allowing 'Spar to amend the credit terms if need be', the amendments were not done in good faith and were unfair for lack of consultation with the affected retailer members. Consequently, he issued the following order:

'(a) That the decisions and notices of termination **(that is the 2019 notices as well as the 2020 notices)** of the First to Thirteenth Applicants retailer memberships of the Second Respondent[3] be and is hereby set aside.

(b) That the decision by the First Respondent[4] to vary the credit facilities in terms of **clause 5** of the standard terms of the credit application in respect of the First to Thirteenth Applicants taken on the 23rd day of October 2019 be set aside.

(c) That the First, the Second and the Twenty Fifth Respondent,[5] jointly and severally the one paying the other to be absolved are ordered to pay the Applicants' costs - such costs to include the costs of two counsel.'

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[3] The SPAR Guild.
[4] The SPAR Group.
[5] SPAR SA.

[6] In his judgment in the drop-shipment application, the learned judge determined that the limitation on the quantity of drop-shipment supplies which the respondents could order, imposed by the SPAR Group and /or SPAR SA from about 29 October 2019 "in the context the termination of the membership"[6] of the respondents, similarly lacked honesty and good faith. He held that the respondents were entitled to purchase goods sufficient for their usual trade requirements, and 'that in any event, clause 5 of the credit agreement afforded a discretion in favour of SPAR only in relation to the time period for payment and not in relation to the quantity'[7] purchased by the respondents. He therefore issued a declaratory order that the imposition of restrictions by the SPAR Group and /or SPAR SA on the quantity of drop-shipment supplies to the 5th to the 13th applicants in case 9215/19P was unlawful and invalid and ordered costs against the respondents.

[7] The appeal to this Full Court by the first, second and twenty fifth respondents in the termination application, who are also the three respondents in the drop-shipment application, lies with the leave of Barnard AJ against the following three orders:

(a) the order setting aside the second appellant's ("SPAR Guild") notices (of 2019 and 2020) terminating the first to thirteenth respondents' ("Giannacopoulos Respondents") membership of the SPAR Guild;

(b) the order setting aside the first appellant's ("SPAR Group") decision of 23 October 2019 to vary the terms of the Giannacopoulos Respondents' credit facilities; and

(c) the order declaring invalid the decisions by the SPAR Group and /or SPAR SA to impose restrictions on the quantity of the Giannacopoulos Respondents' drop-shipment supplies.

The parties and their relationship

[8] The brand name 'SPAR' is a familiar one, as stores trading under the name 'SPAR' are located throughout South Africa, in neighbouring territories and have an international footprint. The appellants, (collectively referred to as 'SPAR' in this judgment) are the three entities that constitute the trading model and business

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[6] Paragraph 17 of the court a quo judgment in case number 9215/19P.
[7] Ibid para 21.

operations of SPAR in Southern Africa. The first appellant, the SPAR Group Limited ('SPAR Group'), is a wholesaler. Its primary business is described as 'the acquisition of goods at best possible prices, warehousing and exclusive distribution of those goods to the retailer members of the Second Appellant ("SPAR Guild" or "Guild") at competitive wholesale prices.' It grants credit facilities to members of the Guild on terms and conditions as set out in approved credit applications. Security for the indebtedness of the retailer members to the SPAR Group is required in the form of notarial bonds and suretyships. The SPAR Group holds the leases or sub-leases for the business premises of retailer members; alternatively, retailer members are required to cede lease agreements for their business premises to the SPAR Group.

[9] The SPAR Guild is a non-profit company formed for the purposes of promoting, implementing and regulating SPAR's system of voluntary group trading by wholesalers ie the SPAR distribution centres in the various regions, and independent store retailers in South Africa and neighbouring territories as determined by SPAR SA. The MOI of the Guild provides that its membership is constituted by voting and non-voting members, distribution centre members and the independent store operators ('retailer members'). The voting members are the directors of the Guild. The directors or a regional committee of the Guild are entitled to approve or not approve any application for membership (clause 4.3 of the MOI) and to terminate the membership of a retailer member (clause 4.10 of the MOI).

[10] The Guild prescribes regulations and obligations in regard to the implementation of the voluntary group trading system which is binding upon its members. It has the power to implement and enforce the agreements which members enter into when they are granted the right to participate in the voluntary group trading system. Disputes are referred to the Guild Board of Directors, which is constituted by ten directors who are distribution centre members appointed by SPAR SA and ten directors who are retailer members appointed by the National Council.

[11] The third appellant SPAR South Africa (Pty) Ltd ("Spar SA"), is a wholly owned subsidiary of the SPAR Group and holds the rights to the SPAR name and identity. Spar SA has granted the right to use the SPAR name and trademarks to the Guild in terms of a registered User Agreement. Under that agreement, each retailer member

of the Guild may use the SPAR name and trademarks as long as it remains a member of the Guild.

[12] The respondents in this appeal, who were the applicants before the court a quo, are retailer members of the Guild who control 45 stores trading under the SPAR name. The relationship between the respondents and SPAR which spans some 21 years, was established in a Membership Agreement between the respondents and the Guild, and is subject to the MOI. The Respondents have a common shareholder in the Giannacopoulos Family Trust. The Fifteenth, Sixteenth and Seventeenth Respondents are the three Giannacopoulos brothers ('Chris', 'Yianni' and 'Harry' respectively, collectively referred to as 'the Giannacopoulos brothers'), who have been the principal persons involved in the respondents' interactions with SPAR.

Factual matrix and litigation history

[13] In the light of the arguments advanced on behalf of the parties, it appears prudent to set out the facts in the interaction between the parties which are relevant to the issues in this appeal. The conflict and disputes between the parties which culminated in the applications before the court a quo, have their genesis as far back as 2016. In brief, the appellants alleged inter alia that the respondents, in breach of the MOI, had violated several labour laws, that they had attempted to bypass the SPAR trade model and secure direct supply, that they were disloyal as they were involved in the operation of a store or stores in competition with SPAR, and that the conduct of Chris, specifically, had brought the SPAR brand into disrepute.

[14] All these alleged transgressions were disputed by the respondents, who attributed the attempts to discredit Chris to the acrimony between Chris and two directors of the Guild and Spar, Messrs Borrageiro and Botten. The respondents alleged that that acrimony arose because Chris sourced warehouse products from alternative suppliers instead of the warehouse suppliers of SPAR, which resulted in SPAR SA losing revenue in the form of rebates from its warehouse suppliers and not meeting its targets, and which in turn impacted adversely on the performance bonuses of Messrs Borrageiro and Botten.

[15] SPAR held a meeting with the Giannacopoulos brothers on 29 October 2018 to discuss the issues 'which were putting their Spar membership at risk', as recorded by SPAR in a letter dated 31 October 2018. The compromise solution proposed by SPAR included the exit by Chris from any involvement in the SPAR stores. In a letter dated 15 November 2018 the SPAR Guild reiterated the aforesaid proposals to the Giannacopoulos brothers and indicated that they would 'be given an opportunity to make representation to the National Guild at the meeting which will be held on the 28th of November 2018.'

