



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: AR74/2025

COURT A QUO CASE NO: D6912/2022

In the matter between:

GLOBACON (PTY) LTD

APPELLANT

and

NATIONAL LOTTERIES COMMISSION

RESPONDENT

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban (Gwagwa AJ sitting as court of first instance):

1. The appeal is upheld.
2. The order of Gwagwa AJ dated 3 April 2024 is set aside and replaced with the following order:
'The application is dismissed with costs.'
3. The respondent shall pay the costs of the appeal, as taxed or agreed, including costs of counsel, taxable on scale C.

JUDGMENT

Henriques J (Chithi J and Ploos van Amstel AJ concurring)

Introduction

[1] The appeal which serves before us is by way of an order of the Supreme Court of Appeal granting the appellant leave to appeal against the whole of the judgment of the court *a quo*.

[2] The gravamen of the appeal relates to the interpretation of a court order granted on 4 August 2002 by Moodley J. This was an order sought by consent between the appellant and the respondent after negotiations between their respective legal representatives (the consent order).

Grounds of appeal

[3] The appellant appeals the judgment on the basis that the court *a quo* committed several misdirections in interpreting the consent order. It is contended that, in doing so, the court *a quo* focused on the wording of clause 4.1 and failed to interpret the consent order as a whole, particularly failing to have regard to:

- (a) The wording of paragraph 4.1 of the consent order, which referenced clause 15.6.2 of the SLA entered into between the parties, which requires the appointment of an arbitrator within 30 days;
- (b) The wording of paragraph 4.3 of the consent order, including paragraphs 4.3.1 to 4.3.7, which defined the issues in dispute between the parties which were to be determined at arbitration; and
- (c) That on a proper reading of paragraphs 4.1 and 4.3 of the consent order and the consent order as a whole, the appointment of the arbitrator was aimed at

determining the issues set out in clause 4.3 of the consent order.

[4] The second ground of appeal is that the court did not have proper regard to the principles in the cited authorities. It is contended that the court *a quo* failed to have regard to *Eke v Parsons*.¹ In relying on *Close-Up Mining and Others v Boruchowitz*,² the court *a quo* is said to have committed a misdirection by ignoring that the dispute in the *Close-Up Mining* was a dispute in terms of the Arbitration Foundation of South Africa (AFSA) rules, which have a specific formula for the referral of an arbitration, and that it sets out the procedure in terms of the AFSA rules, being a clearly distinguishing feature.³

[5] The third ground of appeal is that the court *a quo* ignored the fact that the parties had already defined the issues for determination by the arbitrator and the dispute was to be resolved in terms of the SLA. The SLA gave the appellant an election to institute an action or to refer a dispute to arbitration, and in the exercise of such election, refer the dispute to arbitration by seeking the appointment of an arbitrator within the 30-day time period afforded to it.

[6] The fourth ground of appeal is that the court *a quo* committed a misdirection in reaching the conclusion that a statement of claim was necessary to formulate the disputes between the parties before the request for the appointment of an arbitrator could be made.

[7] It must follow that the appellant contends that it complied with the consent order, as the disputes had already been identified in paragraphs 4.3.1 to 4.3.7 of the consent order and all it was required to do was to request the appointment of an arbitrator within the 30-day period, which it did. The respondent, on the other hand, maintains that neither was done.

[8] The respondent's principal submission in the appeal was that there was no dispute to be referred to arbitration given the contents of the SLA.

¹ *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC) (*Eke v Parsons*) para 30.

² *Close-Up Mining and Others v Boruchowitz* [2023] ZASCA 43; 2023 (4) SA 38 (SCA) (*Close-Up Mining*).

³ *Ibid* para 25.

Background

[9] In order to determine the issues in the appeal, a recordal of the antecedents is both warranted and necessary.

[10] It is common cause that the appellant was employed by the respondent to renovate the respondent's property situated at 1[...]/1[...] W[...] Road, Morningside, Durban. The parties had concluded the SLA to govern the relationship between them in relation to such renovations. As a consequence of the dispute which arose between the parties, the respondent purported to cancel the agreement. The appellant, in turn, purported to exercise a lien over the property in respect of amounts which it said were due to it for construction work completed.

