IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 57045/2020

In the matter between:

KINGSGATE CLOTHING (PTY) LIMITED t/a MAJESTIC CLOTHING MANUFACTURERS, PRINCETON SCHOOLWEAR MANUFACTURERS AND STAR CLOTHING MANUFACTURERS	First Applicant
MAYTEX LINEN CC	Second Applicant
SUPER OCEAN TRADING CC	Third Applicant
MAYTEX CARDING CC	Fourth Applicant
CRUISE COLLECTIONS CC	Fifth Applicant
TWIN CLOTHING MANUFACTURERS (PTY) LIMITED	Sixth Applicant
APPAREL INDUSTRIES (PTY) LIMITED	Seventh Applicant
CLEMATIS TRADING (PTY) LIMITED	Eighth Applicant

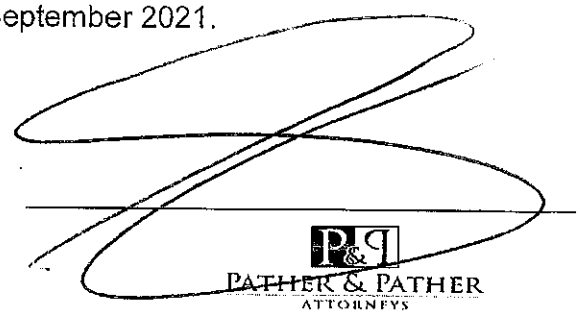
and

EDCON LIMITED (IN BUSINESS RESCUE)	First Respondent
PIERS MARSDEN (JOINT BUSINESS RESCUE PRACTITIONER)	Second Respondent
LANCE SCHAPIRO (JOINT BUSINESS RESCUE PRACTITIONER)	Third Respondent
JUSTICE FDJ BRAND	Fourth Respondent

FILING NOTICE

KINDLY TAKE NOTICE THAT the Applicants file evenly herewith their Heads of Argument, Practice Note and Chronology.

Dated at DURBAN on this the 8th day of September 2021.



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TO: **THE REGISTRAR OF THE ABOVE HONOURABLE COURT**
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APPLICANTS' HEADS OF ARGUMENT

INTRODUCTION

1. The application is brought seeking the review and setting aside of the award made by the fourth respondent on 22 September 2020, in terms of which the fourth respondent effectively found that the applicants had not established their reservation of ownership over the goods supplied by them to the first respondent in respect of which goods the applicants have not been paid[1].

2. The applicants also ask that following on such review and setting aside, the matter be referred for determination by Justice Nugent[2].

THE ARBITRATION ACT 42 OF 1965

3. The arbitration was conducted under the Arbitration Act 42 of 1965.

4. The first to third respondents assert that the fourth respondent acted as an expert in the matter and not as an arbitrator.

5. This is simply wrong as it is plain that the fourth respondent did not rely on his expertise as an expert but conducted a *quasi* judicial hearing.

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1 Notice of Motion, page 003-2
Award, Page 013-1 to page 013-8

2 Notice of Motion, page 003-2, paragraph 2

6. The fourth respondent directed that the matter be dealt with on the basis of an opposed motion before the High Court[3]. In addition, the fourth respondent relied on affidavits put up by the parties pursuant thereto as well as written argument tendered to him.

7. In broad brush, the Arbitration Act sets out three grounds on which a review can be brought[4].

8. The applicants rely upon the grounds of irregularity and misconduct.

GROUND FOR RELIEF SOUGHT

Irregularity

9. There are numerous irregularities evident in the matter, some of which are quite plainly gross.

10. Alternatively, applicants contend that the irregularities are too numerous to be excused.

[3] Minutes of Pre-Dispute Resolution meeting on 6 August 2020, page 007-3 to page 007-4

[4] Section 33(1) of the Arbitration Act

Failure to have Regard to Binding SCA Authority

11. The fourth respondent failed to have regard to binding SCA authority, in regard to interpretation of documents, despite the authority being specifically brought to the fourth respondent's attention[5].

12. The fourth respondent made no attempt to interpret the meaning to be ascribed to the word "*title*" in Clause 9.4 of the Edcon Merchandise Supply Agreement in a contextual manner.[6] More particularly failing to consider Clauses 10.1, 10.2, 10.3, 10.4, 16.1, 16.2 and 18.1 of that Agreement[7].