[16] The minutes of the meeting of the SPAR guild held on 28 November 2018 reflect that the Giannacopoulos brothers attended the meeting. Chris made a presentation, and provided a file of documents relating to the allegations of non-compliance by the respondents with the labour laws. After being questioned, the Giannacopoulos brothers were requested to leave the meeting. Thereafter a decision was taken by the directors of the National Guild to the effect that Chris would be required to exit the Giannacopoulos Group involved with SPAR with effect from 3 January 2019 for a period of 3 years, he could not be involved in the ownership, management or control of any competing supermarket business, and the Giannacopoulos family would have to dispose of their interest in the current 'competing' stores by 1 May 2019. These conditions together with notification of a prescribed HR audit in all the respondent SPAR Stores were conveyed in a letter dated 3 December 2018 from the Chairman of the Guild, Mr Roelf Venter ('Mr Venter').

[17] The respondents' attorney, Mr S Shoot of Fluxmans Attorneys, responded to the allegations against Chris, describing them as 'spurious and false', and the Guild's decision in a 23-page letter dated 28 December 2018, pointing out in particular that the Giannacopoulos brothers were not give the opportunity to make representations to the board of directors at the meeting and that the decision and 'order' were 'procedurally and substantively unfair and unlawful.'

[18] On 21 January 2019, Mr Venter responded that the SPAR Guild had no intention of enforcing the decision which he had conveyed in his letter of 3 December 2018, and that he had conveyed the compromise offered by the Guild in its letter dated 15 November 2018. The compromise had been endorsed by the National Guild

Directors on 28 November 2018, and open for acceptance by the Giannacopoulos group. However, as it was clear that the proposal was rejected as unacceptable to them, the Guild sought compliance with the undertakings given on behalf of the Giannacopoulos Group by Harry on 28 and 30 November 2018. Mr Venter also defended the legitimacy of the SPAR voluntary trading system and denied the allegations of a vendetta against Chris and/or the Giannacopoulos group.

[19] The minutes of a further meeting of the board of directors of the SPAR Guild, held on 20 February 2019, reflect that 'The chairman noted that in terms of the Guild's MOI, the board could not legally give Chris Giannacopoulos notice to exit his stores but that they could terminate membership of entities forming part of the Giannacopoulos Group' on three grounds. The Board agreed to the proposal by management of a compromise to be offered to the Giannacopoulos Group and further that should the compromise be rejected or breached (if accepted), a hearing would take place to determine whether to terminate membership.

[20] The compromise was rejected. Subsequently, in a letter dated 10 April 2019 Mr Venter advised Chris, Yianni and Harry that the SPAR Guild had 'resolved that the hearing to determine whether the members forming part of the Giannacopoulos Group membership should be terminated will be held on the 2nd or 3rd May 2019.' He advised further that:

'The termination is in terms of the clauses 4.10(1), 4.10(2), 4.10(3) and 4.10(4) of the Memorandum of Incorporation of the SPAR Guild.

You will be provided with the details of the breaches of the said clauses in due course.

You will be entitled to attend and make verbal representations.'

[21] The hearing referred to did not take place on the proposed dates and was rescheduled for 29 May 2019. However, Harry and Yianni were overseas on 29 May 2019. In a letter dated 31 July 2019 to Fluxmans, Mr Venter stated:

'3. ...More accurately:

(a) the matter of your client's membership and the termination or continuation thereof was not pre-determined and the convening of a hearing, where evidence can be presented and submissions made, would enable an informed decision to be taken;...'

[22] After confirming that the adjourned hearing would take place on 1 and 2 October 2019 and dealing with the queries in respect of various documents, Mr Venter wrote:

'15. You are again reminded that the hearing will take proceed on 1 and 2 October 2019. No further request for alternate dates will be entertained.

16. Please advise which family members will be representing the Group at the hearing.'

On 6 September 2019, Mr Venter confirmed to Mr Shoot that:

'...a resolution was passed by The SPAR Guild Directors that a hearing should take place to consider whether your client's membership should be terminated.

In my capacity as Guild Chairman, I then determined which of The Guild Directors were available at the time set for the hearing, and they were accordingly requested to sit on the panel.'

Together with the latter Mr Venter enclosed 'a few additional documents which will form part of files 1 and 4' and confirmed that the index to the files 'will be forwarded to your shortly.'

[23] On 17 September 2019, Mr Shoot addressed a 23-page letter to Mr Venter, the purpose of which, as set out in paragraph 10 thereof was 'to give you advance prior notice that **"submissions" of a complex legal nature** will be made by our clients duly represented on 1 and 2 October 2019.' Mr Shoot then elaborated on the preliminary submissions to be made at the hearing, which included:

(a) the Guild had not resolved to conduct the proposed hearing to determine whether the 41 businesses of the respondents should be terminated on the basis of the termination charge sheets, which had not even been considered by the Guild;

(b) the Guild had not duly determined that a panel (including persons with perceived bias), conduct the hearing and determine whether to terminate the membership of the Guild of any of the respondents' businesses. It was not legally competent for a panel (identified by unspecified persons), as opposed to an unbiased duly constituted quorum of directors of the Guild, to make such determination; and

(c) the SPAR Group was precluded from presenting evidence or making any submissions at the hearing.

[24] Mr Shoot listed ten further submissions, and recorded that the respondents would not however be limited to the submissions listed. He then projected that the presentation of the preliminary submissions would take the duration of the two days allocated ie 1 and 2 October 2019, where after, depending on the outcome, the merits could be heard at a further hearing. Mr Shoot also set out several proposals on the hearing of the merits, intended to ensure procedural and substantive fairness in the determination of thereof, and requested further particulars to the allegations set out in the 'Second ground for termination' received from Mr Venter. In conclusion he confirmed that the respondents' legal representatives would be making the submissions at the hearing and queried whether recording facilities would be available. He also requested the outstanding documentation and information in the interim.

[25] A response to this letter was sent by Mr O'Connor on 19 September 2019, who advised that he was replying on behalf of Mr Venter who was overseas. Mr O'Connor stated that:

'The contents of your letter have been considered and as a result the hearing will not proceed on the 1 and 2 October 2019.

We will address you further in due course.'

Two letters from Mr Shoot dated 20 September 2019 and 15 October 2019 respectively elicited no further response about the hearing from Mr Venter or the SPAR Guild.

[26] On 17 October 2019 the SPAR Guild delivered a notice of termination to each of the retail member respondents advising that it had been resolved at a directors' meeting held on 15 October 2019 to terminate its membership of the SPAR Guild on one (1) calendar months' notice. The notice stated that 'the grounds for termination are based on the provisions of:

'1. clause 4.10.3 of the Guild's Memorandum of Incorporation in that the Retail Members competed with the business of other retail members in respect of their acquisition of two Food Lovers stores and an OK Foods; and

2. clause 4.10.4 of the Guild's Memorandum of Incorporation in that the Retail Members brought the SPAR brand into dispute in:

    a. the dealings with suppliers;

    b. failing to comply with the provisions of the Labour Relations Act; and

    c. dealing with expired goods.'

[27] It is common cause that at the directors meeting which took place on 15 October 2019, various procedural measures aligned with the proposals of Mr Shoot, were implemented and eight witnesses testified. However, the respondents were not notified of the meeting nor were they invited to make representations at the meeting, albeit they were impacted by the decision taken by the directors.