[11] The parties exchanged correspondence for a period in excess of three months prior to the respondent instituting application proceedings seeking the eviction of the appellant from its property and the return of its property on 7 July 2022. The application was opposed by the appellant, which filed an interim answering affidavit on 22 July 2022, which contained a draft final account and a reference to amounts which it said were due by the respondent to it.

[12] After several appearances, the consent order was taken on 4 August 2022. It is apparent from submissions made from the bar and also the contents of the replying affidavit that the parties settled such application on the basis that the respondent would provide security in the form of a guarantee for the monies which the appellant claimed were due to it in an amount of R1.6 million, the appellant would then hand over the property to the respondent on the provision of the guarantee and the appellant's entitlement to exercise the right of retention/lien was to be referred either to an action or arbitration. Such arbitration was to be in accordance with the SLA concluded between the parties and was to be instituted within 30 days of the granting of the order.

[13] That consent order brought an end to or settled, as the respondent references

in its replying affidavit, the right of the appellant to continue to retain the property.

[14] The security of R1.6 million was further subject to certain conditions. The most important of these was the condition that in the event that the appellant failed to comply with the time periods stipulated in paragraph 4.1 of the consent order – to institute proceedings within 30 days - then the guarantee would lapse and the respondent would be entitled to approach the court for a determination of the issue of costs in the main application.

[15] On 15 September 2022, within the 30-day time period, the appellant's attorney of record wrote to the Gauteng Legal Practice Council requesting the appointment of an arbitrator. Such application to the Gauteng Legal Practice Council was necessitated as the respondent had delayed in signing the arbitration agreement and the 30-day time period was to expire on that day. This is evident from the email correspondence exchanged between the parties' legal representatives; the appellant's legal representatives being Cox Yeats at the time.

[16] The Gauteng Legal Practice Council appointed Mr Van Nieuwenhuizen on 22 February 2023 to deal with the arbitration.

[17] The respondent, however, took issue with the appointment of the arbitrator and indicated that the referral to arbitration in terms of the consent order required the appellant to deliver a statement of claim setting out the dispute and that it ought to have been filed prior to the appointment of an arbitrator. Given that the parties could not agree on the course of action going forward and the appellant maintained that all it was required to do was to apply for the appointment of an arbitrator, the arbitration proceedings did not progress.

Proceedings before the court *a quo*

[18] The respondent, instead, instituted an application staying the arbitration proceedings before Mr Van Nieuwenhuizen and sought a declaratory order that the appellant had not complied with the consent order. This is the application which served before the court *a quo*.

[19] The court *a quo* granted the orders as contained in the notice of motion, finding that the interpretation of clause 4.3 meant that the appellant had to file a statement of claim within 30 days, as this constituted the dispute and issues which an arbitrator would have to decide and the appellant had not complied with paragraph 4.1. of the consent order. The court *a quo* consequently then granted the orders which stayed the arbitration proceedings, declared the appointment of the arbitrator as being premature, and declared that the guarantee had lapsed as a consequence of the appellant's failure to refer a dispute to arbitration within the 30-day time period.

[20] Perhaps most crucially of the relief sought, owing to the cascading effect of this finding for either party, was prayer 5 which stated, 'In referring a claim to arbitration, the Respondent was required to deliver a statement of claim to the arbitrator, in its request for an arbitrator's appointment'.

The terms of the consent order and the SLA

[21] At this juncture, it is perhaps useful to set out the most important clauses of the consent order, as this is what is required to be interpreted:

'...

2. The respondent's entitlement to exercise a right of retention in respect of the premises known as Number 1[...]/1[...] W[...] Road, Morningside, Durban ("the premises"), is to be determined in an action or arbitration referred to in 4 below.
3. The applicant is ordered, in accordance with its tender, to furnish the security to the respondent as follows:
 - 3.1 Within 10 (TEN) days of the granting of this order the applicant is to pay an amount of R1,600,000,00 (One Million Six Hundred Thousand Rands) into the trust account of Diale Mogashoa Attorneys, as security for the purported lien the respondent has over the property.
 - 3.2 Such security shall be furnished to the respondent, in the form of a guarantee issued by Nedbank Ltd or a banking institution elected by Diale Mogashoa Attorneys, after receipt of the funds mentioned in paragraph 3.1 above in its trust account.
 - 3.3 The funds held in trust and the guarantee, are irrevocable, until the finalisation of the dispute between the parties, as envisaged in paragraph 4 below.

