IN THE HIGH COURT OF SOUTH-AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEAL CASE NO: A5075/2021

COURT A QUO CASE NO: 3071/2018

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

DATE 05 . 09. 2022. SIGNATURE

IN THE MATTER BETWEEN:

AFRISAM (SOUTH AFRICA)	**APPELLANT**
(PTY LTD)	**(DEFENDANT)**
	IN THE COURT A QUO
AND	
MAKE COMMODITIES	**RESPONDENT**
(PTY) LTD	**(PLAINTIFF)**

IN THE COURT A QUO

JUDGMENT

Strijdom AJ

INTRODUCTION

1. This is an appeal from a decision of Mahalelo J in the court a quo. A dispute arose between the parties concerning a coal supply agreement. The appellant who was the defendant in the court a quo had ordered coal from the respondent, the plaintiff a quo, in terms of certain purchase orders. That dispute could not be resolved until there had been a determination over what agreement governed their relationship. Each party alleged a different agreement bound them.
2. The appellant contended for a contract in general terms which had been concluded several years before the purchase orders were sent out. The respondent, the plaintiff in the court a quo, contended that the binding contract was a more recent document, albeit only signed by the plaintiff. The relevance of the dispute relates to a special plea by the appellant that the court had no jurisdiction to hear the dispute.
3. The appellant had pleaded that its agreement contained an arbitration clause and hence the dispute had to be referred to arbitration. However, if the respondent was correct, its agreement contained no arbitration clause and therefore the court had jurisdiction to hear the dispute. The court a quo only had to decide whether or not to uphold the special plea. The court decided in favour of the respondent and dismissed the special plea. The appellant has appealed to us against that decision with leave of the court a quo. The appellant seeks to overturn the decision and for this court on appeal to find that its version of the contract binds the parties and accordingly seeks an order for this court to uphold the special plea.

THE PARTIES

4. The appellant is a cement manufacturing company. It procures various goods and services from approved suppliers, inter alia coal it requires for its production process.
5. The respondent is a supplier of services and tendered to supply coal to the applicant

BACKGROUND

6. On 29 January 2018 the respondent instituted action against appellant claiming damages in the amount of R23 400 000.00 plus interest, and costs in respect of appellants alleged breach of the written agreement which it contended was the one entered into between the parties. [1]

7. The appellant disputes the respondent's claim on several grounds. On 24 January 2020 the appellant filed its plea which incorporated a special plea and a plea on the merits. In response to the special plea, the respondent replicated and raised estoppel as its defence but this was not persisted with in argument in the court a quo.

8. At a pre-trial conference held on 22 May 2019 the parties agreed to separate the issues in terms of Rule 33 (4) of the Uniform Rules and resolved that the special plea had be determined first.

9. The special plea foreshadowed an attack on the court's jurisdiction insofar as the appellant alleges that the parties agreed to arbitration.

10. The court a quo declared that the respondent's version was the agreement between the parties. This was referred to as annexure "K" in the court a quo and I will continue to use this nomenclature. The court a quo decided that since Annexure K did not contain any arbitration clause the court had jurisdiction to hear the matter. The special plea was dismissed with costs.

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[1] Vide: Annexure "K" Caselines: 0001-43

11. On 15 October 2021 leave to appeal was granted to a Full Court of this division by the court a quo.

THE ISSUES

12. The court a quo was requested to decide which of two contracts govern the relationship between the parties with regard to the purchase and sale of coal. The appellant alleges that it is governed by annexure "S P1" read with annexure "S P2" to the special plea. The respondent alleges that the relationship is governed by annexure "K" to the particulars of claim.

13. Flowing from the first issue, the second issue was whether the court a quo had jurisdiction to deal with the respondent's claim. The appellant wanted the respondent's claim to be referred to arbitration whereas the respondent disagreed.

    The appellant contends that the court a quo erred by not deciding the case on the common cause facts. Had it done so it would have had to accept that annexure K was not a binding contract.

THE SALIENT FACTS

14. During 2014, the respondent approached the appellant for certain business opportunities. Subsequently, the appellant provided the respondent with its vendor application form to complete and to become the appellant's vendor. The respondent's product offering in 2014, as specified in the vendor application form included strategic procurement for industrial, agricultural, mining, energy and ICT concerned firms: pumps, valves, bearings, forklifts, graders, excavators, and safety wear.

15. In November 2014 the respondent submitted to the appellant the completed vendor application form, annexure "S P1" to the special plea. In February 2015, the appellant approved the respondent's application to become its vendor by way of letter which is marked "S P1 (a)". The letter of approval was accompanied by the Shared Service Centre Supplier payment guide

document ("the payment guide"). Enclosed with the letter of approval was also the appellant's General Conditions of Purchase which is annexure "S P2" to the special plea.