[28] However prior to the service of the notices of termination, on 16 October 2019, the appellants launched two ex parte applications in Pretoria and in Pietermaritzburg, for urgent relief to enable them to perfect their general notarial bonds and preserve their security, which was precipitated by the decision to terminate. Having obtained interim relief in both courts on the basis that the respondents' membership of the Guild had been terminated, the orders were executed over the next two days and the employees of SPAR took over several of the respondent stores in Pretoria and KwaZulu-Natal. On 18 October 2019 the relief obtained ex parte was set aside at the instance of the respondents in both divisions, the application was dismissed by Kollapen J in Pretoria and the status quo ante in respect of their affected stores was restored to the respondents.

[29] The standard credit facilities agreement which regulates the supply of products to the retail members by the SPAR Group, provides that, in respect of direct purchases from the distribution centres, payment is due within 19 days of a weekly statement. In respect of "drop-shipment" purchases ie purchases by retail members from third party suppliers who are paid by the SPAR Group which then invoices the retail member – payment is due 31 days from the weekly statement. On 25 October 2019[8], a few days after the termination decision, the SPAR Group amended the terms of the credit

[8] Par 292 of the FA. The Appellants refer to 23 October 2019 in their HoA.

facilities agreement by a reduction of the payment periods from 19 days to 7 days and 31 days to 7 days.[9]

[30] These actions by the appellants culminated in an urgent application by the respondents for the restoration of their status quo as at 14 October 2019, and concomitant relief, suspending the notices of termination of the respondents' retailer memberships of the Guild and the variation of the terms of the credit afforded to the respondents by the SPAR Group alternatively SPAR SA ('the termination application').

[31] About the time when SPAR altered the respondents' credit terms, it also issued letters to the major drop-shipment suppliers in which it placed purchase limits on certain of the respondent stores. Attempts to resolve the limitations imposed on the quantity and value of goods ordered by the respondents failed and at the beginning of December 2019, the respondents launched the urgent drop-shipment application seeking an interim order interdicting the SPAR Group and or SPAR SA from implementing any restrictions and limitations on the quantity of drop-shipment supplies to the respondents, pending the determination of the final relief sought viz a declaratory order that the imposition of the restriction on the quantity of drop-shipment supplies was unlawful and invalid. On 11 December 2019, the interim relief in the form of undertakings by the respondents was ordered, pending determination of the final relief sought.

[32] Both applications were opposed by the appellants. During the course of the protracted hearing, the appellants issued a second set of termination notices to the respondents on 19 March 2020, and filed supplementary affidavits explaining why the notices were dispositive of the matter. The matter was however determined in favour of the respondents by Barnard AJ.

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[9] These terms are recorded in clause 5 of the standard terms and condition. In para 28 of his judgment, Barnard AJ records '30 days' and the Appellants also refer to '30 days' in their heads of argument.

The termination application: the validity of the notices of termination

[33] The main thrust of the argument advanced by the appellants is that the contractual relationship between the parties rendered the process followed and decision by the directors to terminate the membership of the respondents from the Guild and notices subsequently served on them lawful and valid. They submitted that SPAR (and the Guild specifically) as a private entity is in the position of a private owner and can therefore decide who it wishes to do business with, provided that it does not break its contracts with the retailer members. The appellants contended that they acted in accordance with what clause 4.10(1) of the MOI required them to afford the respondents: a reasonable opportunity to make representations. They emphasised that there is nothing in the MOI that remotely suggests that by affording a retailer member the opportunity of 'a hearing', the Guild was extending any invitation other than that contemplated by clause 4.10(1).

[34] The appellants submitted further that clause 4.10(1) envisages an informal, expedited process because the Guild is a voluntary organisation where membership is a privilege and a member's conduct is peer-reviewed, and there are no express provisions dealing with procedural or formal requirements for a 'hearing. Therefore, all that was required, and in the circumstances all that was offered, was a 'hearing' which would facilitate a reasonable opportunity for the respondents to make representations in relation to the grounds of termination that the directors would be considering. Their submission is consistent with the enquiry as to which of the family members would represent the respondents at the hearing.

[35] The appellants argued further that the procedure to be followed is at the discretion of the directors as private associations may hold domestic disciplinary or other such proceedings according to their own rules. They pointed out that the principles of natural justice do not require a domestic tribunal to follow the procedures and to apply the technical rules of evidence observed in a court of law, provided that the person charged has the opportunity to deal with the merits of the charges. They expressed the view that the admission of lawyers might hamper rather than enhance the conduct of domestic disciplinary proceedings and was in any event not compulsory as the proceedings were not a civil trial or quasi-judicial hearing. They contended that

the insistence on such formalities and procedures such as the observation of rules of evidence and the attendance of lawyers would stultify the process and render the directors' powers to terminate membership nugatory.

[36] Mr *Subel SC* who presented the argument on this ground of appeal on behalf of the appellants, submitted that the court a quo had taken too narrow an approach in its assessment of the two termination notices issued by SPAR. Mr *Subel* addressed the second notice first, which he contended was dispositive of the issue of the termination. He submitted that clause 4.10(2)(a) of the MOI entrenched the right to disassociate or freedom of disassociation, which was an economically sensible approach and made commercial sense in that a member could not be locked into a contractual, voluntary trading model. He submitted that consequently, on any construction of the words, the plain meaning of clause 4.10(2)(a)(ii) was that the directors had the right to give written notice of termination of membership to a retailer member without a reason. In this case, there was in any event a fundamentally incompatible relationship between SPAR and the retailer member respondents. Mr *Subel* submitted that the court a quo had therefore erred in reading into this clause that the respondents had to be given reasonable opportunity to make representations, as it was never intended that such a requirement be included in this sub-clause. He added that it was not necessary for a contextual interpretation as the clear wording of the clause could not be overtaken by context.

[37] In respect of the first notice of termination and clause 4.10(1), Mr *Subel* pointed out that there was no provision in the MOI for a 'hearing' as demanded by the respondents. He reiterated that all that the respondents were entitled to was a reasonable opportunity to make representations, which the court a quo conflated with an agreement to convene a hearing. He contended that the respondents had been afforded many opportunities to make representations between November 2018 and September 2019, but chose not to co-operate or even attempt to make representations. Instead they attempted to subvert the process decided on by SPAR. Mr *Subel* stated that this was evident in the demands and challenges to the validity of the composition of the panel and of the process, and deferment of representations and consideration of the merits contained in Mr Shoot's letter of 17 September 2019. He argued that the respondents evinced this lack of cooperation despite the fact that they

had accepted the SPAR business model and subscribed to the MOI. He added that to aggravate the appellants' umbrage, Mr Shoot stated that the appellants were to be excluded from making submissions at the hearing. Mr *Subel* argued that in the premises, it was not necessary for the appellants to establish repudiation; if the court were to find that the respondents had failed to establish that they were not given a reasonable opportunity to make representations, then their application had to fail.

[38] The appellants therefore deny that there was an agreement, outside the constraints of the contractual relationships established through the membership agreements and specifically the MOI, that the respondents would be afforded a hearing, which went beyond the ambit of 'a reasonable opportunity to make representations.' Nevertheless they submit that 'the High Court ought to have found that the Giannacopoulos Respondents eschewed the fair opportunity given to them to make representations *or have a hearing...*'[10] (my emphasis) – which contrary to their submissions, draws the very distinction they disclaim. Further, the appellants admitted in their preliminary answering affidavit:

'93. It is so that the Guild intended to convene a hearing to allow the First to Thirteenth Applicants to make representations as to why their membership in the Guild should not be terminated.'

