

IN THE HIGH COURT OF SOUTH AFRICA**GAUTENG DIVISION, PRETORIA**

CASE NO.:57045/2020

In the matter between:

KINGSGATE CLOTHING (PTY) LTD T/A	First Applicant
MAJESTIC CLOTHING MANUFACTURERS, PRINCETON SCHOOLWEAR MANUFACTURERS AND STAR CLOTHING MANUFACTURERS	
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 SCHAPIRO (Joint business rescue practitioner)	Third Respondent
JUSTICE FDJ BRAND	Fourth Respondent

FILING SHEET

BE PLEASED TO TAKE NOTICE THAT the first to third respondents hereby present their answering affidavit for service and filing.

Dated at Sandton on this the 9th Day of December 2020.



ENSAFRICA INCORPORATED

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TO: THE REGISTRAR OF THE ABOVE HONOURABLE COURT
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AND TO: PATHER AND PATHER ATTORNEYS INC.
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MacRobert
 Attorneys

2020 -12- 09

Without prejudice of clients rights
 Sonder benadeeling van klient se regte

Alleen 15

AND TO: THE HONOURABLE JUSTICE FDJ BRAND
 Per email by agreement: fritzdj.brand@mweb.co.za

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

FIRST, SECOND AND THIRD RESPONDENTS' ANSWERING AFFIDAVIT

I, the undersigned,

LANCE SCHAPIRO,

do hereby make oath and say:

1. I am a major male chartered accountant and I am the third respondent herein, cited in my capacity as the joint business rescue practitioner of the first respondent ("Edcon").
2. The facts contained in this affidavit fall within my personal knowledge, save where otherwise stated or where the contrary appears from the context, and are true and correct.
3. I am supported in my opposition to this application by the second respondent.
4. On 22 September 2020, the fourth respondent ("the Expert") handed down his determination ("the Expert Report") in the dispute resolution proceedings between the applicants and the first, second and third respondents (hereafter collectively referred to as "the respondents").
5. The applicants delivered the record of the dispute resolution proceedings, including the approved business rescue plan ("the Plan"), the affidavits filed with the Expert, the minutes of the pre-dispute resolution meetings, the submissions and the Expert Report simultaneously with the application.

6. In paragraph 58 of the founding affidavit, the applicants purport to specifically and expressly incorporate their evidence in the affidavits which served before the Expert into their founding affidavit in this application. The applicants also assert that "*a consideration of all of that evidence will be necessary for a determination of this application*".
7. This is impermissible as the applicants do not identify those aspects of the evidence on which reliance will be placed when the application is argued.
8. Moreover, the entire founding affidavit in this application is premised on legal argument, which is impermissibly included and irrelevant. It appears from the founding affidavit that no issue is taken by the applicants with any factual findings of the Expert.
9. For the sake of clarity, to the extent that it may become necessary, the third respondent and I confirm the contents of our answering affidavit before the Expert and incorporate same by reference into this affidavit.
10. The applicants seek an order setting aside the Expert Report of the Expert and require a referral of the matter for fresh determination by alternate experts as well as relief pertaining to security for the claim *alternatively* interdictory relief.
11. It will be demonstrated that the application is ill-founded and contains scurrilous and unfounded allegations as concerns the Expert. Clearly, the

application is a transparent attempt to circumvent the Expert Report on appeal, which is not open to the applicants.

12. The dispute resolution procedures were implemented pursuant to the adoption the Plan. In terms of section 152(4) of the Companies Act, 71 of 2008 ("the Companies Act") the provisions of the Plan are binding on Edcon, on each of the creditors of Edcon and every holder of Edcon's securities.
13. Clause 39.3.7 of the Plan provides that the determination of the Expert will be final and binding on the creditors, Edcon and the business rescue practitioners and will not be subject to any subsequent review or appeal application/procedure/process.
14. The applicants impermissibly apply to Court contending that the Expert acted as an arbitrator. He did not. Consequently, the provisions of the Arbitration Act, 42 of 1965 ("the Arbitration Act") do not find application to the Expert Report. In light of the aforesaid, the only recourse available to the applicants is a common law review, but the applicants failed to meet any of the requirements for such relief.
15. Even if the applicants are correct, which is denied, they have failed to make a case for relief in terms of the Arbitration Act, as will be demonstrated below.

