NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL, PIETERMARITZBURG

CASE NO : 2142/2008

In the matter between:

LAFARGE INDUSTRIES SOUTH AFRICA

(PTY) LIMITED Plaintiff

and

HOWICK RETIREMENT VILLAGES

(PTY) LIMITED Defendant

JUDGMENT

Delivered on 13 May 2009

SKINNER, AJ:

1

This matter came before me for argument on the plaintiff's special plea. The plaintiff had instituted action against the defendant during January 2008 for payment of the sum of R548 972.92 which it alleged was owing in respect of the price of certain readymix concrete supplied by

the plaintiff to the defendant. The action was opposed and the defendant filed a plea in which it averred that it had in fact overpaid the plaintiff by an amount of R368 428.61 and further that the concrete supplied was defective which would cause the defendant to have to re-do a large area at a cost of R7 205 265.53. The defendant claimed both these amounts by way of a claim in reconvention.

2

The plaintiff raised a special plea to the claim in reconvention in which it sought that the claim in reconvention be stayed pending the final determination of the dispute concerning the quality of the concrete supplied by arbitration in accordance with the rules of the Arbitration Foundation of Southern Africa. The defendant replicated to the special plea by averring that in terms of the agreement between the parties only the plaintiff had an election to refer the matter to arbitration or to proceed directly to the jurisdiction of the courts and that since it had elected to institute proceedings, this constituted an election and it was bound by it. The defendant accordingly contended that the matter could not be referred at this stage to arbitration.

3

The parties had, it was common cause, contracted on the basis of the plaintiff's standard terms and conditions of trading. These contained the following provision:

"**18. RESOLUTION OF TECHNICAL DISPUTES**

18.1 In the event of a dispute arising between the Company [i.e. the plaintiff] and the Customer [i.e. the defendant], the basis of which dispute is the quality, quantity or performance of the Product supplied by the Company, such dispute shall initially be referred to the Company's local plant manager and the Customer's site manager, who shall, within seven days after such referral, meet and use commercially reasonable endeavours to resolve such dispute.

18.2 If they are unable to resolve the dispute then the matter shall be referred to the Company's and the Customer's Regional General Managers who shall likewise meet within seven days after such referral and use commercially reasonable endeavours to resolve the dispute.

18.3 If the dispute is still not resolved, then the matter shall be referred, at the Company's election, to :

18.3.1 an independent expert appointed by the Cement and Concrete Institute; or

18.3.2 **arbitration in accordance with the Rules of the Arbitration Foundation of Southern Africa; or**

18.3.3 proceed directly to the jurisdiction of the Courts in terms of Clause 5.

18.4 Neither the Company nor the Customer may resort to the jurisdiction of the Courts in terms of Clause 5 without first following the procedure in Clauses 18.1 and 18.2."

4

It is clear from the aforegoing that only the plaintiff had the election whether to proceed to arbitration or to proceed to the courts. It is further clear that clause 18 was only applicable if there was a dispute the basis of which was "the quality, quantity or performance" of the concrete supplied.

5

The plaintiff in its special plea averred that the claim in reconvention raised a dispute of a technical nature concerning the quality of the concrete supplied and further averred that such dispute fell in terms of clause 18.3.2 to be decided by arbitration. The special plea further averred "the defendant has not referred this technical dispute to arbitration as it is obliged to do in terms of clause 18.3.2." Mr Broster SC who appeared on behalf of the plaintiff conceded that the aforegoing averment was entirely incorrect. He submitted however that it could and should be regarded as *pro non scripto* as it was superfluous to the contention raised in the special plea that the present dispute fell under clause 18.3.2 and therefore had to be decided by arbitration. I am in agreement with this submission. The averment is unnecessary and does not detract from the issue raised by the special plea.

6

It was common cause between the parties that the procedures referred to in clauses 18.1 and 18.2 had been followed but these had not resulted in resolving the dispute. It was further common cause that at no time had the plaintiff advised the defendant, either in writing or orally, that it was making an election that the dispute regarding the quality of the concrete was to be referred to arbitration. Mr Broster SC submitted that the delivery of the special plea constituted an election

by the plaintiff that the claim in reconvention should be referred to arbitration.

7

In response thereto Mr Joubert for the defendant relied upon the authority of **Santam Insurance Limited v Cave t/a The Entertainers and the Record Box** 1986 (2) SA 48 (AD). At first sight such matter is in point and overwhelmingly in favour of the defendant. The appeal court at page 56 B – D held that :

> **"The arbitration clause clearly provides that the condition precedent to any right of action or suit only comes into operation if and when the appellant exercises its right to require the dispute to be referred to arbitration. If the appellant does not exercise that right the respondent is free to commence his action or suit, for there is then no condition precedent in operation to prevent him from doing so. When an action has been instituted the appellant will obviously not be able, by thereafter raising a dispute as to the amount of the claim, to cause the condition precedent to come into operation with retrospective effect."**

8

In my view however the judgment is distinguishable from the present situation. I should point out that the learned Judge was not describing

a general principle – this is clear from his use of the words in the passage quoted “appellant” and “respondent”. With respect it appears that he had in mind pertinently the facts of that particular case. The insurance company had repudiated the claim on two bases – the failure by the insured to comply with an endorsement that burglar bars be installed on all the windows, and secondly that action had not been instituted timeously in terms of the time-bar provisions of the contract of insurance. The appeal court held at page 57 B – D :

> **“In the instant case, as is clear from the appellant’s letters of 24 February 1982 and 15 March 1982, there was a complete and unequivocal rejection of the respondent’s claim. No correspondence passed between the parties that could give rise to a dispute as to the amount of the claim. There was thus no dispute in existence and no room nor opportunity for anything to be done under the arbitration clause.”**

9

The second letter referred to in the extract quoted indicated that the insured could not proceed to enforce his claim in the event of the insurance company disputing the amount of the claim and that in such event the matter should be submitted to arbitration. It accordingly issued an invitation to the insurance company to advise the insured within one week whether it was prepared to admit the claim and if it

continued to dispute liability whether it was prepared to admit the amount of the claim in order to obviate any arbitration proceedings. The insurance company did not reply to this letter.