[39] According to the argument advanced on appeal, the appellants claim that they did not rely on a repudiation of the agreement by the respondents to hold a hearing. This would, as pointed out by the respondents, have necessarily entailed the acknowledgement of an agreement between the parties to hold a hearing, as found by Barnard AJ. Instead the appellants submit that they relied on the respondents' repudiation of the membership agreements to which they voluntarily bound themselves. This is however not consistent with their affidavits in which the appellants aver that the conduct of the respondents in not attending the hearings previously arranged and the letter of 17 September 2019 constituted a repudiation by the respondents of their agreement to attend a hearing.

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[10] Appellants heads of argument para 160.

[40] The appellants also submit that the repudiation is further evident in the papers filed by the respondents in these proceedings. They submit that the attack by the respondents on 'the lawfulness of various contractual provisions of the membership agreements that concern the termination of membership', and the 'spurious constitutional law, competition law and company law arguments aimed at bringing down the entire SPAR structure (which they ironically seek to remain part of)'... 'evinces an unequivocal intention on the part of the Giannacopoulos Respondents no longer to be bound to the provisions of the membership agreements and constitutes a repudiation of those agreements.'[11] As these papers were delivered post the decision to terminate the membership of the respondents, the reliance of the appellants to sustain the allegation of repudiation by the respondents which rendered the termination notices of 17 October 2019 valid and lawful, is unsustainable.

[41] In his judgment Barnard AJ properly noted that in the proceedings before him, the appellants complained that the respondents repudiated the agreement by way of their conduct and, in particular, in the 'demands' in their letter of 17 September 2019. He concluded that the inferences SPAR had sought to draw from that letter were however unjustified, and that it was in fact proper for the litigant's attorney to bring to the attention of the other party before the hearing commences, the issues to be raised, especially points of law. He reasoned further that the panel of directors could have determined if there was any merit in the legal issues as well as the submissions about the nature and fairness of the hearing; and if they found no merit in the issues raised, they could have directed that the hearing continue.

[42] The appellants' averment of repudiation must be considered firstly in the context of the correspondence emanating from the appellants and the responses from the respondents. As the respondents have correctly pointed out, on 20 February 2019 the Guild's Board resolved formally to hold a hearing prior to terminating the respondents' membership because 'The right procedure needed to be followed going forward should the board decide to terminate membership, so that if the matter went legal, SPAR would be in a position to show that the correct procedure was followed in terminating their membership.' The Board resolved further that if it could not reach a

[11] Appellants heads of argument paras 161-162.

compromise with the Giannacopoulos Group then a hearing would take place to determine whether to terminate membership. The Guild communicated its intention to convene a hearing to the respondents in its letter of 10 April 2019, in which it stated that SPAR had 'resolved' that there would be a 'hearing' to determine whether the respondents' membership would be terminated which the respondents would be 'entitled to attend and make verbal representations.' The letter further stated that the termination was in terms of clauses 4.10(1), 4.10(2), 4.10(3) and 4.10(4) of the MOI. Consequently, the understanding by the respondents that SPAR undertook to first hold a hearing if it intended to terminate membership pursuant to any of these clauses, cannot be impugned.

[43] It is therefore pertinent, as pointed out by the respondents, that Mr Venter as representative of the Guild, specifically articulated that the respondents could "attend and make representations" at the hearing, and further confirmed the existence of this agreement in his letter to the respondents on 31 July 2019, by recording that the Guild would not pre-determine whether to terminate their membership, but would convene a hearing at which evidence could be presented and submissions made, which would enable an informed decision to be taken by the Guild. Mr Venter noted further that the hearing would proceed on 1 and 2 October 2019. On 6 September 2019, he advised the respondents that the directors resolved that a hearing should take place in order to determine whether the respondents' membership should be terminated, and a panel of directors had been finalised, and enclosed further documents to be utilised at the hearing.

[44] There is nothing in any of these communications that indicated that the respondents had conducted themselves in a manner from which it could be inferred that they had not availed themselves of the opportunity to make representations, or that they were intent upon not availing themselves of the opportunity to respond to the charges against them at the hearing convened by the Guild. Once the Guild resolved to hold a hearing in February 2019, at no stage were the respondents requested to make representations outside the hearing to be convened, nor was it necessary for them to do so. The respondents properly point out that SPAR's claim that the respondents had an opportunity to make representations in November 2018 is illogical and incorrect because the events appearing in the charge sheet had not all arisen by

that stage and because even at that stage, SPAR did not give them an opportunity to be heard.

[45] It is also pertinent that in preparation for the hearing, the Guild sent the respondents charge sheets and lever arch files of 'evidence' which it would rely on at the hearing. It is inconceivable that in this context, as created by the Guild itself, a fair hearing would exclude the respondents from responding to the allegations against them as set out in the charge sheets and supported by the 'evidence' presented to them. The respondents contend that their subsequent request for fairness in the proceedings and in the leading of evidence at the hearing was consistent with the information about intended proceedings and material presented to them by the Guild. It is therefore unsurprising that the court a quo concluded that the respondents' attorney was correct in giving notice to the Guild of the issues that were to be raised in the interests of achieving a fair and properly ventilation of the respondents' submissions in respect of the charges against them. Similarly, it found no merit in the submission that 'The persistence in misinterpreting a right to (be) make representations at a hearing constitutes a repudiation', and concluded that the Guild overreacted to Mr Shoot's letter of 17 September 2019, and drew unjustified inferences from it.

[46] I am of the considered view that the undertaking by SPAR to hold a hearing and its communications with the respondents undermine the argument that all that the respondents were entitled to was a reasonable opportunity to make representations, strictly in accordance with the contractual terms of the MOI. To the contrary, the correspondence confirms that the Guild had resolved to hold a hearing and the respondents had accepted that they would be permitted to attend and make submissions which would enable a fair determination of the allegations against them. There was therefore an agreement between the parties, irrespective of what the appellants contend the MOI provides.

[47] The accepted legal principle as expressed in *AB and Another v Pridwin Preparatory School and Others*,[12] is that while parties in a private contractual relationship are not obliged to convene a hearing before termination, nevertheless, if there is such an agreement that a hearing will be convened, then the hearing must be procedurally fair, unless this is expressly excluded by the parties.[13] Therefore if "the contract sets up a form of tribunal to hear issues, . . . the tribunal will be bound by the principles of natural justice."[14]

[48] I am unable to find merit in the argument, given the specific context in which the domestic hearing was convened by the Guild, that the consideration by the directors of oral and documentary evidence without any input from the respondents, who were directly impacted by such evidence, was a fair, just and appropriate basis for their decision to terminate membership. The conduct of such a 'hearing' cannot be construed as congruent with the rules of natural justice or termed 'fair'. The respondents were not advised that the Guild had decided that they had repudiated the hearing agreement and rejected the reasonable opportunities afforded to them to make representations, and that the Guild would proceed with the hearing without them.

[49] To the contrary, the respondents were led to believe that the hearing would take place in due course. In fact, the appellants admit that when the letter in response to Mr Shoot's letter of 17 September 2019 was dispatched, the directors were not in a position to proceed with the hearing or even respond adequately to the issues raised. However, the appellants now protest that there was in any event no obligation on them to communicate their decision to the respondents, but the termination notices served to notify the respondents that the hearing was cancelled and to express acceptance of the repudiation by the respondents.