16. The reference to manifest error in the Plan is inconsequential: there is no distinction between a mistake on the face of the Expert Report and one not appearing on the face of it.
17. The fundamental problem for the applicants is the established legal position that a review such as the present application is impermissible, for two main reasons: first, the general principle that when parties select an arbitrator or expert as the judge of fact and law, the award or determination is final and conclusive, irrespective of how erroneous, factually or legally, the decision was; and second, even if the Arbitration Act finds application, which is denied, the position does not change.
18. An error by an expert or arbitrator does not amount to misconduct unless the mistake was so gross and manifest that it could not have been made without some degree of misconduct or partiality. In that event, the award or determination would not be set aside on the basis of a mistake, but on the basis of misconduct. No such misconduct or bias has been raised or established in respect of the Expert.
19. The applicants' reliance on the common law review for the setting aside of the ruling is inappropriate.
20. If the Arbitration Act applies, which is denied, the applicants would have to rely on section 33 of the Arbitration Act as there is no common-law review under arbitration law.

21. Likewise, the Arbitration Act does not allow a review for material error of law. In its essence, the contentions of the applicants are that the Expert committed errors of law in interpreting the agreement.
22. However, the parties are bound to the terms of the Plan and no grounds of review, whether at common law or otherwise, exist or are available to the applicants.
23. The applicants have not made reference to misconduct on the part of the Expert. It is noteworthy that no facts are identified or set out in the founding affidavit in support of any misconduct on the part of the Expert. Rather, it appears that the main thrust of the contentions is premised on the Expert committing gross irregularities in the conduct of the dispute resolution proceedings, by repeated references to manifest errors, irregularities and unsustainable conclusions.
24. In addition, the applicants place some reliance on section 34 of the Constitution. The constitutionality of the Arbitration Act, if it is found to apply, is not raised as an issue and its validity is accepted. In respect of section 33 of the Arbitration Act, the Supreme Court of Appeal has held that an arbitration does not fall within the purview of administrative action.
25. In respect of section 34 of the Constitution, it provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair, public hearing before a Court or, where appropriate, another independent or impartial tribunal or forum. The Supreme Court of

Appeal has held that section 34 does apply to arbitration proceedings. But there is nothing to prevent parties from defining what is fair for purposes of their dispute.

26. In this instance, the applicants are bound to what is set out in the Plan in respect of the dispute resolution, and that it would be binding on the parties, and expressly agreed to the process adopted by the Expert, after or at pre-dispute resolution meetings, as was recorded. The applicants are bound to the provisions of the Plan, which prevent the review of material errors of law because the Expert has exclusive jurisdiction over questions of fact and law.
27. The Expert Report is final and binding and will not be subject to any appeal or review application / procedure / process. Each party must abide by and comply with the Expert Report in accordance with its terms. The reference to "*manifest error*" does not mean that all errors that make a party lose the determination are manifest.
28. Although errors of law can lead to gross irregularities in the conduct of the proceedings, the applicants have not established the existence of gross irregularities, or any irregularities, for that matter.
29. A further fundamental difficulty for the applicants is that the Expert was fulfilling his function assigned to him when interpreting the written agreement. His interpretation, which we submit cannot be faulted, is in any event not subject to review by a Court even if it was wrong. Plainly, it does

not matter for purposes of a review application, such as the present, whether the Expert was right or wrong.

30. In the circumstances, no case is made for the relief sought.
31. I turn to deal with the founding affidavit of the applicants. I do not intend to deal with each and every allegation contained therein and my failure to do so should not be construed as an admission of the correctness thereof.

AD PARAGRAPHS 1 TO 13

32. Save to record that Edcon is not a private company and that it was placed in business rescue on 29 April 2020, the remaining allegations contained in these paragraphs are not in dispute.

