REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No:013187/2022
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
DATE: 28/08/24
SIGNATURE

In the matter between:

CREAM WE GO (PTY) LTD	First Applicant
SONJA BOSHOFF	Second Applicant
and	
PAUL'S HOMEMADE (PTY) LTD	First Respondent
ARBITRATION FOUNDATION OF SOUTHERN AFRICA	Second Respondent
ADV. AE BHAM SC N.O.	Third Respondent
NATIONAL CONSUMER COMMISSION	Fourth Respondent

Delivered: *This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal*

representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date and for hand-down is deemed to be 28 August 2024.

JUDGMENT

KUMALO, J

[1] This is Part B of the application brought by the Applicants seeking relief declaring that the Third Respondent has no jurisdiction to adjudicate the dispute between the First Respondent and the Applicants.

[2] The Applicants further seek an order declaring that the dispute between the First Respondent and the Applicants does not stand to be adjudicated by way of arbitration, and that it be declared that the arbitration agreement as contained in clauses 21 and 22 of the franchise agreement concluded between the Applicants and First Respondent is void and unenforceable.

[3] The Applicants seek in the alternative, an order that the arbitration agreement, as contained in clauses 21 and 22 of the franchise agreement between the two parties be set aside, in terms of section 3(2) of the Arbitration Act,[1] that the dispute shall not be referred to arbitration and/or that the arbitration agreement/clause shall cease to have effect with reference to the mentioned dispute.

[4] The application is opposed by the First Respondent.

[5] The First Applicant is Cream We Go (Pty) Ltd, a private company with limited liability duly registered and incorporated in terms of the company laws of the Republic of South Africa with registration number: 2020/5409333/07 with its principal place of business situated at Number 1[…], The C[…], 2[...] F[...] Road, Morningside, Johannesburg.

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[1] Act 42 of 1965.

[6] The Second Applicant is Ms. Sonja Boshoff, the sole shareholder and director of the First Applicant.

[7] The First Respondent is Paul's Homemade (Pty) Ltd, a private company with limited liability duly registered and incorporated in terms of the company laws of the Republic of South Africa with registration number: 2014/035338/07 with its principal place of business situated at Number […], 1[…] Street, O[…] Grove, Johannesburg.

[8] The Second Respondent is the Arbitration Foundation of Southern Africa NPC ("AFSA"), a nonprofit company and arbitration foundation with registration number: 1996/007496/08, and principal place of business at first floor, Grindrod Tower, 8[…] P[…] Place, Sandton.

[9] The Third Respondent, Adv. AE Bham SC N.O., is a practicing advocate practicing as a member of the Johannesburg Society of Advocates appointed by AFSA as an arbitrator in the dispute between the First Applicant and the First Respondent.

[10] The Fourth Respondent is the National Consumer Commission, cited herein as an interested party in the matter. There is no order sought against it.

[11] The Applicants and the First Respondent concluded a franchise agreement in terms of which, the First Respondent was the Franchisor and the First Applicant, the Franchisee.

[12] The franchise agreement provides specific dispute resolution clauses that if the parties are unable to resolve any dispute through negotiation, then their disputes are to be determined in accordance with the provision in clause 22 of the franchise agreement.

[13] A dispute arose between the parties, allegedly during February 2022, and the First Respondent submitted a Request for Arbitration to AFSA. In a nutshell, the First Respondent's statement of claim is based on the franchise agreement and

allegations of breaches thereof and a claim against the Second Applicant based on the deed of suretyship she signed as the proprietor of the First Applicant.

[14] In response to the First Respondent's claim, the Applicants delivered a notice in terms of Rule 6.1.4 of AFSA's Commercial Rules disputing that the arbitration clause is operative and that the claims of the First Respondent fall within the terms of the arbitration agreement.

[15] The Third Respondent made his ruling on the challenge of his jurisdiction and dismissed the Applicants' jurisdictional challenges and made the finding that he does have jurisdiction to determine the claim brought by the First Respondent.

[16] Following the Third Respondent's ruling, the Applicants launched their application to this court in two parts, Part A being for the stay of the arbitration proceedings between the parties pending the determination of Part B.

[17] The stay application was granted by my brother Kuny J.