[50] This submission was advanced for the first time in argument and does not appear in the answering affidavits. Consequently, and especially in the light of the

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[12] *AB and Another v Pridwin Preparatory School and Others* (38670/2016) [2017] ZAGPJHC 186 (3 July 2017).
[13] Ibid paras 96-97 and the authorities referred to therein. This aspect of the judgment was confirmed on appeal by the Supreme Court of Appeal in *AB and Another v Pridwin Preparatory School and Others* 2019 (1) SA 327 (SCA).
[14] *Pridwin* [2017] para 97.

misleading contents of the response from the Guild on 19 September 2019, the import belatedly assigned to the termination notices lacks credibility, particularly as by this time, the membership of the respondents had already been terminated, the notarial bonds perfected and SPAR had assumed control of the respondents' stores.

[51] In his comments that are quoted below, Kollapen J in his ruling in which he set aside the ex parte order in the Pretoria application to perfect the notarial bond, pertinently enunciated the prejudicial consequences emanating from the failure to comply with agreement between the parties:

'...the Guild then convened on the 16th of October 2019 and made the decision to terminate their membership. This was done without any notice to the respondents and without affording them the opportunity to be present and participate in the hearing.

The Spar Group in response argued that firstly the rules of the Guild provide for termination of the membership without a hearing. While that may be so what emerges and it is not disputed that the parties chose to engage with each other outside of that rule if regard [is had] to the correspondence exchanged between the parties and it reached an agreement that the hearing that would be held to determine the future membership of the respondents would be one to which the respondents will be invited.

That they were not invited to such a hearing [] violated the spirit of the agreement [that] was reached between the Guild and the respondents and importantly deprived them of the opportunity of making submission[s] both in law and in facts as the[ir] corresponden[ce] seem to suggest that would be relevant and that would ultimately have a bearing on the decision of the Guild...' [15]

[52] Mr *Symon SC* who responded on behalf of the respondents to the argument on the termination application, submitted that in the light of SPAR's undertaking to convene a domestic tribunal over which directors of the Guild would preside, the respondents were well within their rights to seek these procedural safeguards and to know the case against them. While agreeing with the submission that fairness is to be assessed in context,[16] Mr *Symon* emphasised that context, in this case, must include

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[15] Appeal Record Vol 1 at 62-63.

[16] *Doody v Secretary of State for the Home Department and Other Appeals* [1993] 3 All ER 92 (HL), quoted with approval in *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) para 152 and

the severe consequences of loss of employment and livelihood for the respondents and their employees, the complexity of the charges against the respondents and the volume of evidence SPAR intended to lead at the hearing, the constitution of the panel of directors and whether they would be predisposed to bias against the respondents and in favour of SPAR. He submitted that in these circumstances, the letter could not be construed as unreasonable or indicating a lack of bona fides; the respondents were merely striving to achieve a fair hearing as agreed by the parties.

[53] Why then did the appellants subsequently decide that the hearing should proceed without the respondents, especially as they acknowledge that the principles of natural justice require that even a domestic tribunal must afford the person charged the opportunity to deal with the merits of the charges? All that followed the letters of 17 September 2019 were the enquiries by Mr Shoot about the date to which the hearing would be rescheduled. A further relevant question that remains unanswered is why the appellants did not inform the respondents of their view (so lucidly expressed in their arguments before this court) that, as this was a domestic hearing in a private contractual context, the directors of the Guild were entitled to lay down the relevant procedures and that they considered the proposals of Mr Shoot as excessive and unnecessary.

[54] In any event, the Guild did in fact acknowledge the validity of the concerns raised by Mr Shoot. As set out by the respondents in their heads of argument, the hearing in fact took place within the parameters and with the processes proposed by Mr Shoot, except for the obvious and, in my view, unwarranted and unfair exclusion of the respondents. This clearly demonstrates that SPAR did not consider Mr Shoot's suggestions to be contrary to their agreement or unnecessary for a fair hearing. There would therefore have been little reason to conclude that his letter constituted repudiation, whether of the opportunity to make representations at the hearing or of the respondents' obligations under membership agreements.

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC) para 45.

[55] The respondents have vigorously resisted any imputation of deliberate delay to or derailing of the hearing, or repudiation as attributed to them by the appellants. They contend that the appellants' claim that because there was a postponement in the original hearing date, the agreement to have a hearing fell away or was repudiated, could never be correct because as the 31 July 2019 letter reiterated, regardless of previous postponements, SPAR was committed to the hearing proceeding in October 2019. They further deny that their letter of 17 September 2019 was timed and engineered to force another postponement, pointing out that it was a response to the contents of the letter dated 6 September 2019 from the Guild, and contained a confirmation that the hearing would proceed as scheduled, which again could not be construed as repudiation.

[56] In reaching the conclusion that there was no repudiation by the respondents of the agreement to participate in a hearing prior to any decision about termination, and that the agreement to have a hearing remained intact despite the letter of 17 September 2019, Barnard AJ applied the legal test for repudiation set out in *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd*: [17]

'[18] The conduct from which the inference of impending non- or malperformance is to be drawn must be clearcut and unequivocal, ie not equally consistent with any other feasible hypothesis. Repudiation, it has often been stated, is "a serious matter", requiring anxious consideration and - because parties must be assumed to be predisposed to respect rather than to disregard their contractual commitments - not lightly to be presumed.' (References omitted.)

He also noted that SPAR never communicated its acceptance of the alleged repudiation but instead led the respondents to believe the hearing would go ahead and then secretly convened a hearing in their absence in breach of the agreement. Barnard AJ therefore, correctly in my view, rejected the notion that this conduct could constitute acceptance of the repudiation.

[57] However, the opening paragraph of the *Datacolor* judgment is also relevant, given both the reliance by the appellants on the repudiation by the respondents before the court a quo and their subsequent reliance on the termination notices to constitute

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[17] *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA).

notices of cancellation of the proposed hearing and SPAR's acceptance of the repudiation. At the commencement of the judgment, Nienaber JA stated:

'[1] Repudiation has sometimes been said to consist of two parts: the act of repudiation by the guilty party, evincing a deliberate and unequivocal intention no longer to be bound by the agreement, and the act of his adversary, "accepting" and thus completing the breach. ... Both the analogy and the language of offer and acceptance, a legacy from England, have on occasion been deprecated by this Court. The better view is that repudiation is a breach in itself; that the "intention" does not in truth have to be either deliberate or subjective but is simply descriptive of conduct heralding non- or malperformance on the part of the repudiator; and that the so-called "acceptance", although a convenient catchword, does not "complete" the breach but is simply the exercise by the aggrieved party of his right to terminate the agreement. This case, and the outcome of the appeal, is concerned with both "parts" of repudiation: whether the appellant improperly repudiated the agreement between the parties ... and if so whether the respondent, in response, properly cancelled it...' (References omitted.)