- 3.4 The guarantee shall be in accordance with the draft annexed marked "A" hereto.
4. The aforesaid bank guarantee shall be security for any claim that the respondent may have in respect of the premises, and shall be irrevocable, subject to the following terms:
 - 4.1 The respondent is to institute an action in respect of, alternatively, refer to arbitration in accordance with Clause 15.6.2 of the Service Level Agreement concluded between the parties, its claim against the applicant and other party in respect of the property within 30 (Thirty) days of the granting of this order.
 - 4.2 In the event that the respondent complies with paragraph 4.1, hereof, the amount paid in terms of paragraph 3.1 hereof shall be retained in an interest-bearing bank account held by the applicant's attorneys of record pending the finalisation of the action or arbitration as set out in paragraph 4.1 hereof, including the final determination of any subsequent reviews and/or appeals instituted by either party.
 - 4.3 The following list of issues, though not exhaustive, must form part of the issues to be referred for determination by the arbitrator or judge presiding over the matter:
 - 4.3.1 Whether there is indeed a JBCC Agreement between the parties;
 - 4.3.1.1 If so, whether or not the JBCC Agreement is valid;
 - 4.3.2 Whether or not the following entities, Allydre Trading, Maketango and Aluminium Blinds 4 U, whose quotation was submitted for the consideration of the principal agent, do in fact exist;
 - 4.3.3 Whether the entities so named, in their ordinary cause of business, provide the materials sought to be procured by the respondent;
 - 4.3.4 Whether or not the prices of the material sold to the respondent were grossly inflated;
 - 4.3.5 Whether the submission of the above quotations amounted to fraudulent misrepresentations by the respondent;
 - 4.3.6 Whether there was any amount outstanding / due to the respondent under the agreement (s); and
 - 4.3.7 The applicant shall be entitled to bring a counterclaim for any claim(s) it may have against the respondent.'
5. The respondent shall hand over the premises, within forty-eight hours of the furnishing of the guarantee.'

[22] Paragraph 4.3 which lists seven issues in the building dispute between the parties is also similar to the list of disputes raised by the respondent's attorneys in their correspondence of 1 July 2022 when the guarantee was first tendered.

[23] The balance of the relief in the consent order is not relevant to the determination of the appeal and is consequently omitted.

[24] Also of relevance for the interpretative exercise this court must undertake, is clause 15.6.2 of the SLA, which provides as follows:

'15.6 The arbitrator shall be, if the question in issue is:

...

15.6.2 primarily a legal matter, or any other matter, a practising attorney of not less than ten (10) years standing.'

[25] Clause 15.7, which appears to have the first line thereof omitted erroneously in the signed agreement, provides:

'15.7 agreed upon between the Parties to the dispute, and, failing agreement, appointed on the application of either Party, ... in the case of 15.6.2 being applicable, by the President for the time being of the appropriate Law Society.'

[26] While nothing turns on this, it is clear that the deleted first line of clause 15.7 provides for an agreement to be reached on the choice of arbitrator. Further, there is no dispute raised that the Legal Practice Council now fulfils the function of the Law Society.

Issue to be determined

[27] The crisp issue is the interpretation of paragraph 4.1 of such order specifically the interpretation of the provision "refer any dispute for arbitration within 30 days of the granting of the court order" in accordance with clause 15.6.2 of the Service Level Agreement concluded between the parties. Has the appellant, by writing to the Legal Practice Council for the appointment of an arbitrator failing an agreement being reached, complied with paragraph 4.1 of the consent order. Alternatively, as the respondent contends, whether the delivery of a statement of claim in order to define the issues for referral was required for compliance with the consent order to be met.

Analysis

[28] It is important to note that whether or not the appellant had a right of retention or a lien, be it a lien in whatever form, is not an issue which the court *a quo* was required to decide nor is it one which we are called upon to decide.

[29] The sole focus of the application before the court *a quo* centred around the interpretation of the consent order and whether or not the appellant had complied therewith. The history as to how the consent order had been taken was not an issue which the court *a quo* had to determine, although it was relevant only to the extent of understanding the surrounding circumstances under which the consent order was granted.

[30] Much time was spent by Mr *Chauke*, at the hearing of the appeal, focusing on the circumstances under which the consent order was taken and whether or not the appellant had a right of retention or a lien in terms of the legal principles and/or in terms of the SLA.

