

**IN THE HIGH COURT OF SOUTH AFRICA
SOUTH GAUTENG HIGH COURT
JOHANNESBURG**

**CASE No. A5053/09
SGHC CASE No. 29786/08**



Reportable in:

SAFLII, JDR (Juta) and JOL (LexisNexis) only

DELETE WHICHEVER IS NOT APPLICABLE

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

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DATE

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In the matter between:

**THE CHEMICAL INDUSTRIES NATIONAL
PROVIDENT FUND**

Appellant

and

TRISTAR INVESTMENTS (PTY) LTD Respondent

JUDGMENT

WILLIS J:

[1] This is a so-called “full bench” appeal against the judgment of our brother, C.J. Claassen J delivered on 12th February, 2009. In issue has been the validity of a document, dated 19th December, 2007, described as an “Investment Counselling Agreement” to which the parties appear to be Tristar Investments (Pty) Ltd, the applicant in the court below, now the respondent in this appeal (“Tristar”) and the Chemical Industries National Provident Fund, the respondent in the court below, now the appellant (“the Fund”). Tristar sought an order that this document be declared valid and binding upon the parties and that the Provident Fund pay to Tristar certain fees due in terms thereof from May 2008. The fees amounted to some R700 000- per month. Tristar also sought certain ancillary relief and costs. Claassen J granted the order.

[2] The Fund contended that this document was in contravention of the provisions of the Pension Funds Act, No, 24 of 1956 as well as the Funds own rules by reason of the fact that the requisite two-thirds majority of the Funds's trustees had not voted in favour of Tristar's appointment and that the two signatories to the document, who purportedly signed the document on behalf of the Fund, had no authority to do so.

[3] Tristar accepts that, standing on its own, the document is unenforceable. Rule 13.6.8 of the rules of the Fund, appearing as an annexure to Tristar's founding affidavit require that all decisions of the trustees of the Fund must have the "support of at least two thirds of the Employers' Trustees and at least two thirds of the Members' Trustees at any quorate meeting". It is common cause that, at the time when the document in question was signed, there had not been compliance with this rule. Tristar relies, however, upon the fact that, according to its version of events, the minutes of a meeting of the board of trustees of the Fund held on 5th February 2008, record that the full board unanimously ratified the appointment of Tristar as the sole provider of investment consulting services to the Fund, consequent upon an invitation to tender. The Fund disputes the accuracy of this minute.

[4] The Fund alleges, in addition, that, although Tristar was paid R2.7 million by the Fund, directly via Standard Bank, for the four month period from January to April 2008, Tristar failed to comply with its obligations to present the Fund with detailed, written, financial reports. Tristar has rendered no services to the Fund as investment consultants since April 2008. It would appear from Tristar's founding affidavit that during May 2008, Tristar became aware that the Fund considered that it had no relationship with Tristar as investment consultants. At the very latest, it became aware of this fact on 30th June, 2008. The Fund has instituted an action against Tristar to

recover the R2,7 million which has been paid to Tristar. It has done so under case number 08/41311 in this court. A trial date had been allocated for February of this year but the parties agreed not to proceed until this case had been finalized.

[4] There have been skirmishes between the parties as to the interpretation that should be placed on the minutes of certain meetings of the board of trustees that took place prior to 5th February, 2010. Although there has been plenty of “atmosphere” in this case and although the papers voluminously have generated much “heat and dust” the appeal turns on whether or not, in motion proceedings, the disputed minute of the meeting of 5th February, 2008 should be accepted.

[5] In the answering affidavit, the Fund disputes the accuracy of this minute. In this regard it points to a subsequent meeting of the board of trustees of the fund on 28th and 29th February and 17th April 2008 wherein it is recorded that “Mr Geldenhuys proposed that the minute of the Special Board of Trustees meeting be reviewed as well as there was no decision that was taken to appoint Tristar but to diversify services”. Mr Geldenhuys was an employer trustee. In that meeting it is also recorded that;

Mr De Wet (who had been in favour of the appointment of Tristar) commented that it was clear that there were major differences of opinions on the matter at hand, and the fact that for the past 20 years the Trustees have used a consensus decision has backfired on them.

Mr De Wet conceded that in arriving at the decision to appoint Tristar consensus was not reached, however it was a majority decision despite the objections.

Not only does this make it plain that there could not, therefore, have been a unanimous decision to appoint Tristar but it is not clear

whether the requisite two-thirds majority not only of the employers' trustees but also the members' trustees had been obtained. It is evident from the founding affidavit of Tristar that it could only have obtained copies of these the minutes of these various meetings of the board of trustees of the Fund, held in February and April 2008 sometime after 30th June, 2008. Nevertheless, it is patent that whether or not Tristar should have been appointed as an investment consultant to the Fund and, if so, on what terms and conditions has, since at least August 2007, been a matter of burning internal controversy within the Fund.

[6] Claassen J, in his judgment, records that, in respect of the minute of the meeting of 5th February, 2008 "this particular minute was not attacked by the respondent (the Fund) in its answering affidavit. It therefore, should be regarded as common cause that on 5 February a unanimous decision was taken at a full board meeting to stand with the agreement and continue with its execution" Later he says: "it would appear to me that on the basis of those facts it cannot be said that the respondent raised a real dispute in denying the fact that a valid decision was taken to appoint the applicant (Tristar)."

