REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 57045/2020

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 15 November 2021 E van der Schyff

In the matter between:

KINGSGATE CLOTHING (PTY) LTD	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) LTD	SIXTH APPLICANT
APPAREL INDUSTRIES (PTY) LTD	SEVENTH APPLICANT
CLEMATIS TRADING (PTY) LTD	EIGHTH APPLICANT

and

EDCON LIMITED (IN BUSINESS RESCUE)	FIRST RESPONDENT
PIERS MARSDEN (JOINT BUSINESS RESCUE PRACTITIONER)	SECOND RESPONDENT
LANCE SHAPIRO (JOINT BUSINESS PRACTITIONER)	THIRD RESPONDENT
JUSTICE FDJ BRAND	FOURTH RESPONDENT

JUDGMENT

Van der Schyff J

Introduction and background

[1] The applicants seek the review and setting aside of an award made by the fourth respondent on 22 September 2020 in terms whereof the fourth respondent effectively found that the applicants had not established a reservation of ownership over goods supplied by them to the first respondent prior to the first respondent being placed under business rescue. The applicants seek that the matter be referred to Justice Nugent for fresh determination, alternatively for such relief as the court deems appropriate. The fourth respondent filed a notice to abide.

[2] The first respondent was placed under business rescue on 29 April 2020. A business rescue plan (the BRP) was published on 8 June 2020 and adopted on 22 June 2020. As a result, the BRP is binding on the first respondent and the applicants, although the applicants state that they voted against the adoption thereof. A dispute arose between the applicants and the second and third respondents as joint business rescue practitioners. The dispute revolved around the interpretation of the Edcon Merchandise Supply Agreement (EMSA) and whether it provided for a reservation of ownership in favour of the applicants. This dispute was referred to the fourth respondent for determination in accordance with clause 39 of the BRP. The applicants are not satisfied with the award of the fourth respondent.

[3] The applicants aver in their founding affidavit that the fourth respondent committed gross irregularities and manifest errors in coming to a conclusion that is so wrong that it led to a 'patently inequitable result'. It is trite that the affidavits filed in motion proceedings must contain the pleadings as well as the evidence. It is thus necessary to consider the founding affidavit in order to determine the factual basis for the submission that gross irregularities and manifest errors were committed by the fourth respondent. To this end the applicants aver that:

i. The fourth respondent failed and refused to have regard to binding Supreme Court of Appeal authority in respect of the interpretation of written documents. 'It is plain from the reading of the award that the fourth respondent had no regard to the authority.' He failed to – (a) follow the precepts of interpretation of written documents on the basis of text, context, material known to the parties and the purpose for the document; and (b) recognise the *ex contrariis* principle;

ii. The fourth respondent's conclusion that the explanation tendered by the applicants in regard to the meaning to be ascribed to clause 9.4 of the EMSA should be rejected because it would amount to stating the obvious, equally applies to the conclusion reached that the meaning of 'ownership' should be ascribed to the word 'title' as used in clause 9.4 of the EMSA considering that it was not disputed that the applicants sold goods to Edcon on credit;

iii. The fourth respondent committed a manifest error in concluding that the meaning of 'ownership' should be ascribed to the word 'title' in clause 9.4 of the EMSA considering that such an interpretation leads to an unintelligible meaning being ascribed to that clause;

iv. A further manifest error committed by the fourth respondent in respect of the exercise of interpretation was the finding that a proper interpretation of clause 9.4 of the EMSA did not lead to the conclusion that could establish a reservation of ownership on the part of the applicants. In making this finding, the fourth respondent was unduly and impermissibly influenced by the wording that had been struck out in the letter of the first applicant to Edcon;

v. The fourth respondent ignored the evidence of the expert Baard, which evidence was not contradicted in any manner, in regard to the South African

experience with the use of the word 'title' to represent 'ownership' in the clothing industry;

vi. A further manifest error on the part of the fourth respondent is the fourth respondent's disregard for his obligation to interpret the EMSA in a judicious manner as required by law. The applicants further state that 'It is difficult to accept as a mere coincidence that the fourth respondent so failed considering that the second and third respondents, in an unauthorised supplementary submission to the fourth respondent, contended, albeit plainly incorrect, that the fourth respondent should not have regard to the contextual interpretation of the EMSA since the applicants had not raised this in their affidavits;

vii. The fourth respondent was enjoined to call for further evidence and/or submissions and not to dismiss the applicant's claims;

viii. The fourth respondent also made manifest errors in seeking to rely upon the meaning of the term 'ownership' being ascribed to the word 'title' in s 134(3) of the Companies Act to determine the meaning to be ascribed to the word 'title' in the EMSA, and by transposing the meaning ascribed to 'title interest' in the Companies Act to the EMSA;

