



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No: 5280/2019

In the matter between:

GERTRUIDA MAGDALENA OOSTHUIZEN

t/a WILGER MOTORS

Applicant

and

PUMA ENERGY SOUTH AFRICA (PTY) LTD

1st Respondent

THE ARBITRATION FOUNDATION OF
SOUTHERN AFRICA

2nd Respondent

ADVOCATE AMM MOTIMELE SC

3rd Respondent

CORAM: MURRAY, AJ

HEARD ON: 27 NOVEMBER 2019

JUDGMENT BY: MURRAY, AJ

DELIVERED ON: 28 NOVEMBER 2019

- [1] This is an urgent application for an interdict to stay arbitration proceedings instituted in Pretoria at the instance of the First Respondent pending the determination of the validity of the Arbitration Agreement to be brought in terms of Part B of this application. The Applicant prays for the First and Third Respondent to be interdicted from proceeding with the arbitration until the Part B application has been finalised.
- [2] The Applicant and the First Respondent entered into a 10-year Dealer Agreement on 10 November 2017. In terms thereof the Applicant would buy Puma fuel and products from First Respondent on a 'cash before or on delivery' basis which Wilger Motors in Brandfort, Free State Province, would on-sell at a higher price.
- [3] The First Respondent would deliver the fuel to the said filling station in Brandfort and install all the necessary equipment, including electronic fuel pumps and a new computer system coupled to pumps and the fuel tanks. All such equipment was to remain the property of the First Respondent who was to be responsible for the upkeep and maintenance of all equipment installed by it.
- [4] The Dealer Agreement contains two arbitration clauses. Clause 25 gives the First Respondent the right to elect to handle disputes by way of litigation or by way of referral to arbitration. Clause 26, the general arbitration clause, determines that a dispute *shall* on

written demand by any party to the dispute be submitted to arbitration *in Pretoria* in accordance with the Rules of the Arbitration Foundation (“AFSA”) of South Africa by arbitrator/s appointed by AFSA *and agreed to by the parties*.

- [5] Although Clause 26.1 determines that even the validity of the arbitration agreement itself may be decided by the arbitrator, and Clause 11.2.2 empowers an arbitrator to rule on a dispute regarding the validity or scope of the arbitration agreement, significantly Clause 26.5 determines that

“Nothing herein contained shall be deemed to prevent or prohibit either party from applying to the appropriate court for urgent relief.”

Clause 26.5 expresses the legal position regarding arbitration proceedings in South Africa, namely that no arbitration agreement supersedes a party’s right to refer a particular dispute to a court of law for adjudication.

- [6] The right of either party to, at any time during the arbitration proceedings, apply for a stay of the proceedings in order to have a dispute adjudicated by a court, is based on section 3(2) of the Arbitration Act 42 of 1965 which determines that

“ 3(2) The court may at any time on the application of any party to an arbitration agreement on good cause shown:

(a) ...

(b) order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration

(c) *order that the arbitration agreement shall cease to have effect with reference to any dispute referred to it”.*

- [7] There can therefore be no question as to the Applicant’s right to apply for a stay of the Arbitration proceedings in order to refer the dispute about the validity of the arbitration agreement to court by way of an urgent application.
- [8] The Applicant avers that, instead of making a profit, due to the faulty calibration of the electronics of the fuel pumps, Wilger Motors from the very beginning failed to do so. After several investigations by the First Respondent in which it found ‘nothing wrong’, an independent investigation finally established that the fuel pumps indicated a wrong total of fuel dispensed, for instance 40 litres whereas actually 50 litres had been dispensed, and the customer accordingly paid for only 40 litres. Despite several written reports to First Respondent, the problem persisted. In May 2019 the Applicant put the First Respondent on terms to repair the equipment.
- [9] When this did not happen, the Applicant on 26 June 2019 cancelled the Dealer Agreement by formal notice, relying on section 14(2)(b) of the *Consumer Protection Act of 2008* (“the CPA”) which empowers a consumer bound by a fixed term consumer agreement to cancel such agreement at any time by giving the supplier 20 business days’ notice in writing.

- [10] The First Respondent notified the Applicant that it regarded the cancellation as a repudiation of the agreement, which repudiation it accepted and that it elected to terminate the agreement and to proceed with arbitration.
- [11] On 30 August 2019 the First Respondent submitted a request for arbitration with a statement of claim for the R20,6 million which it would allegedly have earned if the contract had run for 10 years as per the agreement. The Applicant was provided with the said statement, and informed that AFSA accepted the duty to administer the arbitration and that a non-refundable arbitration fee of R49 822 plus VAT of R10 000, per party, was to be paid by 23 September 2019.
- [12] Article 6.1.4 of the AFSA Rules gave the Applicant the option to state whether she admitted or disputed the arbitration agreement. On 8 October 2019 the Applicant informed the First and Second Respondents that she did not find any of the three proposed arbitrators acceptable, that she disputed the validity of the arbitration agreement, that she would apply for a declaratory order or interdict in that regard, and that she did not accept the applicability or jurisdiction of the AFSA rules. She informed the First Respondent that she did not want AFSA nominated arbitrators since they could be prohibitively expensive and asked for a mutually agreed arbitrator to be appointed.
- [13] AFSA gave the Applicant an extension until 25 October 2019 to deliver a statement of defense and to pay the first AFSA fee in terms of Article 6 of the Rules. When she did not do so, First

Respondent paid her fee in order to get an arbitrator appointed by AFSA and to set the arbitration proceedings in motion despite the Applicant's objections.