[31] The crisp issue is what is meant by a ‘referral to arbitration’ and whether the court *a quo* was correct in its interpretation as to what constituted compliance with the consent order. If the matter was properly and timeously referred to arbitration, then the respondent’s application was ill-suited and should have been dismissed.

[32] It is perhaps useful to set out the legal principles which the courts have followed in interpreting court orders.

[33] In *Eke v Parsons*, a decision that was a prominent feature of both the submissions of the parties and the judgment by the court *a quo*, the Constitutional Court held as follows:

‘[29] Once a settlement agreement has been made an order of court, it is an order like any other. It will be interpreted like all court orders. Here is the well-established test on the interpretation of court orders:

“The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court’s intention is to be ascertained primarily from the

language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention."

[30] This is equally true of court orders following on settlement agreements, of course with a slant that is specific to orders of this nature:

"The Court order in this case records an agreement of settlement and the basic principles of the interpretation of contracts need therefore be applied to ascertain the meaning of the agreement. . . .

The intention of the parties is ascertained from the language used read in its contextual setting and in the light of admissible evidence. There are three classes of admissible evidence. Evidence of background facts is always admissible. These facts, matters probably present in the mind of the parties when they contracted, are part of the context and explain the "genesis of the transaction" or its "factual matrix". Its aim is to put the Court "in the armchair of the author(s)" of the document. Evidence of "surrounding circumstances" is admissible only if a contextual interpretation fails to clear up an ambiguity or uncertainty. Evidence of what passed between the parties during the negotiations that preceded the conclusion of the agreement is admissible only in the case where evidence of the surrounding circumstances does not provide "sufficient certainty". (Footnotes omitted.) (Footnotes omitted.)

[34] Reading the consent order taken in the current matter, it is clear that the consent order was akin to the type of order envisaged in *Eke v Parsons*. While embodied in a court order, it is clear that the parties had negotiated a settlement of the right of retention by the appellant by the respondent offering substituted security in the form of a guarantee, and such guarantee being conditional on (amongst other terms) the timeous institution of legal proceedings, whether by an action in court or arbitration.

[35] Accordingly, the court is obliged to employ contractual interpretation principles to determine the correct interpretation to be afforded to paragraph 4.1 of the consent order.

[36] In summarising the principles relating to contractual interpretation, the

Constitutional Court held in *University of Johannesburg v Auckland Park Theological Seminary and Another*⁴ that the current approach by our courts should be as follows:

[66] The approach in *Endumeni* “updated” the previous position, which was that context could be resorted to if there was ambiguity or lack of clarity in the text. The Supreme Court of Appeal has explicitly pointed out in cases subsequent to *Endumeni* that context and purpose must be taken into account as a matter of course, whether or not the words used in the contract are ambiguous. A court interpreting a contract has to, from the onset, consider the contract’s factual matrix, its purpose, the circumstances leading up to its conclusion, and the knowledge at the time of those who negotiated and produced the contract.

[67] This means that parties will invariably have to adduce evidence to establish the context and purpose of the relevant contractual provisions. That evidence could include the pre-contractual exchanges between the parties leading up to the conclusion of the contract and evidence of the context in which a contract was concluded. As the Supreme Court of Appeal held in *Novartis*:

“This court has consistently held, for many decades, that the interpretative process is one of ascertaining the intention of the parties — what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it. . . . A court must examine all the facts — the context — in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing.”

[68] Let me clarify that what I say here does not mean that extrinsic evidence is *always* admissible. It is true that a court’s recourse to extrinsic evidence is not limitless because “interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses”. It is also true that “to the extent that evidence may be admissible to contextualise the document (since “context is everything”) to establish its factual matrix or purpose or for purposes of identification, one must use it as conservatively as possible”. I must, however, make it clear that this does not detract from the injunction on courts to consider evidence of context and purpose. Where, in a given case, reasonable people may disagree on the admissibility of the contextual evidence in question, the unitary approach to contractual interpretation enjoins a court to err on the side of admitting the evidence. There would, of course, still be sufficient checks against any undue reach of such evidence because the court dealing with the evidence could still disregard it on the basis that it lacks weight. When dealing with evidence in this context, it is important not to conflate admissibility and weight.’ (Footnotes omitted.)

⁴ *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13; 2021 (6) SA 1 (CC).