16. On 24 July 2017, the respondent sent to the appellants a written proposal to supply it with coal. The written proposal inter alia, set out the proposed prices, quality, and specifications of the coal that the respondent intended to supply to the appellant. The respondent proposed that it be paid on a sliding scale basis. In terms of this sliding scale, the less the tons of coal the appellant could purchase, the higher the price it would pay per ton.

17. On 18 August 2017 and after receiving the respondent's proposal, the appellant sent an email to the respondent enclosing the first draft of a document which would govern the relationship between the parties. On the same day, the appellant issued three purchase orders to the respondent for the supply of 20 000 tons of coal.

18. On 21 August 2017 the appellant sent an email to the respondent requesting it to accept the changes to the draft agreement, sign it and send it back to the appellant for its signature. The appellant, however, did not sign, instead proposed amendments to the document and enquired about the payment guarantee by the appellant.

19. On 23 August 2017, the appellant sent an email to the respondent informing it that the appellant would attend to the draft agreement, but they will first need to monitor the performance of the deliveries as per the purchase orders.

20. On 24 August 2017, the appellant paid the respondent an amount of R2 660 000 00, being the portion of the upfront payment. The upfront payment was equal to 4000 tons of coal.

21. On 25 August 2017 the appellant sent to the respondent an updated draft under cover of an email advising the respondent to accept the changes, sign the document and return it to the appellant for its signature.

22. On 28 August 2017 the respondent accepted the changes and signed the draft agreement.

23. Between 25 August 2017 and 21 September 2017, the respondent supplied the appellant with coal. The appellant took delivery of the coal supplied by the respondent.

24. On 6 September 2017, the respondent sent to the appellant the signed draft agreement for its signature under cover of an email communicating to the appellant its acceptance of the draft agreement. Between 25 August 2017 and 21 September 2017, the respondent supplied the appellant with coal after the appellant had issued purchase orders on 18 September 2017.

25. On 2 October 2017, the appellant sent a letter to the respondent cancelling the agreement and demanded a refund of the uncollected tonnages and also sought compensation for poor quality product, which was allegedly below the agreed specifications.

26. On 7 December 2017, the respondent advised the appellant in writing that it had accepted the appellants repudiation and had cancelled the contract.

27. The respondent alleges that as a result of the appellants repudiation of the contract it lost profits in the amount of R23 400 000.00.

THE APPELLANTS' SPECIAL PLEA

28. The Appellants special plea can be summarised as follows:

"2.1. The Defendant denies that the Honourable Court has jurisdiction to adjudicate the Plaintiff's claim as a result of:

2.1.1. The provisions of the contract which governs the relationship between the parties, and not the unsigned contract as alleged by the Plaintiff;

2.1.2. The above is confirmed by the reference in the cancellation letter dated 2 October 2017, as contemplated in paragraphs 20 and 21 and attached as annexure "P" to the particulars of claim, of the Orders issued in pursuance of the vendors application and the Defendants General Conditions of Purchase as per the Orders referenced herein earlier;

2.1.3. The Contract provides for a specific dispute resolution process to be followed in terms of clause 35 of the Defendants' General Conditions of Purchase and that such process shall be conducted through an arbitration process in accordance with the rules of the Arbitration Foundation of South Africa;

2.1.4. The Defendant has instituted proceedings at the Arbitration Foundation of Southern-Africa which has jurisdiction over the dispute in terms of clause 35 with reference number A 159/18. Written confirmation of the referral is attached as annexure "S P3" hereto.

2.1.5. The basis of the dispute and claim before the Arbitration Foundation of Southern Africa relates specifically to the relationship between the Plaintiff and Defendant, the Plaintiff's failure to perform in respect of the Orders (which forms the basis of the cancellation notice as annexure "P" to the particulars of claim), a claim for repayment of an amount overpaid in respect of the Orders, as well as a claim for damages following from the Plaintiffs' failure to perform in terms of the contract."

THE PRE-TRIAL MINUTE OF 22 MAY 2019

29. In the pre-trial minute dated 22 May 2019 it was agreed upon by the parties that the following issues shall be decided first before the merits of the matter in pursuance of the special plea raised:

2.1. "Determination of which contract governs the relationship between the parties – annexure "K" to the particulars of claim or annexure S P 1 read with annexure S P 2 to the special plea;

2.2. Determination of the defendants' special plea of jurisdiction in paragraph 2 of its special plea." [2]

30. The court a quo concluded that in terms of the pre-trial agreement it was only requested to determine whether the contract which governs the relationship between the parties is annexure "K" or annexure "S P 1" read with "S P 2" [3]

31. The court a quo further concluded that "It is important at this stage to mention that paragraph 2 (1) records that the documents concerned (Annexure "K", "S P 1" and "S P 2") are accepted as valid contracts." [4]

32. It was submitted by the appellant that the court a quo erred in finding that the court was not required to consider the effect of the non-signature of annexure "K" as per paragraph 24 of the judgement. This is where the court a quo misconstrued the issue as will be shown below. The real issue was whether the Purchase Orders were governed by the provisions of Annexure "K" or Annexure "SP1, read with SP2". If "K" is applied, then Make was relying on an invalid document. If "SP1" or "SP2" is applied, then the dispute had to go to arbitration.