10

At page 55 D – H the court held :

> **"The arbitration clause deals with the situation where a difference arises as to the amount of the loss or damage suffered by the insured. In that event the insurer has an election of either allowing the insured to institute action against it for the amount claimed or of requiring that the difference be referred for a decision to arbitration. In the latter case the insurer has in terms of the arbitration clause a right to require that the matter be referred to arbitration and if that right is exercised by the insurer, it is then a condition precedent to any right of action or suit upon the policy that the award by the arbitrator of the amount of the loss or damage be first obtained. This clause has relevance and application only if and when two essential requirements have been satisfied, namely (a) there must be in existence a difference between the parties as to the amount of the loss or damage, and (b) the insurer must have exercised its right by actually requiring that the difference be referred for a decision to arbitration. The parties by including this arbitration clause in the policy manifestly intended to afford the insurer the right and opportunity to have the disputed amount**

> **determined by arbitration if it should so desire because if it should exercise that right no action or suit against the insurer may be commenced until the award is first obtained. The condition precedent comes into operation only after the insurer has actually exercised its right to require that the disputed amount of the loss or damage be determined by arbitration. If there is no dispute then there is obviously nothing that can be referred to arbitration."**

11

In my respectful view the court, in relation to the facts before it, was pointing out that there was not and could not be any dispute between the parties as to the amount of the claim because the insurance company had completely and unequivocally rejected the claim and had further declined the invitation to admit the amount of the claim even if disputing liability to pay the claim. There was therefore nothing that had to be referred to arbitration. The insurance company had to exercise its right to refer the matter to arbitration and if it did not exercise such right then the insured was free to commence the action because there was no condition precedent in operation at the time to prevent him from doing so. The view of the court that the insurance company could not thereafter raise a dispute condition precedent to come into operation with retrospective effect is with respect understandable and correct. By its conduct and by its refusal to

respond to the invitation to indicate its attitude as to agreeing the amount of the claim while disputing the liability, the insurance company could only be regarded as having made an election not to refer the matter to arbitration. It could then in those circumstances not seek retrospectively to raise a dispute which had clearly not existed between the parties and thereby prevent the insured from continuing with an action which he had been entitled to commence.

12

In the present case, the issuing of proceedings by the plaintiff does not in my view constitute any form of election. The claim of the plaintiff had nothing to do with any dispute regarding the quantity or quality of the concrete supplied and could by no stretch of the imagination by described as a “technical dispute”. The claim in reconvention is however of a very different nature and undeniably is a technical dispute concerning the quality of the concrete. There is no suggestion in the present case of the plaintiff having declined or failed to respond to any invitation to make the election as to whether to proceed to arbitration. The defendant in its replication had not raised any issue of estoppel in the sense of the plaintiff being estopped from electing to refer the matter to arbitration in the light either of any conduct by it or of any unreasonable delay by it in making an election.

13

This is not an instance of a party when sued seeking to raise a dispute which previously had not existed and then utilising such dispute as a condition precedent with retrospective effect. Further, the plaintiff in instituting action on its claim was not falling under the provisions of clause 18 since it was not proceeding directly to the jurisdiction of the courts in a dispute of a technical nature.

14

For these reasons I respectfully consider that the present case is distinguishable on its facts from the judgment in the **Santam** case supra. In those circumstances the plaintiff was entitled on receipt of the claim in reconvention to raise the special plea that the matter should be referred to arbitration.

15

There was no contention on behalf of the defendant that this was not an appropriate matter to be referred to arbitration. Indeed because of the technical nature of the dispute it seems a matter that is eminently suitable to be referred to an arbitrator with the requisite technical expertise and knowledge. There is accordingly no reason for me not to uphold the provisions of the arbitration clause.

16

During argument I raised with the respective counsel whether, if I were to find that the special plea should be upheld, the entire action should not be stayed rather than merely the claim in reconvention. The reason for this is that the defence to the claim by the plaintiff is to a very large extent dependent on succeeding in the claim in reconvention and if that is stayed the defendant would not properly be able to raise its defence in the trial on the plaintiff's claim. Mr Broster SC agreed that if I found that the special plea had merit, the entire action should be stayed. Mr Joubert preferred to abide whatever decision I reached on that aspect.

17

I accordingly make the following order :

(a) The special plea of the plaintiff that the claim in reconvention of the defendant should be stayed pending the final determination of the dispute by arbitration in accordance with the Rules of the Arbitration Foundation of South Africa is upheld.

(b) The claim in convention as well as the claim in reconvention is stayed pending the determination of such arbitration.

(c) The defendant is directed to pay the costs of the plaintiff occasioned by the special plea including the costs of the hearing of the opposed motion.

_____

SKINNER, AJ

Acting Judge of the High Court

KWAZULU-NATAL, PIETERMARITZBURG

Date of hearing	:	8 May 2009
Date of Judgment	:	13 May 2009
Counsel for Plaintiff	:	Mr. L. Broster S.C.
		Instructed by :
		Cox Yeats
Counsel for Defendant	:	Mr D. Joubert
		Instructed by :
		Randles Incorporated