[14] On 4 November 2019 AFSA appointed the Third Respondent as the arbitrator. The Applicant was informed of his fees of R45 000 per day and R4 500 and the indication that the arbitration was expected to run for five days. The Third Respondent set up a pre-trial meeting for 7 November 2019. On 8 November 2019 the Applicant by e-mail requested a stay of the arbitration proceedings. On the same day the First Respondent replied that the pre-trial was to proceed as scheduled, and on 11 November 2019 the pre-trial did indeed take place. On 13 November 2019 the Applicant then served this urgent application for an interim interdict to stay the arbitration proceedings until the application for the determination of the validity of the arbitration agreement by the court has been finalised.

[15] The First Respondent opposed the application on three grounds: it disputes (1) the jurisdiction of this Court to entertain the application; (2) the Applicant's right to rely on the protection of the Consumer Protection Act; and (3) the urgency.

Jurisdiction:

[16] Regarding the alleged lack of jurisdiction, Mr Bava argued that this Court cannot have jurisdiction because the Dealer Agreement was concluded in Johannesburg, the Respondents are all in Gauteng, and the Applicant agreed to the '*non-exclusive jurisdiction*' of the

Johannesburg High Court. According to him the latter agreement implied that either the Johannesburg or the Pretoria High Court would have jurisdiction, not the Bloemfontein High Court. But, as Mr Benade correctly pointed out, parties to a contract cannot exclude jurisdiction by agreement, as Leach JA held in **Foize Africa (Pty) Ltd v Foize Beheer BV and Others**¹.

[17] S 21(1) of the Superior Courts Act determines that a Division has jurisdiction in relation to all causes arising within its area of jurisdiction. The dispute between the parties arose in Brandfort, Free State Province. Mr Pava argued that the cause of action arose from cancellation of the contract that was concluded in Johannesburg and therefore the 'cause' referred to in s 21(1) arose in Gauteng and the Bloemfontein Court therefore lacked jurisdiction.

[18] But, as Mr Benade pointed out, with reference to , **Cordiant Trading v Daimler Chrysler**², a Court which has jurisdiction over the area within which the cause of action arose, is competent to decide a matter on that basis alone. It is indisputable that the cause of action in this matter is a contractual one and in **Roberts Construction v Willcox**³ and **Hugo v Wessels**⁴ it was held that a contractual cause arises where the contract is to be performed, wholly or in part. The First Respondent had to deliver the fuel and other products and to maintain the equipment in Brandfort and the

¹ 2013 (3) SA 91 (SCA) at 99F

² 2005 (6) SA 205 (SCA) at 211E

³ 1962 (4) SA 326 AD at 337 A – C where it was held that "... it appears, therefore, that the necessary jurisdictional ground in this case is present. The Appellant's obligation had to be fulfilled on the Free State side as well..."

⁴ 1987 (3) SA 837 AD at 850B where it was held that "the common law acknowledges as a valid jurisdictional ground the circumstance that a contract ...has to be executed ... within the court's area of jurisdiction."

Dealer Agreement therefore had to be performed to a major extent in Brandfort.

- [19] In my view, therefore, the First Respondent's contention that this Court lacks jurisdiction to adjudicate this application cannot succeed.

Urgency:

- [20] The First Respondent contended that the matter lacks urgency since the dispute about the fuel arose in 2018 already and because the Applicant in August 2019 already indicated that she disputed the validity of the contract and on 9 October 2019 indicated that she was going to bring this application.

- [21] I find the submissions on behalf of the Applicant regarding urgency persuasive, however. Mr Benade averred that the urgency only started at the earliest on 8 November 2019 when the First Respondent refused the Applicant's request to agree to stay the arbitration proceedings pending the finalisation of the application regarding the validity of the arbitration agreement which was to be delivered before 18 November 2019; or on 11 November 2019 when the Third Respondent insisted and ruled on the continuation of the arbitration proceedings despite the Applicant's objections and request for a stay till after the adjudication of the declaratory order.

- [22] As has already been pointed out, the Applicant had the right to approach court regarding the dispute. At that stage AFSA Rule

8.2 would then have contributed to the urgency by determining that:

“Any application to a court of law on any matter so contested or other matters in dispute ... shall not affect the continuation of the arbitration proceedings save and to the extent that a court otherwise orders.”

[23] The arbitration therefore was set to start (or as Mr Bava pointed out had already started with the pre-trial) and as in **Transnet v Rubenstein**⁵ the application was then urgent because the commencement of the arbitration was imminent. And the Applicant cannot be criticised for first attempting to amicably resolve the issues before instituting litigation.