The learned judge later restated 'the established law that the manifestation of the election to cancel may consist of conduct and need not correctly identify its cause.'[18]

[58] The appellants submit that the conduct of the respondents, underscored by Mr Shoot's letter of 17 September 2019, did in fact manifest their intention not to participate in the hearing. They argue that the respondents asserted 'an alleged right to an entirely different hearing to that which was being afforded or which could legitimately be expected.' In the context of the respondents' entire approach to the matter, the appellants understood this as a repudiation of the right to be heard, which was accepted when the directors decided not to adhere to the respondents' demands and to proceed with the hearing in their absence. The appellants point out further: '***DataColor*** is also authority for the proposition that what is required is not "acceptance" as would be necessary for the formation of a contract; but simply that the aggrieved party within a reasonable time exercises the election (which vests in it) to cancel the agreement. It is also not required that the communication of the cancellation be done formally by the aggrieved party – it suffices that the election of a cancellation is brought to the attention of the repudiator by any means.'[19]

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[18] Ibid para 33.
[19] Appellants heads of argument para 155.

They contend that the termination notices of 17 October 2019 constituted notices of cancellation of the proposed hearing.

[59] I am however not persuaded that, objectively considered, the conduct of the respondents in requesting that the hearing be convened with procedural fairness manifested their unequivocal intention or election to cancel the agreement to attend a hearing convened by the Guild, or heralded their non-performance. In fact, it would have made little sense for them to do so, given the constraints of their membership of the Guild and the severe adverse impact their refusal to attend the hearing would have on their businesses. More significantly, in the absence of a competent act of cancellation by the respondents, the 'aggrieved' appellants could not have acquired the legal right to terminate the agreement.

[60] However, even if the appellants subjectively believed or perceived that the respondents were cancelling their participation in the hearing, their belated insistence that the exercise of their right to cancel the agreement and the cancellation itself was communicated to the respondents in the termination notices is untenable. The *Datacolor* judgment does not suggest that the communication of cancellation, in whatever form, should be at the discretion of the aggrieved party. In order to complete the repudiation, the cancellation must be communicated to the repudiator. In this instance, the notices of termination of membership were delivered to the respondents *after* the Guild held the hearing on 15 October 2019 and decided to terminate their membership, having deliberated on the evidence and representations made at the hearing without the participation or knowledge of the respondents. Consequently, the termination notices could not constitute either the exercise of the appellants' right to terminate the agreement to hold the hearing, or the proper communication of their decision to cancel the agreement in completion of the repudiation.

[61] Even more importantly, the very reliance on this repudiation flies in the face of the appellants' protestations and denials of an agreement to convene a hearing. It would appear that a realisation of this anomaly has caused the appellants' belated attempt to broaden the alleged repudiation to encompass the membership agreements. I however remain unpersuaded, like the court a quo, that the appellants proved repudiation or that their termination notices of 17 October 2019 are

unassailable. In the premises, I am unable to fault the conclusion by the court a quo that the termination notices of 17 October 2019 were neither lawful nor valid and had to be set aside.

The second termination notice – 19 March 2020

[62] The appellants persist that should this Court find that the conduct of the respondents prior to the termination decision of October 2019 did not constitute a repudiation of any agreement, their conduct during these proceedings was a clear repudiation of the membership agreements, which in itself justified the Guild issuing the second termination notices on 19 March 2020.

[63] In the second set of notices, the Guild recorded its stance that the respondents' memberships of the Guild had been validly terminated, but if for any reason it were to be found that such membership had not been validly terminated, then such letter served as a notice by the directors of the Guild in terms of clause 4.10(2)(a)(ii) of the MOI, terminating the respondents' membership. Such notice therefore would result in the recipients ipso facto ceasing to be members of the Guild upon the expiry of one month after receipt by them of the notice. The appellants submit that the second notice was independently valid in that the Guild was not required to have any reason to give notice nor to afford any opportunity for a hearing.

[64] Firstly, if the second notices were independently valid and did not require reasons, then the submissions on the repudiation of the membership agreements by the conduct of the respondents in these proceedings, which apply to the 2020 notices, are superfluous. Secondly, when Mr Venter conveyed SPAR's undertaking to hold a hearing in his letter dated 10 April 2019, he recorded that 'The termination is in terms of the clauses 4.10(1), 4.10(2), 4.10(3) and 4.10(4) of the MOI.' As reasoned by Barnard AJ, the agreement to hold a hearing, which encompassed termination in terms of the clause 4.10(2)(a)(ii), effectively precluded the basis relied on by the appellants for the validity of the second notice.

[65] I nevertheless consider it necessary to deal briefly with the submissions of Mr *Subel* on the interpretation of clause 4.10(2)(a)(ii). It is common cause that clause 4.10

of the MOI creates an obligation to allow retailer members an opportunity to make representations, which is independent and separate from the agreement to convene a hearing. The relevant provisions of clause 4.10 of the MOI provide:

'**4.10 Termination of Retailer Membership**

1. The directors or a regional committee shall be entitled to terminate the membership of a retailer member by written notice to such retailer member provided that such member shall have been given a reasonable opportunity to make representations to such directors or regional committee, if:

...

(b) he commits any breach of the provisions of this Memorandum of Incorporation or SPAR membership or any rules, regulations or obligations imposed on him in terms of this Memorandum of Incorporation or if such member in the reasonable estimation of the directors has accepted stolen goods, whether knowingly or otherwise; or

...

2. A retailer member shall ipso facto cease to be a member:

(a) upon the expiry of either-

...

(ii) one month after the date upon which the directors have given to him written notice of their intention to terminate his membership; or

...'

[66] To my mind, a plain reading of clause 4.10 does not require or suggest or permit an excision of clause 4.10(2)(a)(ii) from a reading of the entire clause in sequence. Clause 4.10(2)(a)(ii) is consistent and coherent when read after clause 4.10(1), as it provides that the membership of the relevant retailer member will ipso facto cease upon expiration of the period of one month after the delivery of the notice of termination issued by the Guild, pursuant to the decision it has taken to terminate membership in accordance with 4.10(1). The 'ipso facto' referred to, that is the 'act' or 'fact' relied on, at which the termination becomes effective, is the expiration of the notice period, and not the act of issuing the notice. I am consequently not persuaded that the term 'ipso

facto' suggests an independent right to terminate. Although 'fairness is not a freestanding requirement for the exercise of a contractual right',[20] the notice period also incorporates a degree of fairness as the affected member will have to take measures to alleviate the consequences of the termination, which accords with the purported intention of the Guild to apply the rules of natural justice and follow fair procedure in the resolution of disputes.

[67] The conduct of the directors of the Guild in holding a hearing at which they received representations, albeit not from the respondents, and then delivering the notices of termination to the retailer members – as set out in clause 4.10(1) and 4.10(2)(a)(ii), indicates that this was indeed their understanding of the process of termination as required by the MOI. Therefore, even without the detailed analysis offered by the respondents, I am inclined to agree with their interpretation rather than the contrived interpretation favoured by the appellants, as did Barnard AJ. The second notices to terminate, which the appellants contend required no reason, also appears to be an afterthought, when considered in the light of the litany of complaints about the serious transgressions by the respondents, in particular Chris, for over a year before SPAR resolved to convene a hearing. If the termination without affording the respondents an opportunity to make representations under clause 4.10(2)(a)(ii) of the MOI was competent, valid and available to the appellants, they could have simply have resorted to it earlier. Instead, the appellants took what they thought was the appropriate recourse in the form of the 'compromise' and attempted to exclude Chris in the manner set out in the letter from Mr Venter dated 3 December 2018. Then they subsequently retracted this proposal and resolved to have a hearing. Their conduct is therefore at odds with their assertion of the independent validity of the second notices of termination issued in March 2020. It is also relevant, as emphasised by Mr *Symon*, that there has been no response to the request for the resolution pursuant to which the 2020 termination notices were issued. I am accordingly not persuaded that Barnard AJ was wrong in concluding that the second termination notices were also invalid and unlawful, and should like the first notices, be set aside.