33. It was argued by the respondent that the applicant made its offer to the respondent on 25 August 2017 and the respondent accepted the offer on 28 August 2017 and communicated that acceptance on 26 September 2017. Therefore, annexure "K" is a valid and binding contract between the parties.

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[2] Vide: Caselines: 0001-142
[3] Vide: Judgement: Caselines 030-13 para 24
[4] Vide: Judgement: Caselines 030-12 para 22

34. It is common cause that annexure "K" was not signed by the appellant. The court a quo failed to consider that annexure "K" did not create a binding obligation between the parties. Annexure "K" contains a formality requirement that requires the signature of both parties to become a legally binding agreement[5].

35. Notably paragraph 2 of Annexure "K" provides as follows:

"Either party shall, notwithstanding the provisions of the above clause, have the rights to terminate this offer, which after signature by both parties below becomes a legally binding agreement ("the Agreement") on 3 (three) months' notice given to the other party."

36. It is common cause that the appellant transmitted its intention in relation to annexure "K" in an email dated 23 August 2017 wherein it recorded that it would consider annexure "K" only once performance was achieved by the respondent in terms of the earlier issued purchase orders.

37. Material to the consideration and interpretation of annexure "K" was whether consensus was achieved between the parties.

38. In my view, on the interpretation of annexure "K", the court a quo should have found that the formality requirement in relation to the signature by both parties was not met and that no consensus was reached between the parties. The "Offer" between the parties only becomes a legally binding agreement between the parties after signature by both parties of the "Offer".

39. Once the parties have decided that they will reduce their contract to writing and that they will be bound by their written contract but not by an earlier

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[5] Vide: Caselines: 015-58

informal contract, then the contract only comes into existence when the written document containing it has been signed by both parties. [6]

40. The court a quo erred in finding that the appellant conceded in para 2.1 of the pre-trial minute that annexure "K" is a valid contract. The appellant unequivocally contested the validity of annexure "K" in its special plea.

41. The court a quo was in my view not confined to the question which contract governed the relationship between the parties. The court a quo was also tasked with the question of whether annexure "K" constitutes a valid contract. The court a quo erred in failing to analyse and apply the case law that sets out the requirements to prove a binding contractual relationship where a clause in the written agreement contains a specific condition.

EVALUATION OF THE EVIDENCE

42. In support of the special plea the appellant adduced the evidence of three witnesses namely Mr Solomon Mekoa Matjila (Matjila) a procurement officer of the appellant, Mr Zunaid Rasdien (Rasdien) who has been employed by the appellant since 2018 as National Procurement Manager and Mr Viljoen Stephanus Izak, the attorney of record of the appellant.

43. The court a quo concluded that "nothing in the witness statements suggest annexure "S P1" read with "S P2" is the contract which governs the purchase of coal by the defendant from the plaintiff"

44. The court a quo further concluded that "Mr Viljoen's testimony is aimed at showing the court that there was miscommunication by his law firm when it referred to annexure "K" as the written contract between the parties in the letter of demand."[7]

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[6] Vide: Goldblatt v Fremantle 1920 AD 123-129; Patrikios v The African Commercial Co Ltd 1940 S R 45 567
[7] Vide: Caselines: 030-15 para 29-30

45. The respondent led the evidence of Mr Keba Mokoena (Mr Mokoena). Under cross examination Mr Mokoena conceded that the general terms of annexure S P1 read with annexure SP2 applied to all transactions between the respondent and its suppliers on a general basis[8].

46. Mr Mokoena further confirmed the appellants' submission that there is a general terms and conditions (i.e., SP1) and if there is a need for a further agreement between the parties there will be a further written agreement with its special terms[9].

47. There is no indication in the judgment of the court a quo whether the evidence of Mr Mokoena was considered and analysed.