ix. The fourth respondent 'slavishly adopted the argument of the second and third respondents' that a distinction could be drawn in the present matter between its facts and those that apply with regard to the striking out of material in a written agreement in regard to which the then Appellate Division held no inferences might be drawn. In drawing the inference, it drawn, the fourth respondent only had superficial regard to the material deleted and failed to recognise that the first applicant in fact drew a clear distinction between the words' ownership' and 'title';

x. A further manifest irregularity is the failure of the fourth respondent to apply his mind to the issue at hand in a legitimate manner. This is demonstrated by the fact that once again the fourth respondent 'slavishly adopted the argument of the second and third respondents with regard to the effect of the deletion of wording in the first applicant's letter to Edcon and treated the issue as if it applied equally to all the other applicants.' The applicants also state – 'It is plain as day that the fourth respondent simply adopted that approach without bringing his mind to bear on the subject.'

xi. The fourth respondent failed to have regard to the contentions advanced by the applicants;

xii. The fourth respondent totally disregarded binding authority and showed an 'abject failure to approach the determination of the dispute in a legitimate manner' alternatively a failure to appreciate what he was called upon to do. 'The finding is so replete with unsustainable conclusions as to render it an instance where it can be said that the Tribunal failed to appreciate what it is that it was tasked to do. Fundamentally, the fourth respondent committed a manifest error in demonstrating a mind that was not open to persuasion.'

xiii. In its replying affidavit the applicants in addition averred that the fourth respondent's judgment was exercised so unreasonably, irregularly and wrongly that it resulted in a manifest error which led to a patently inequitable result which is manifestly unjust;

xiv. The fourth respondent failed to follow a procedurally fair process, and as a result the applicants were not afforded a fair hearing because the fourth respondent disregarded legal submissions by the applicants on the basis advanced by the first to third respondents;

xv. The manifest errors of fact and law are plain and indisputable and amount to a complete disregard of the controlling law or the credible evidence on record.

[4] The applicants take issue with the fact that the fourth respondent did not interpret clause 9.4 of the EMSA as they proposed it should be interpreted. However, the founding and replying affidavit are replete with repetitive emotive, and general submissions rather than facts substantiating those averments. The only averments that can be tested for its factual accuracy or inaccuracy are the averments relating to (i) the method of interpretation employed by the fourth respondent, inclusive of the finding regarding the invoices, the struck portion of the first applicant's letter to Edcon, and the references made to s 134 of the Companies Act in the interpretation process; (ii) the issue as to whether the fourth respondent should have, or was obliged to, invited further evidence or submissions; (iii) the consideration of the expert Baard's evidence; and (iv) the consideration of a supplementary affidavit filed by the second and third respondents.

[5] Before the veracity of the applicants' averments is assessed, it is necessary to determine the legal matrix within which this application is to be considered.

[6] Clause 39 of the approved BRP provided for a dispute resolution mechanism. Clause 39.3.7 is of specific relevance. This clause provides as follows:

> 'The Creditor/s agree/s that, save for any manifest error the determination of the expert will be final and binding on the Creditor/s, the Company and the BRPs and will not be subject to any subsequent review or appeal application / procedure / process.'

[7] The jurisdictional fact for any further appeal or review procedure is the existence of a 'manifest error' in the determination made by the expert. Due to the wording of this clause I am of the view that it is irrelevant whether the adjudicator of any dispute provided for in clause 39 is referred to as an 'expert' or an 'arbitrator' or even a 'mediator.' Absent a manifest error, the determination of the dispute in issue is final.

[8] In *Media24 (Pty) Ltd v Estate Late Du Plessis*[1] the Supreme Court of Appeal explained that a manifest error is an error that is:

> 'plain and indisputable and that amounts to a complete disregard of the controlling law or the credible evidence on record.'

The Supreme Court of Appeal referred with approval to *Winfield v Dimension Data Holdings Limited & Others,*[2] where the court in turn referred not only to the meaning ascribed to the term in Black's Law Dictionary, but also to a decision of the Chancery Division of Northern Ireland – *Dixon Group plc v John Andrew Murray-Oboynski*[3] where it was held that a manifest error is an error that 'may easily be seen by the eye or perceived by the mind'.

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[1] (169/2017) [2017] ZASCA 168 (1 December 2017) at para [13].

[2] 2004 JDR 0307 (T) at para [25].

[3] 86 BLR 32.

[9] Van der Linde AJ, as he then was, held in *James v Micor Holdings Ltd*[4] that-

> 'A narrower interpretation of 'manifest error', is that it refers to an error which is manifest, or patent, on the face of determination; one which results in the determination not being that which the appointee himself/herself had intended. On this interpretation, 'error' would relate to the standards set by the appointee himself/herself and 'manifest' would relate to the obviousness of this deviation.'

He rejected the argument that that deviation from the required standard of conduct would constitute a manifest error as this would mean that:

> 'the determination may be revisited on the merits, in order to assess whether it contains a deviation ..., and if so, whether the deviation in question is manifest or not. In my view, such an interpretation of 'manifest error' is subversive of the notion of the final determination of complex accountant disputes by a third party'.