Interpretation leading to an unintelligible result

13. The fourth respondent failed to explain how it could conceivably be that the word "*title*" in Clause 9.4 of the Agreement could be ascribed the meaning "*ownership*" when it is trite that ownership can never pass when goods are supplied on consignment. This was specifically brought to the attention of the fourth respondent.

Ex Contrariis Principle

14. The fourth respondent ignored the submission that the Agreement was evidently drafted by legally trained people who must be taken to have

[5] *Natal Joint Municipal Pension Fund v eNdumeni Municipality* (2012) JOL 28621 (SCA)

[6] Annexure Yv2, page 014-44

[7] Annexure Yv2, page 014-45 to page 014-46, page 014-49 and page 014-51

intended the use of the word "*title*" in Clause 9.4 considering that they used the word "*ownership*" in other Clauses of the Agreement when they intended to mean "*ownership*". To put it differently, the fourth respondent ignored the *ex contrariis* principle.

Stating the Obvious

15. Applicants tendered an explanation that gives meaning to Clause 9.4 of the Agreement. The fourth respondent erred in concluding that the explanation should be rejected because it would amount to stating the obvious. This despite the fact that if the word "*title*" in Clause 9.4 of the Agreement is ascribed the meaning "*ownership*" that would also amount to stating the obvious regard being had to the fact that it is common cause that the applicant sold goods to the first respondent on credit.

Having Regard to Inadmissible Evidence

16. The authority in respect of not having regard to anything deleted in a document[8] was specifically brought to the fourth respondent's attention.

17. Contrary to that binding authority, the fourth respondent relied on the fact of the striking out in the letter from the first applicant to the first respondent thereby receiving into evidence that which is inadmissible.

[8] *Pritchard Properties (Pty) Ltd v Koulis* 1986 (2) 1 (AD) at 8H-10A

Reliance on the Word "Title" in the Companies Act of 2008

18. The fourth respondent relied upon the meaning "*ownership*" that has been ascribed to the word "*title*", by the court[9], in order to conclude that the word "*title*", as used in Clause 9.4 of the Agreement should be ascribed the meaning "*ownership*".

19. There are several manifest errors evident in doing so.

20. The applicants have never disputed that the word "*title*" can, in context, bear the meaning "*ownership*". It is the applicant's contention that for all the reasons they submitted, the word "*title*", in Clause 9.4 of the Agreement, could not bear the meaning "*ownership*".

21. It is a non-sequitur that simply because the meaning "*ownership*" has been ascribed the wording in Section 134(3) of the Companies Act of 2008, it follows that that must be the meaning ascribed to the word "*title*" in Clause 9.4 of the Agreement.

22. In addition, the meaning "*ownership*" has been ascribed to the expression "*title interest*", and not the word "*title*", in Section 134(3) of the Companies Act of 2008.

[9] *Energy Drive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd* 2017 (3) SA 539

Reliance on the First Applicant's Letter to Come to a Conclusion in Regard to All the Applicants

23. There are eight separate applicants in the matter.

24. The fourth respondent had impermissible regard to the striking out of a paragraph in the letter from the first applicant to the first respondent dated 30 March 2021[10], as aforesaid.

25. However, despite that letter only having privity between the first applicant and the first respondent, the fourth respondent relied upon that impermissible evidence not only in regard to the first applicant but in regard to all the applicants in circumstances where the other applicants have nothing whatsoever connecting them to that letter.

Failure to Have Regard to Admissible Evidence

26. The Agreement provides that it is in all instances, to be governed, construed and interpreted n accordance with the land of the Republic of South Africa.[11]

27. The Agreement expressly provides that regard must be given to the way in which words are understood in the usual plain English meaning[12].

[10] Annexure Yv2, page 014-76

[11] Annexure Yv2, page 014-59, para 30.6

[12] Annexure Yv2, page 014-38, para 2.2.15

28. Applicants tendered the evidence of the expert Baard, whose evidence was not contradicted in any manner, who testified that within South Africa the use of the word "*title*" is not employed to represent ownership in the clothing industry[13].

29. Because the fourth respondent came to the conclusion that the word "*title*" did not mean "*ownership*", in Clause 9.4 of the Agreement, the fourth respondent considered it unnecessary to have regard to the evidence of Baard.