AD PARAGRAPHS 14 TO 19

33. The exchange of correspondence is admitted. The alleged lack of cooperation is denied. The parties are bound to the Plan. The dispute resolution procedures contained in the Plan do not contemplate or allow an appeal or review process, as was sought by the applicants. For this reason, it was not necessary for the respondents to respond to the request made in regard to the joinder of the Expert. In any event, not joining the Expert would be inappropriate.
34. To the extent that any allegation contained in these paragraphs has not been addressed, it is denied.

AD PARAGRAPHS 20 TO 22

35. It is denied that the Expert acted as an arbitrator and that the dispute resolution proceedings fall within the scope and meaning of the Arbitration Act.
36. The applicants have completely disregarded the discretion of the Expert and the process that was agreed to between the applicants and the respondents, which process was implemented by the Expert and was procedurally fair. No contention is raised otherwise. The applicants were afforded an opportunity to set out their case in their affidavits; the respondents answered thereto and the applicants delivered their replying affidavits. The applicants and the respondents made written submissions to the Expert who considered the submissions and the affidavits, and made his ruling.
37. The applicants incorrectly assert that the usual procedure employed for the determination of opposed motions in the High Court would apply to the dispute. It was only in respect of disputes of fact that the Expert would, within his wide discretion, deal with it as in normal motion court proceedings.

AD PARAGRAPHS 23 TO 36

38. It is denied that the Plan fulfils the requirements for an arbitration agreement under the Arbitration Act.

39. It is further denied that the dispute resolution proceedings fall within the purview of section 33 of the Arbitration Act. Even if it did, the applicants have not made a case for a setting aside as contemplated by section 33 of the Arbitration Act.
40. The applicants, in their founding affidavit, contend for an error in law committed by the Expert, which is not a ground for the setting aside of an award in terms of section 33 of the Arbitration Act.
41. The alternative ground based on the common law review is also inappropriate. The common law review is not available in these circumstances.
42. The respondents do not raise any point in respect of the time period within which the application has been brought and what is stated in paragraphs 28 to 30 is therefore irrelevant.
43. Likewise, the process adopted by the applicants, namely a long form application instead of Rule 53, is of no moment. What is set out in paragraphs 31 to 34 is therefore also irrelevant.
44. I have already dealt with the joining of the Expert, who has already delivered a notice of intention to abide the decision of the Court. What is set out in paragraphs 35 to 36 is therefore also irrelevant.
45. To the extent that I have not dealt with any allegation contained in these paragraphs, it is denied.

AD PARAGRAPHS 37 TO 47

46. The applicants rely on manifest errors by the Expert, all of which are denied, and submit that the Court should not decide the issue of meeting jurisdictional requirements upfront, which is wrong.
47. For the reasons already advanced, and as will be demonstrated to the Court in argument, the applicants impermissibly seek to set aside the Expert Report either in terms of section 33 of the Arbitration Act (which does not find application and for which no case is made) or in terms of the common law review (which is inappropriate, not available to the applicants and for which no case is made).
48. Accordingly, the respondents will raise *in limine* that the applicants have failed to satisfy the jurisdictional requirements for this Court to set aside or review the Expert Report.
49. It is incorrect for the applicants to state that we were obliged to consider "*the appropriateness of an appeal*" where the dispute resolution clause of the Plan provides expressly that the Expert Report is binding on the parties. What the applicants actually suggest is that their say-so or belief that there is a manifest error in the Expert Report results in the Expert Report not being binding and it not having any effect. This is absurd.
50. The allegations contained in paragraphs 44 and 45 have already been dealt with.

51. It is regrettable that the applicants state in paragraph 46 that we "*refused to apply [our] minds*" and that we were "*haughtily dismissive of applicants' rights under the [Plan]*". Not only is this contradicted by the facts and by the affidavits of the applicants, but it serves no purpose for the applicants to become emotive in these proceedings.
52. The applicants are dismissive of the terms and conditions of the dispute resolution provisions of the Plan and the Expert Report.
53. To the extent that I have not dealt with any allegation contained in these paragraphs, it is denied.