[10] A cumulative reading of the case law referred to above, leads to the conclusion that a 'manifest error' is more than merely a wrong conclusion. It refers to oversights and blunders so obvious and obviously capable of affecting the award or determination 'as to admit no difference of opinion'.[5] This narrow interpretation of the term limits a court's jurisdiction to interfere with awards made subject to what can be referred to as the manifest error exception. This limitation is justified, however, in the context of cases like the present, where the legislature provided for the adoption of a BRP in prescribed circumstances with the aim of speedily resolving issues. It sets a high bar for establishing that such an error has occurred. If courts were to have a wider scope in which to interfere with an expert's determination the courts would simply become an alternative forum for the party dissatisfied with the expert's conclusions, and this

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[4] 1999 CLR 237 (W) at [24] and [25].

[5] *Flowgroup plc (in liquidation) v Co-operative Energy Ltd* [2021] EWHC 344 (Comm).

would refute the purpose of business rescue proceedings. Having said this, the question as to whether a plain and obvious error has occurred will be a question of fact that needs to be assessed in the face of the 'controlling law or the credible evidence on record.'

[11] Respondents' counsel correctly submitted that the question as to whether a manifest error or errors occurred necessitates an analysis of the expert report provided by the fourth respondent.

[12] An analysis of the expert's report refutes the applicants' contention that the fourth respondent ignored the evidence of Mr. Baard, 'slavishly' adopted the second and third respondents' argument and failed to have regard to the contentions advanced by the applicants, and failed to apply his mind to the issues at hand in a legitimate manner.

[13] Although the fourth respondent did not explicitly elaborate on the interpretative process he followed, it is evident from a reading of the report that he was acutely aware of the context within which the EMSA had to be interpreted, and he had due regard thereto. His finding that the deletion of the first applicants' proposal that the EMSA should provide that *'title/ownership to the Ordered products shall pass to Edcon upon payment. It is only risk in the Ordered Products that shall pass upon delivery'* shows that Edcon pertinently refused to contract on the first applicant's usual terms, and the reason for the finding, cannot be faulted.[6] This letter with its deleted paragraph contextually supported and confirmed the interpretation that the EMSA did not provide for a reservation of ownership. There is no manifest error in attributing the interpretation of the EMSA entered into between the first applicant and the first respondent to all the EMSAs entered into by the first respondent and the remainder of the applicants since all the EMSAs contain the same terms.

[14] The fourth respondent dealt in his report with each of the aspects raised by the applicants in this application. He indicated clearly why Mr. Baard's evidence does

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[6] The Constitutional Court recently emphasised the importance of context, and the admissibility of contextual evidence in *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13.

not take the matter further. His reference to the meaning of 'title interest' as contained in the Companies Act cannot be faulted in light of the applicants' reliance on s 134(3) of the said Act. He aptly explained why the invoices should not be regarded as containing contractual terms and the resultant effect of such a finding. There is no merit in the contention that the fourth respondent failed to have regard to binding authority or slavishly adopted the respondents' arguments. The fact that he was not persuaded by the applicants' case is not indicative of a manifest error. As for the allegation that an irregularity occurred because the respondents provided the fourth respondent with an 'unauthorised' supplementary submission is laid to bed if it is considered that the applicants filed a 'response to the respondent's further submissions.' *Audi et alteram* was not violated. The applicants did not provide an iota of evidence indicating that the fourth respondent failed to follow a procedurally fair process or that they were not afforded a fair hearing.

[15] Even if it is accepted to the benefit of the applicants, without finding so, that the applicants' proposed interpretation constitutes an arguable competing interpretation, the applicants failed to show that the fourth respondents' interpretation was obviously wrong.[7] The applicants did not make out a case that the fourth respondent's report is the product of an indisputable error of judgment in complete disregard of the facts of the case, the applicable law and credible evidence.

[16] There is no reason for costs not to follow the event. The employment of two counsel was justified.

ORDER

In the result, the following order is made:

1. The application is dismissed.

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[7] In *Ivensys plc v Automotive Sealing Systems Ltd* [2002] 1 All ER (Comm) 222, the court remarked obiter that it is not enough for an applicant to show that its interpretation of an agreement is right; it has to show that the expert's interpretation of the agreement was obviously wrong

2. The applicants are to pay the costs of the application jointly and severally, the one paying the other to be absolved, such costs to include the costs consequent upon the employment of two counsel,

E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email. The date for hand-down is deemed to be 15 November 2021.

Counsel for the applicants:	Adv. A O Moosa SC
Instructed by:	PATHER & PATHER ATTORNEYS INC
For the 1st – 3rd respondents:	Adv. A E Bham SC
Instructed by:	ENS AFRICA INC
Date of the hearing:	9 November 2021
Date of judgment:	15 November 2021