[37] In approaching this task, the court *a quo* appeared to have committed two material misdirections.

[38] Firstly, the court *a quo* applied the *ratio* of *Close-Up Mining* as support for the contention that the consent order required a statement of claim to define the dispute between the parties, as without a statement of claim there is no dispute to be arbitrated.

[39] The reliance on *Close-Up Mining* was, however, misplaced. It speaks of the limitations to the powers of an arbitrator to only deal with the disputes raised in the statement of claim and statement of defence. It is not relevant authority for the determination of what the parties meant in paragraph 4.1 of the consent order.

[40] Further, there was clearly a live dispute between the parties, as paragraph 4.3 provides for a minimum of seven disputes between the parties requiring referral, and, to reiterate, that list is largely in accordance with the issues raised by the respondent in correspondence prior to the initial application.

[41] Secondly, the referral to the arbitrator in paragraph 4 of the consent order made specific reference to the SLA between the parties. Despite this, the court *a quo* did not consider the ambit of clause 15 of the SLA.

[42] Crucially, there is no term in clause 15 of the SLA which necessitates a party to have delivered a statement of claim before the arbitration proceedings are initiated. To the contrary, it appears, instead, that all aspects of the procedure of the arbitration are, in terms of the SLA, deferred.

[43] Clause 15.4 of the SLA provides:

‘The arbitration referred to in 15.3 shall be held in Gauteng in a summary manner, namely, on the basis that it shall not be necessary to observe or carry out either the strict rules of evidence or the usual formalities or procedure, that is to say, in the absence of Agreement between the Parties, the procedure to be followed shall be laid down by the arbitrator.’

[44] The interpretation of paragraph 4.1 of the consent order espoused by the respondent, and found to be correct by the court *a quo*, namely, that the statement of claim had to be delivered in order for the appellant to have instituted arbitration proceedings, cannot be correct. To hold the statement of claim to be necessary would be to imbue the SLA with a term that does not exist, and if it did exist, it would potentially be contrary to clause 15.4 quoted above.

[45] What faced the appellant in terms of paragraph 4.1 of the consent order was an election to make – whether to issue summons or to refer the dispute to arbitration – and a time period within which to make the election. There is no dispute that, prior to the expiry of the 30 days recorded in paragraph 4.1, the appellant wrote to the Legal Practice Council requesting the appointment of an arbitrator. This was done, in accordance with clause 15.7 of the SLA, considering there had been no agreement as to the identity of the arbitrator.

[46] Importantly, this was a clear communication of the appellant's election for arbitration, timeously made.

[47] Considering the finding above that the statement of claim, as a precondition for referral, was not a term of either the consent order or the underlying SLA, the appellant had taken every step required of it under paragraph 4.1 of the consent order.

[48] Accordingly, the court *a quo* was incorrect in its finding that the appellant had not properly referred the matter to arbitration, as envisaged in paragraph 4.1 of the consent order. Resultantly from this, the declarator of the appellant's non-compliance with the consent order should not have been granted, and the balance of the relief sought by the respondent should have consequently failed as well.

[49] It therefore follows that the appeal should be upheld.

Costs

[50] As for costs, there is no reason why the general principle that costs should follow the result should not be applied.

[51] For the underlying application, the court has been requested to award the costs of the original application to the appellant, with such costs to be payable on scale C. The requested scale cannot be awarded considering that the judgment was handed down on 3 April 2024, whereas the scales for advocate fees were only enacted on 12 April 2024.

[52] However, the same restriction would not apply to the costs of the appeal. The matter is clearly sufficiently complex that the respondent thought it necessary to employ two counsel and seek costs of both counsels. Costs were furthermore sought by the respondent on an attorney and client scale. In those circumstances, the respondent can hardly contend that scale C would not be an appropriate scale to award.

Order

[53] The following order is issued:

4. The appeal is upheld.
5. The order of Gwagwa AJ dated 3 April 2024 is set aside and replaced with the following order:
'The application is dismissed with costs.'
6. The respondent shall pay the costs of the appeal, as taxed or agreed, including costs of counsel, taxable on scale C.

HENRIQUES J

CHITHI J

PLOOS VAN AMSTEL AJ

Case Information

Date of hearing: 08 May 2026

Date of judgment: 8 September 2026

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This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand down is deemed to be 8 September 2026 at 14h30.