48. It is trite law that the conclusion which is reached in any matter must account for all the evidence. A court does not base its conclusion on only part of the evidence. [10]

ANALYSES OF ANNEXURE "S P1" READ WITH "S P2"

49. The court a quo concluded that annexure "S P1" read with "S P2" could not be the governing contract between the parties as neither makes provision for any of the following which are contained in the purchase orders contained in the purchase orders;

"30.1 the purchase by Afrisam of R180 000 tons of coal at R665 per ton;

30.2 that the 180 000 tons of coal would be delivered from 25 August 2017 until 31 August 2018;

30.3 that Afrisam would pay Make Commodities in advance for the first 20 000 tons of coal; and

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[8] Vide: Caselines: 0001-745
[9] Vide: Caselines: 0001-746
[10] Vide: S v Van der Meyden 1999 (2) SA 79 W

30.4 that the coal would have a moisture content of 5 to 9 percent and gross CV air dry of 27 MJ/Kg." [11]

50. The court contended that none of the following is provided for in SP2;

"1. The transaction for the purchase and sale of coal;

2. the date when the transaction for the purchase and sale of coal was concluded;

3. the place where the transaction was concluded;

4. who presented the parties in concluding that transaction[12]"

51. Certain material concessions were made by the Respondent during the trial. This was done by Mr Mokoena and in relation to the witness statement of Mr Solly Matjila, the representative of Afrisam. The following concessions were made:

51.1. Afrisam's terms and conditions regulate the transaction between Afrisam and the supplier, Make on a general basis[13];

51.2. At the time of presenting the quotation Make was aware of the specifications of coal required.

52. Mr Mokoena, similarly, made concessions concerning the statement of Mr Rasdien, an Afrisam employee, as follows:

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[11] Vide: Caselines: 030-16 para 30
[12] Vide: Caseline: 030-17 para 33
[13] Vol 17 p 709, lines 1 to 25: Caselines 027-241.

52.1. Make agreed that for any supplier to become a supplier such supplier is required to complete a vendor application and to agree to the associated terms thereof

52.2. The purpose of the Vendor Master Procedure is to ensure all suppliers taken on Afrisam's vendor database are duly approved for use prior to any purchases made by them.

53. The Court a quo erred in finding that the purchase orders form part of annexure "K". The following material differences can be highlighted:

53.1. The purchase orders had the aim to obtain a speedy delivery of specified grade A coal by the end of September 2017 of 20 000 tons to service the urgent need for coal. This stands in contrast to the purported supply contract that required deliveries from 25 August 2017 to 31 July 2018 for 15 000 tons per month of 180 000 tons per annum;

53.2. A prepayment (albeit a portion) in respect of the purchase orders (the initial 20 000 tons were arranged by Afrisam) whilst annexure "K" requires payment of invoice within 7 days from the date of invoice;

53.3. The purchase orders expired at the end of September 2017, whilst annexure "K" was to run for a further period until 31 July 2018.

54. The purchase orders were issued with a short return period so as to specifically monitor the performance of Make in its consideration for a longer-term supply. It is clear in the correspondence of Mr Matjila wherein he indicated that the performance would first be monitored before the finalisation of the longer supply agreement. [14]

55. The Court a quo concluded that the language used in annexure "SP 2" excludes coal from the conditions. Upon a construction of the documents and

[14] Caselines: 0001 Record Vol 1 p23.

evidence placed before court I disagree with this conclusion. The purpose of the conditions of purchase as explained in the evidence was, to act as general terms applicable to all sales with the appellant. The purchase orders which do contain the detail the court a quo found absent in SP1 and SP2 are issued in terms of those agreements and are consistent with them in providing the specifics of each order.

56. The advanced payment was authorised in terms of the provisions of the conditions flowing from the fact that a coal shortage existed.

57. At the time of presenting the quotation the Respondent was aware of the specifications of coal required[15].

58. The principle of offer and acceptance finds application insofar as Make offered to render a service to Afrisam. This came in the forms of the vendor application. The application was processed and accepted by dispatching the welcome letter to make, thereby enclosing the terms of their engagement. The "welcome letter", in the sequence of process, confirms the "acceptance" by Afrisam of Makes' intention to act as a supplier.

59. The utilisation of the vendor number on the issued purchased orders, confirms that the order follows in terms of the general terms.

60. In my view the balance of probabilities favour of the contentions of the Appellant that the General Conditions of Purchase, read with the documents set out in the Special Plea, be confirmed as the operative agreement between the parties. This means that the disputes must be decided in terms of the arbitration clause and the court does not have jurisdiction.

61. In the result the following order is made:

    1. The appeal is upheld with costs

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[15] Vide: Caselines 027-245 lines 7-16.

2. The order of the court below is set aside and replaced with the following

"The defendants' special plea is upheld with costs"

J.J STRIJDOM AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

I AGREE

MANOIM J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

I AGREE AND IT IS SO ORDERED

MALINDI J

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Appearances:

Counsel for Appellant: Adv J L Posthumus

Instructed by: Barnard Incorporated

Counsel for Respondent: Adv P Mbana

Instructed by: SA Maninjwa Attorneys

DATE HEARD: 6 JUNE 2022

DATE OF JUDGMENT: 5.09.2022.