[18] This court has already alluded in paragraphs 1 to 3 above to the remedy that the Applicants seek and will not be repeated herein again.

[19] The Applicants' case is in a nutshell predicated in their view that the franchise agreement that they entered into with the First Respondent offends certain provisions of the Consumer Protection Act[2] ("CPA").

[20] The Applicants seek to invoke the provisions of section 52(1)(a) and (3) of the CPA on the basis that the First Respondent contravened sections 40, 41 and 48 of the CPA.

[21] The Applicants contended that, in the light of the fact that they intend to invoke section 52(1)(a) and (3) in their defence, the arbitrator has no jurisdiction to

[2] Act 68 of 2008.

adjudicate the disputes between the parties and only a court can determine the issues.

[22] Section 52(1) provides as follows:

> "If, in any proceedings before a court concerning a transaction or agreement between a supplier and consumer, a person alleges that-
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> a. the supplier contravened sections 40, 41 or 48; and
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> b. this Act does not otherwise provide a remedy sufficient to correct the relevant prohibited conduct, unfairness, injustice or unconscionability,
>
> the court, after considering the principles, purposes and provisions of this Act, and the matters set out in subsection (2), may make an order contemplated in subsection (3)."

[23] Sections 40, 41 and 48 of the CPA provide for unconscionable conduct, false, misleading and deceptive representations, unreasonable or unjust contract terms.

[24] It was submitted on behalf of the Applicants that the relief in terms of section 52 of the CPA can only be granted by a court and not by an arbitrator, and if this is correct, an arbitrator has no jurisdiction to proceed with the pending arbitration. It was further submitted that upon a plain reading of section 52 of the CPA, it is a jurisdictional requirement that the matter be before a court, and not an arbitrator or tribunal, and clearly reserves the jurisdiction relating to remedies in terms of section 52 of CPA for the courts.

[25] This court cannot agree with the suggested interpretation of the said provision of the CPA.

[26] As correctly submitted by the First Respondent, the point of departure in an interpretation of any statute or legal document is always the language but that is not the end point.

[27] In the matter of *Natal Joint Municipal Pension Fund v Endumeni Municipality,*[3] the Supreme Court of Appeal (SCA), dealing with the interpretation of a statute, said the following:

> "The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document." (Footnotes omitted.)

[28] This contextual approach was endorsed by the Constitutional Court and elaborated upon in *University of Johannesburg v Auckland Park Theological*

[3] [2012] 2 All SA 262 (SCA) at para 18.

Seminary and Another.[4] In the matter of *Cool Ideas 1186 CC v Hubbard and Another,*[5] the Constitutional Court said the following:

> "A fundamental tent of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in absurdity. There are three important interrelated riders to this general principle, namely:
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> a. the statutory provision should always be interpreted purposively;
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> b. the relevant statutory provision must be properly contextualised; and
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> c. all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)." (Footnotes omitted.)

[29] In so far as the provisions of section 52 of the CPA are concerned, I am of the view that the interpretation proposed by the Applicants does not take into consideration the context of the legislation in question. Section 52 does not oust the jurisdiction of the arbitrator.

[30] Section 52 can, in my view, be invoked only in those situations where the CPA does not provide a remedy sufficient to correct the relevant prohibited conduct, unfairness, injustice or unconscionability. Further, the phrase "If, in any proceedings before a court concerning a transaction or agreement…" does not, to my mind, imply that the remedies stipulated are the preserve of the courts and no other tribunal or forums, which may include arbitrations.

[31] To suggest that only a court can offer the remedies stipulated in section 52 is, in my view, absurd.

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[4] 2021 (6) SA 1 (CC).
[5] 2014 (8) BCLR 869 (CC) at para 28.

[32] As correctly pointed out by the First Respondent in its heads of argument, section 69 of the CPA makes provision for a person contemplated in section 4(1) to seek to enforce any right in terms of the CPA or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier by referring the matter to the applicable ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud.

[33] The section further provides that if the matter does not concern a supplier as contemplated in paragraph (b), the matter may be referred to another alternative dispute resolution agent contemplated in section 70 and more importantly, the court with jurisdiction over the matter, if all remedies available to that person in terms of the national legislation have been exhausted.