[24] And as Mr Benade argued, that was the point when the last of the four requirements for an interim interdict was present and an urgent application could be launched, which was done within two days, on 13 November 2019. It was only when it was clear that arbitration was definitely to proceed, that the Applicant could submit that it had no other remedy and had a reasonable apprehension of irreparable harm if the interim order were to be refused.

[25] I therefore accept that the matter was indeed urgent.

Consumer Protection Act:

[26] The First Respondent asserts that the Applicant cannot depend on the protection of the Consumer Protection Act essentially because

⁵ 2006 (1) SA 591 (SCA) at 603 B - C

the Dealer Agreement is not a Consumer Agreement and the Applicant is not a consumer as defined in the Act. This, Mr Bava argued, was because the Applicant is a retailer in terms of the Petroleum Products Act of 1977 and the Dealer Agreement is a long term commercial contract. On that basis the First Respondent alleged that the Applicant has no clear right to interim relief.

[27] An interlocutory interdict depends on whether the Court is satisfied that the Applicant has a *prima facie* right, established on a balance of probabilities, which is being infringed or is under threat of infringement.

[28] There is nothing in the CPA that excludes the Applicant from the protection of the CPA against agreements that are unfair, unjust, unreasonable. A consumer is defined as a person to whom *any* goods or services are marketed, and the petroleum industry and therefore petroleum products have not been exempted by s 5(3) of the CPA.

[29] The submission that the Applicant is not a consumer because she is a retailer does not carry any water either. A franchisee, which is always a retailer, for instance, is specifically included in the definition of a consumer.

[30] I am therefore satisfied that the Applicant is a consumer and as such has a right to the protection of the CPA which limits the length of fixed term contracts to 24 months, gives a right to cancel, and which in s 48 determines that a supplier must not supply or

enter into an agreement to supply any goods or services on terms that are unfair, unreasonable or unjust. It also in s 48(1)(c) determines that a supplier, such as First Respondent, must not require a customer to waive any rights or to waive any liability of the supplier on terms which are unfair, unreasonable or unjust.

[31] The Act further defines and provides for clauses in agreements to be presumed unfair if they have the purpose or effect of excluding or hindering the consumer's right to take legal action or exercise any legal remedy. Regulation 44 (3)(x) includes therein clauses that require the consumer to take disputes exclusively to arbitration.⁶

[32] And s 52 determines that if a person alleges in any proceedings before a court that a supplier contravened s 48, the court may make an order as contemplated in s 52(3), namely to make a declaration that the agreement is unconscionable, unjust, unreasonable or unfair. The court may also require the supplier to cease such practice. An order such as prayed for in the Notice of Motion would therefore be competent in appropriate circumstances.

[33] It appears that the stay until adjudication of Part B of the application would not impose undue hardship on the First Respondent since it would not cause an unduly lengthy delay. The Applicant appears to have legitimate concerns which she has every right to have decided by a court of law before such issues as

⁶ Naude & Eiselen: Commentary on the Consumer Protection Act, p. reg. 44-1, 44-2; p. reg. 44-53 to reg. 44 – 56.

claims and counterclaims are to be decided. In my view the prejudice she would suffer if the interim relief is not granted far outweighs the inconvenience of a delay to the First Respondent.

[34] It is clear, furthermore, that if the Applicant wants a stay to pursue the adjudication of the validity of the Dealer Agreement and the Arbitration Agreement contained therein, she indeed has no other satisfactory remedy.

[35] In **Savage v Sisters of the Holy Cross**⁷ the court pointed out that an application for an interim interdict in essence is to be decided on the Applicant's version. This was confirmed in **Arendse v Van der Merwe**⁸ in which the court held that

“... the determination of the question whether a prima facie case has been made out is usually made purely on a consideration of the evidence contained in the founding affidavit without regard to any evidence adduced in rebuttal ...”

[36] It was argued on behalf of the First Respondent that it is imperative for this Court to uphold the sanctity of the arbitration clause so as not to open the floodgate for commercial parties to dispute the validity of arbitration agreements. But, of course, it is trite law that each case must be decided on its own circumstances. And on the facts of this case I am satisfied that the Applicant in terms of the AFSA Rules and the Arbitration Act has the right to request the adjudication of the validity of the Agreement by a court and to request a stay of the Arbitration proceedings for that purpose, and that an order to that effect would be justified.

⁷ 2015 (6) SA 1 (SAWCC) at 9 D - H

⁸ 2016 (6) SA 490 (GJ) at 494 D - E

[37] There is no reason to deviate from the normal procedure regarding costs.

WHEREFORE I make the following order:

1. The Applicant's non-compliance with the prescribed forms and service is condoned and the application is heard as a matter of urgency in terms of Uniform Rule 6(12).
2. The First, Second and Third Respondents are interdicted from commencing and/or proceeding with the arbitration proceedings under case number **AFSA PTA 01092019** between the Applicant and the First Respondent pending the finalisation of Part B of this application.
3. The First Respondent is ordered to pay the costs of the proceedings under Part A of this application.

H. MURRAY, AJ

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