30. The fourth respondent ought to have had regard to the evidence of Baard before coming to any conclusion in regard to the meaning to be ascribed to the word "*title*" in Clause 9.4 of the Agreement.

31. By ignoring the express provision of the Agreement recording that regard must be had to the way in which words are understood in the usual plain English meaning, the fourth respondent again committed an irregularity.

Misconduct

32. Regrettably, it is manifest that, not only did the fourth respondent grossly err in the manner detailed above, the fourth respondent did so at the behest of the first to third respondents.

[13] Affidavit of Johan Baard, page 015-5 to page 015-6, para 17 to para 19

Regard to Impermissible Evidence at the Behest of the First to Third Respondents

33. So, for example, despite the binding authority tendered by the applicants that regard may not be had to any material struck out in a written document, the fourth respondent did have regard thereto at the urging of the first to third respondents.

34. In exacerbation of that, the first to third respondents, who were patently wrong in doing so, sought to distinguish the facts of the present matter with the *ratio* of that authority.

35. The fourth respondent slavishly adopted that misconceived reasoning.

Regard to Impermissible Evidence, Relating to the First Applicant, at the Behest of the First to Third Respondents, in Order to Determine the Merits of the Assertion made by the Other Applicants

36. The fourth respondent did not of his own accord rely on impermissible evidence relating to the first applicant in order to determine the merits in respect of the other applicants but did so because that was the manner in which the first to third respondents presented their argument to the fourth respondent.

37. Again, demonstrating a slavish adoption.

Failure to Have Regard to a Contextual Interpretation of Clause 9.4 of the Agreement

38. The fourth respondent failed to have regard to a contextual interpretation of Clause 9.4 of the Agreement, as aforesaid.

39. Once more, this did not simply emanate independently from the fourth respondent.

40. The first to third respondents filed an un-authorised set of supplementary submissions to the fourth respondent in which the first to third respondents contended that the fourth respondent should not have regard to a contextual interpretation of Clause 9.4 of the Agreement because such interpretation had not been raised in applicants' affidavits.

41. It is trite that the interpretation of the document is a matter of law and not fact.

42. Affidavits are for evidence and not for argument or legal submissions.

43. Irrespective of what the parties might say in their affidavits, in the end a tribunal must interpret a document in accordance with the legal requirements relating to same.

44. Again, in a slavish adoption of these misconceived submissions tendered by the first to third respondents, the fourth respondent declined to have any regard

to a contextual interpretation. This despite the fact that it was incumbent upon the fourth respondent to do so.

Conclusion

45. This is not a matter where it can be suggested, as the first to third respondents have done, that, at best for the applicants, the fourth respondent committed errors of fact and/or law and these cannot be reviewed and set aside.

46. Rather, one here is dealing with errors which are grossly irregular alternatively the errors are so numerous as to warrant the conclusion that the process involved in coming to the conclusion was far too tainted to have the result remain intact.

47. Further, it is plain that the fourth respondent was also guilty of misconduct in exhibiting a mind not open to persuasion and in slavishly adopting erroneous arguments tendered by the first to third respondents. In doing so, the fourth respondent has created a perception of bias which has worked to the prejudice of the applicants in denying to them a fair and just determination. The applicants submit this with the greatest and sincerest deference and respect to the fourth respondent.

48. The award is so replete with unsustainable conclusions as to warrant its being set aside.

The Way Forward

49. Under the Arbitration Act, if, in a matter such as the present one, the court is minded to review and set aside an award made, the court can refer the matter to be arbitrated again before another arbitrator if so requested by any of the parties.

50. The applicants have indeed requested this.

51. Whilst the court is at large to give directions in regard to who should deal with the matter, the applicants had tendered the names of two judges being the other two names, besides that of the fourth respondent, which they had offered to the first to third respondents before the arbitration was conducted by the fourth respondent.

52. Sadly, Judge Classen passed away on 13 June 2021 such that the applicants now submit the name of Justice Nugent only.

Costs

53. The applicants do not believe that there is any disagreement that the costs of two counsel are warranted in this matter.

54. Both sides have utilised the services of two counsel.

55. In the circumstances, applicants would submit that they are entitled to the costs of the review application with such costs to include those consequent upon the employment of two counsel.

O A MOOSA SC
A MACMANUS
7 SEPTEMBER 2021