[7] Factual disputes in motion proceedings must be determined in accordance with the principles in the cases of *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd*¹ and *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.² These are that where an applicant in motion proceedings seeks final relief, and there is no referral to oral evidence, it is the facts as stated by the respondent together with the admitted or undenied facts in the applicants' founding affidavit which provide the factual basis for the determination, unless the dispute is not real or genuine or the denials in the respondent's version are bald or uncreditworthy, or the respondent's version raises such obviously

¹ 1957 (4) SA 234 (C).

² 1984 (3) SA 623 (A).

fictitious disputes of fact, or is palpably implausible, or far-fetched or so clearly untenable that the court is justified in rejecting that version on the basis that it obviously stands to be rejected. These rules have been re-affirmed in innumerable cases and, recently, in the case of *National Director of Public Prosecutions v Zuma*.³

[8] In the light of the dispute by the Fund as to the accuracy of the minutes of the meeting of 5th February, 2009, Claassen J was, in my respectful view, clearly wrong in finding its contents to be common cause. In the light of the patently heated controversy appearing in the subsequent minutes as to the accuracy of the minute of 5th February, 2008 it cannot be said that this denial of the accuracy thereof was bald or uncreditworthy, or that the Fund's version raises such obviously fictitious disputes of fact, or is palpably implausible, or far-fetched or so clearly untenable that a court would be justified in rejecting that version on the basis that it obviously stands to be rejected. Again, in my respectful opinion, Claassen J was wrong in concluding that there was no "real dispute" between the parties.

[9] Claassen J held that "The subsequent attempt to reverse the decision cannot be of any force or effect as against third parties, like the applicant. As far as the applicant is concerned, the respondent concluded a final and binding agreement which is enforceable by law." Tristar does not, however, rely on estoppel. As recorded above, it only obtained copies the minutes of the various meetings of the board of trustees of the Fund, held in February and April 2008, sometime after 30th June, 2008. Either Tristar was properly appointed as investment consultant to the Fund or it was not. That is a matter factually in dispute. It cannot be determined in favour of Tristar in motion proceedings.

³ 2009 (1) SACR 361 (SCA) at para [26].

[10] Although the appeal turns on the narrow issue of the accuracy of the minutes of the meeting of the board of trustees of the fund on 5th February, 2008, it seems that there are larger issues between the parties which need to be ventilated, which extend beyond even the issue of whether Tristar rendered services for which it was paid some R2,7 million. This is not a case where a narrow issue should be referred to oral evidence.⁴ Claassen J found that he was not persuaded by the argument that Tristar should have been aware of the disputes of fact before it launched motion proceedings. It seems to me that one cannot find that Tristar could not have believed that the minute of the meeting of 5th February, 2008 was conclusive. In order to do justice between the parties, it seems that the dispute should be referred to trial. The Fund has sought this relief in the alternative to the dismissal of the application. During the course of argument, counsel for the parties agreed, however, that if the appeal were to be upheld the appropriate order, in all the circumstances, would be to allow Tristar to file a counterclaim to the plaintiff's claim under case number 08/41311. Lest there be any doubt, it should be emphasised that the issue of whether the Fund had properly entered into a valid and binding agreement with Tristar as the sole provider of investment consulting services to the Fund, is not been rendered *res judicata* in this judgment.

[11] The importance of the matter to the parties justifies the costs of two counsel in the appeal.

[12] The following is the order of this court:

- (a) The appeal is upheld;
- (b) The order of Claassen J on 12th February, 2009 is set aside and the following is substituted therefor:

⁴ See, for example, *Less v Bornstein* 1948 (4) SA 333 (C); *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162; *Conradie v Kleingeld* 1950 (2) SA 594 (O) at 597 and 599; *Oblowitz v Oblowitz* 1953 (4) SA 426 (C) at 434G.

“(i) respondent is given leave to file a counterclaim relating to the subject matter in this dispute, in case number 08/41311 in this court;

(ii) The costs of the application are to be costs in the trial action under case number 08/41311.”

(b) the aforesaid counterclaim is to be filed within 20 days of this order;

(c) The respondent in this appeal is to pay the appellant’s costs in the appeal, which costs are to include the costs of two counsel.

**DATED AT JOHANNESBURG THIS 22ND DAY OF APRIL,
2010**

**N.P. WILLIS
JUDGE OF THE HIGH COURT**

I agree.

**J.P. HORN
JUDGE OF THE HIGH COURT**

I agree.

R.R.D MOKGOATHLENG

JUDGE OF THE HIGH COURT

Counsel for the Appellant: Adv. *M. Du P. van der Nest* SC (with him, *B. Berridge*)

Counsel for the Respondent: Adv. *A.E. Franklin* SC

Attorneys for the Appellant: Webber Wentzel

Attorneys for the Defendants: Werksmans

Date of hearing: 19th April, 2010

Date of judgment: 22nd April, 2010