[34] Section 70 of the CPA provides that a consumer may seek to resolve any dispute in respect of the transaction or agreement with the supplier by referring same to an alternative dispute resolution agent who may be a person or entity providing conciliation, mediation or arbitration services to assist in the resolution of consumer disputes, other than an ombud with jurisdiction, or an accredited industry Ombud.

[35] In this matter, the parties voluntarily entered into an agreement that made provision for the resolution of disputes between them, which incorporated arbitration.

[36] In these circumstances, it is worth noting the genesis of the parties' woes that include an urgent application to this Court by the Third Respondent, where it sought to interdict and restrain the First Applicant from an alleged violation of a restraint of trade and unlawful competition. In those proceedings, the Applicant successfully raised an objection to the court's jurisdiction on the basis that the franchise agreement between the parties makes provision that any disputes between the parties would be resolved through arbitration. It is on that basis that the First Respondent followed up with a referral of its dispute to the AFSA, who appointed the Third Respondent to arbitrate the dispute.

[37] The Applicants' objection that the Arbitrator has no jurisdiction to arbitrate on the dispute on their intention to raise as their defence allegedly based on the provisions of section 52(1) of the CPA is rather at odds with the stance they took in the urgent application launched by the First Respondent.

[38] The deponent to the answering affidavit in the urgent application raised the issue of the existence of compulsory arbitration clauses in both franchise agreements and submitted then that the First Respondent was precluded from seeking final relief other than by way of arbitration. This argument was upheld. This, I believe, should have been the end of any disputes in relation to the jurisdiction of the arbitrator. It cannot be that the Applicants should, when it suits their case or purpose, object to this court's jurisdiction and invoke the arbitration clauses in the agreement, and when, in their view, it does not suit them, raise an objection to the arbitrator's jurisdiction to arbitrate the disputes between the parties.

[39] To further compound matters, the Applicants, in their objection to the arbitration process, state that the reason therefore is because they intend to raise the provisions of section 52 of the CPA as a defence. I agree with the First Respondent's submission that a proper reading of section 52 envisages a litigant bringing a claim, as a consumer and as *dominus litis*. It does not afford a defendant or respondent the right to rely on the section as a defence.

[40] Based on the above reasons, this court is incapable of granting the remedies referred to in paragraphs 1 and 2 of this judgment.

[41] The Applicants further pleaded, in the alternative, for an order that the arbitration agreement, as contained in clauses 21 and 22 of the franchise agreement between the two parties be set aside, in terms of section 3(2) of the Arbitration Act, that the dispute shall not be referred to arbitration and/or that the arbitration agreement/clause shall cease to have effect with reference to the mentioned dispute.

[42] Section 3(2) of the Arbitration Act provides as follows:

"The court may at any time on the application of any party to an arbitration agreement, on good cause shown-

(a) set aside the arbitration agreement; or

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

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

[43] It is to be noted that the operative words in this subsection are "on good cause shown."

[44] In *De Lange v Presiding Bishop of the Methodist church of Southern Africa for the time being and Another,*[6] the Constitutional Court stated that "the requirement of good cause in order to escape an arbitration agreement entails the consideration of the merits of each case in order to arrive at a just and equitable outcome in a specific set of circumstances."

[45] In the current circumstances, the court must agree with the First Respondent's submission that, "To have PHIC first approach the court, which then referred the matter to arbitration, for the matter to now be referred back to court would lead to an absurd outcome which cannot have been the intention of our legislature and certainly is not just and equitable in the circumstances."[7]

[46] Lastly, the First Respondent served and filed an application in terms of rule 6(5)(e) of the Uniform Rules of Court seeking leave to file its answering affidavit in Part B of the application. It is this court's view that it was not necessary in the circumstances, and it would, in any event, be unjust not to allow.

Order

[6] 2016 (2) SA 1 (CC) at para 37.
[7] First Respondent's heads of argument at para 111.

[47] In the circumstances, the following order is made:

1. The Applicants' application is dismissed; and
2. The Applicant is to pay the costs of this application on the "B" scale.

M P KUMALO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

For the Applicants: Adv R Raubenheimer instructed by Tobias Bron Inc.

For the First Respondent: Adv C Shahim instructed by Taitz & Skikne Attorneys.

Date of hearing:

Date of judgment:28 August 2024