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[20] *Bredenkamp and Others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) para 53.

[68] When Mr *Trengrove SC* presented his argument on the variation of the credit facilities and the applicability of the maxim *arbitrio boni viri* raised by the respondents, he submitted that the principles he expounded, which established the appellants' right to unilaterally vary the credit facilities afforded to the respondents, were also applicable to the appellants 'contractual right under the MOI to terminate the membership of the respondents. However, pursuant to the conclusions I have reached on the interpretation of clauses 4.10(1) and 4.10(2)(a)(ii), it is not necessary to consider Mr *Trengrove's* argument *vis a vis* the termination notices.

SPAR's unilateral variation of the credit facilities and limitation of drop-shipment supplies

[69] Two forms of credit were made available by SPAR to the respondents as retailer members of the Guild. Clause 5 of the credit agreement entered into by the parties provides:

'Credit facilities are granted by the seller to the applicant, at the seller's discretion, and the seller may, without notice, at any time vary or terminate such facilities.'

Both the reduction in the period for repayment and the limitation on maximum value of drop-shipment goods purchased from suppliers were variations of the respondents' credit terms effected by the appellants under clause 5 after the termination notices were issued. Barnard AJ recognised that clause 5 expressly permits SPAR to amend the credit terms, but found that SPAR's conduct in doing so was unreasonable.

[70] The appellants contended that even if their appeal against the termination decision fails, the orders of Barnard AJ on the credit and drop-shipment terms may nevertheless be set aside on appeal, because SPAR's decision to amend the terms of credit is independent of the validity of the termination decision. They argued that:

(a) clause 5 of the credit agreement provides that the credit and drop shipment terms are stipulated "*at the seller's discretion, and the seller may, without notice, at any time vary or terminate such facilities.*" Therefore, in amending the credit terms afforded to the respondents, SPAR exercised its contractual discretion;

(b) Barnard AJ erred in finding that SPAR's decisions to reduce the credit terms from 19 days to 7 days and the drop-shipment terms from 30 days to 7 days

were not taken *arbitrio boni viri* – i.e. acting reasonably and exercising reasonable judgment[21] because the *arbitrio* standard is not applicable in this context; and

(c) however, even if the appeal court holds that that Barnard AJ correctly held the *arbitrio* standard to be applicable, the objective, uncontested facts do not support the finding that SPAR acted outside the tenet of *arbitrio boni viri*. SPAR came to a legitimate and reasonable decision, taken in a private contractual setting, and after a substantial period of engagement with the respondents, that it could not continue to do business with the respondents on the existing terms, and that the relationship of trust between the two entities had broken down irretrievably. SPAR's decision to change the credit terms was based on the financial statements provided by the respondents at court coupled with the fact that SPAR had issued notices of termination, which meant that the credit terms had to be restricted to the period of the termination. In addition, there were labour compliance orders against the respondents in excess of R13 million in relation to eight stores for a period of five months. There was a further legitimate concern that compliance orders would also be issued against the remaining stores and for longer periods. This affected the creditworthiness of the respondents and aggravated the risk to SPAR if it continued to do business with them. SPAR's decisions to reduce the credit are also consistent with the Guild's obligation to act in the best interests of all its members, and the SPAR Group's accountability to its shareholders.

[71] Mr *Trengrove*, who argued this issue on behalf of the appellants, submitted that the wording of clause 5 makes it clear that the credit terms were offered entirely at the discretion of the appellants; the clause deals with future transactions and did not convey any undertaking to provide credit for the future; it excluded the *audi alteram partem* rule and permitted the termination of the credit facilities at any time. He submitted that consequently, the respondents' reliance on the *arbitrio* standard to sustain their objection to the appellants' decision to amend the credit facilities and their

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[21] *Juglal NO and Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division* 2004 (5) SA 248 (SCA) para 26.

contention that that any contractual discretion should be exercised in good faith and reasonably, was incorrect.

[72] Mr *Trengrove* referred to *NBS Boland Bank Ltd v One Berg River Drive CC and Others; Deeb and Another v Absa Bank Ltd; Friedman v Standard Bank Of SA Ltd*[22] as authority for his submission that a clause which permitted the appellants to determine the prestation of the counterparty to a contract, was not inimical to the general principles of contract or invalid. He emphasised that the *arbitrio* standard was only capable of a very restricted application as it did not apply to all exercise of contractual discretion; specifically, it did not apply to the decision by the appellants taken in accordance with their clear and unfettered discretion under clause 5. He also submitted that the authorities were clear that for termination in matters of contract, there was no need to go beyond the giving of notice nor was good reason required for the exercise of contractual discretion.[23]

[73] In conclusion Mr *Trengrove* submitted that if this court were to find that the *arbitrio* standard was required for the amendments imposed by the appellants, then the hostile standoff between the parties, the risk of having no or inadequate security for the credit advanced to the respondents because of the intended termination, and the liquidity shortages evinced in the financial statements furnished by the respondents provide the necessary context. In the aforesaid circumstances, although SPAR was entitled to cancel the credit facilities, it acted reasonably in only limiting the facilities.

[74] In his response Mr *Symon* persisted that the finding of the court a quo that clause 5 of the credit agreement did allow SPAR to amend the credit terms, but not without good reason, was in line with case law which provides that where a party has a unilateral discretion under a contract, it should be exercised *arbitrio boni viri.*[24] Therefore the decision to amend taken for an ulterior or improper purpose or without

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[22] *NBS Boland Bank Ltd v One Berg River Drive CC and Others; Deeb and Another v Absa Bank Ltd; Friedman v Standard Bank of SA Ltd* 1999 (4) SA 928 (SCA).
[23] *South African Maritime Safety Authority v McKenzie* 2010 (3) SA 601 (SCA) paras 55-58; *Old Mutual Limited and Others v Moyo and Another* [2020] 2 All SA 261 (GJ).
[24] *Juglal* para 26.

good reason or such a contractual provision may fail for being contrary to public policy, as found by the Supreme Court of Appeal in *NBS Boland Bank*.

[75] Responding to Mr *Trengrove's* submissions that the respondents' reliance on the *arbitrio* standard was misplaced, Mr *Symon* pointed out, correctly in my view, that clause 5 should not be construed literally or narrowly, but considered within the context of the reciprocal nature of the contractual relationship between the parties. As retailer members of a trading group, the respondents are bound to purchase their stock from SPAR and are therefore obliged to accept SPAR's credit terms in order to operate their businesses. He argued, with merit, that the advancing of goods on credit is not a future contract that is subject to a decision by SPAR, on each occasion, whether to enter into such agreement or not. It is an ongoing relationship and part of a larger whole, which is acknowledged in the appellants' statement that the credit agreement is part of an 'ongoing commercial relationship' between the parties. I am also in agreement with his proposition that SPAR's discretion must be exercised reasonably and honestly because of the reciprocal nature of the trading model, as I am unable to find cogent authority for the submission that SPAR's discretion under clause 5 of the credit agreement should be exercised unfettered in the following cases.

[76] In *NBS Boland Bank,* the mortgagors, who were aggrieved by the increase in the interest rate determined unilaterally by the mortgagee, attacked only the validity of the relevant clause. Although Van Heerden DCJ concluded that 'a stipulation conferring upon a contractual party the right to determine a prestation is unobjectionable'[25] he also emphasised that:

'[25] All this does not mean that an exercise of such a contractual discretion is necessarily unassailable. It may be voidable at the instance of the other party. It is, I think, a rule of our common law that *unless a contractual discretionary power was clearly intended to be completely unfettered*, an exercise of such a discretion must be made *arbitrio bono viri*...

...

[29] ... At the risk of repetition, I should again say that the clause is perfectly valid, but that an exercise of the power conferred upon the mortgagor may be objectionable.' (My emphasis.)

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[25] *NBS Boland Bank* para 24.

[77] In the light of the appellants' argument that the wording of clause 5 of the credit agreement indicates that their power to amend the terms of credit was unfettered, it is relevant to note that the learned judge held further that:

'[30] ...It is conceivable, albeit unlikely, that a stipulation may be so worded that an absolute discretion to fix a prestation is conferred on one of the parties. Here again it is unnecessary to express a view as to whether such a stipulation will be invalid as being in conflict with public policy, or whether the fixing of the prestation may only be assailed when it is done in bad faith.

...

[32] I revert to a stipulation which confers on one of the parties the power to fix the purchase price or rental, as the case may be. In the light of what has already been said there does not appear to be any logical rationale for drawing a distinction, in the context under consideration, between such a stipulation and other similar stipulations conferring on a party to a contract a discretion to determine a prestation. The exercise of the power to determine the price or rental would after all be open to attack on the same grounds as in the case of utilisation of other types of discretionary stipulations...'

[78] In *Erasmus and Others v Senwes Ltd and Others*,[26] Du Plessis J similarly held that Senwes' power to amend its own obligation to subsidise medical scheme premiums was unobjectionable. Unlike the argument by the appellants in this appeal, it was not argued that Senwes' power to amend was clearly intended to be unfettered. The learned judge therefore considered whether that power to amend was subject to an objective standard, and having noted the rule of common law stated by the Supreme Court of Appeal in *NBS Boland Bank* as to when a contractual discretionary power must be exercised *arbitrio boni viri*, he proceeded to determine whether, in law, Senwes' power to amend was fettered. He held that:

'There is no reason to limit the rule (that discretionary contractual powers must be exercised *arbitrio boni viri*) to instances where the power vests in the promissee. In fact, if regard is had thereto that all contracts are subject to the principle of good faith, and that parties should as far as possible be held to their contracts, there is good reason to apply the rule also to cases where the power is given to the promissor. Moreover, the SCA has applied the rule to the case of a mortgagee who was given very wide powers in terms of a notarial bond to take over and run the business of the mortgagor and thus to determine the manner in which

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[26] *Erasmus and Others v Senwes Ltd and Others* 2006 (3) SA 529 (T).

it was to exercise its own contractual rights (*Juglal NO and Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division* 2004 (5) SA 248 (SCA) at para [26]). I hold that Senwes is bound to exercise its right to amend the terms of the contract *arbitrio bono viri*...
In the *Juglal* case (at para [26]) the SCA also held that an obligation to act *arbitrio boni viri* obliges the person to "act reasonably and to exercise a reasonable discretion". Applied to the present case, Senwes must exercise its power to amend the contract reasonably.'[27] (Footnotes omitted.)

[79] In the premises, I am unable to fault Barnard AJ's finding that the *arbitrio* standard was applicable to SPAR's amendment to the terms of credit enjoyed by the respondents. Barnard AJ then proceeded to determine whether the decision to amend was taken by SPAR reasonably, honestly and in good faith in the context of the ex parte perfection applications. He found that the timing of the reduction in the credit available to the respondents indicated that having failed in the perfection applications and being unable to take control of the respondents' business operations, the appellants were attempting to achieve the same end as the termination notices through alternative means.

[80] Mr *Trengrove* pointed out correctly that in paragraphs 9 and 10 of his drop-shipment judgment, Barnard AJ had erred by trying to create or derive a right to buy merchandise from what was actually a definition of 'seller' under the Standard Terms of Sale. Nevertheless, his error does not disturb the validity of his finding that SPAR's exercise of its right to vary or limit the drop-shipment supplies in terms of clause 5 of the credit agreement, also had to be subject to the *arbitrio* standard. In respect of the context in which the limitation was imposed, Barnard AJ found that the limitation of supplies which the respondents required in their stores was part of SPAR's plan to sabotage the respondents' business and to ensure termination of their membership. He therefore concluded from the context in which the variation to the terms of credit and the limitation to the drop-shipment supplies were effected, that SPAR did not do so reasonably or in good faith, and the variations were consequently invalid.

[81] Mr *Symon* emphasised that the context and timing of the decision to vary the terms of credit is crucial in evaluating the lawfulness of such a decision, because it

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[27] Ibid at 538B-F.

informs whether or not the decision was made bona fide and was reasonable. He contended that the underhanded conduct of the appellants in attempting to perfect the notarial bonds ex parte without full disclosure and the aggressive and unreasonable manner in which control of some of the respondents' stores was assumed, which followed upon the Guild's unlawful decision to terminate their membership, were part of SPAR's strategy to take over the respondents' businesses. When those attempts failed, the appellants resorted to reducing the credit afforded the respondents and the drop-shipment supplies.

[82] Mr *Symon* countered the appellant's allegation of serious financial risk to SPAR by pointing out that the security was not at risk because the notarial bonds remained in place, though not perfected. He added that the reliance on the Group financial statements to allege that the respondents were in a precarious financial position which rendered future credit risky was baseless and misleading, as the respondents had set out in detail in their reply, and they had always met their financial obligations to SPAR. He pointed out that SPAR's reliance on risk is undermined further by the fact that while it limited the drop-shipment purchases, SPAR did not limit its warehouse goods which it supplied to retailer members.

[83] I find Mr *Symon's* argument compelling, especially because SPAR's fears of the effect of their termination on the respondents' credit worthiness were no longer well founded once it was determined that the termination, which triggered the perfection of the notarial bonds, was invalid. In the premises, there is no reason to interfere with the orders issued by Barnard AJ in respect of the variation of the credit facilities and the drop-shipment application.

[84] In the light of my findings, it is not necessary to consider the further issues raised by the parties, including those arising from competition law.

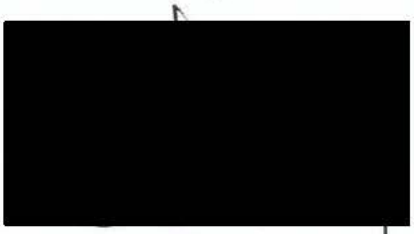
Costs

[85] Costs must follow the result. The respondents have requested costs of three counsel. Both parties employed several senior and junior counsel. Given the nature and significance of the matter to the parties, it was reasonable to do so.

Order

[86] The following order shall issue:

The appeal against the orders of Barnard AJ issued on 17 July 2020 in Case Number 8280/19P and Case Number 9215/19P is dismissed with costs, such costs to include costs of all senior and junior counsel, where so employed.



Moodley J

Radebe J

Bezuidenhout J

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Date of hearing : 15 October 2021

Date of delivery : 7 July 2022

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