AD PARAGRAPHS 48 TO 55

54. It is denied that the threshold percentage required for the adoption of the Plan was not achieved.
55. The allegations contained in paragraphs 51 and 52 are misplaced and irrelevant.
56. I take note of the applicants' reliance on section 34 of the Constitution. Although these contentions constitute legal argument, I wish to make the following points. It is so that section 34 of the Constitution finds application to arbitrations or other dispute resolution proceedings. This has been confirmed by the Supreme Court of Appeal. However, the applicants are incorrect when they suggest that their right in terms of section 34 "*trumps*" the Plan. We do not understand this to be an attack on the constitutional

validity of the business rescue provisions of the Companies Act. What is clear from the authorities of the Supreme Court of Appeal and the Constitutional Court is that contractual autonomy is recognised.

57. Significantly, the applicants did not raise the "*highly circumscribed and stifling procedure*" of the Plan prior to, or in the process of, the dispute resolution proceedings.
58. It is contrary to every principle of the dispute resolution provisions that the Court should deal with the dispute *de novo*. Essentially, the applicants contend for an appeal process which has been expressly excluded. The issue of manifest error, asserted by the applicants repeatedly, is dealt with elsewhere in this affidavit and is denied.
59. To the extent that any allegation contained in these paragraphs has not been dealt with, same is denied.

AD PARAGRAPHS 56 TO 58

60. It is impermissible for the applicants to refer to their affidavits filed before the Expert, in general terms and by incorporation, without identifying that which they wish to rely upon.
61. In particular, I say so in the context thereof that the applicants also effectively seek an interdict in these proceedings, for which no case has been made. Any attempt to place reliance on parts of the affidavits filed

before the Expert in argument, and without affording the respondents an opportunity to deal with it, will be objected to.

62. To the extent that any allegation contained in these paragraphs has not been dealt with, same is denied.

AD PARAGRAPHS 59 TO 60.7

63. These paragraphs contain the crux of the case advanced by the applicants. Each of the allegations contained in these paragraphs is denied.

64. In general terms, the applicants rely on "*manifest irregularities*" and "*gross irregularities*" to contend that they are entitled to the relief sought because the conclusion of the Expert is "*so wrong as to lead to a patently inequitable result*". This is denied, in each respect. Moreover, this is not a ground for the relief sought.

65. In paragraph 60.1, it is contended that the Expert failed and/or refused to have regard to binding Supreme Court of Appeal authority in respect of the interpretation of written documents. The assertion is scurrilous. It is evident from the Expert Report that the Expert, one of the most respected judges in South Africa, did not disregard binding authority. On the contrary, it is clear that he had regard to the authorities dealing with interpretation of contracts. But even if he was wrong, and clearly he was not, this is not a ground for the review or setting aside of his Expert Report nor does it reflect or support any assertion of gross irregularity on his part.

66. In respect of paragraph 60.2, the same line of argument is taken up in respect of the interpretation of the provisions of section 134 of the Companies Act. For the aforesaid reasons, the allegations contained in this paragraph are denied.
67. In paragraphs 60.3 and 60.4, the contention is that the Expert slavishly adopted the respondents' argument and that he had superficial regard to the material deleted from the annexure to the agreement. Clearly, this is not so and is denied.
68. In paragraph 60.5, it is contended that the "*Tribunal*" should have explained "*why compelling and unanswered, if not unanswerable, assertions made by the applicants stood to be rejected*". This is a contention which starts from the incorrect premise. It appears to be copied from an unidentified document, is not comprehensible and cannot meaningfully be responded to. One would have expected from the applicants to have identified the contentions allegedly disregarded.
69. In paragraph 60.6, it is stated that the Expert Report is "*replete with unsustainable conclusions*" and that the "*Tribunal failed to appreciate what it is that it was tasked to do*". This again appears to be copied from an unidentified document, however, to the extent that the reference to "*Tribunal*" is meant to be "*Expert*", all of the allegations contained in this paragraph are denied. Clearly, the Expert was fully aware of and understood what he was tasked to do, and he considered the binding authority when interpreting the agreement.

70. It is therefore denied that the Expert committed a manifest error, or that he did not have an open mind, or that he was not open to persuasion, in circumstances where he clearly was and fairly adjudicated the dispute. Even a manifest error on the part of the Expert in respect of the interpretation of the agreements between the applicants and Edcon does not justify a setting aside or review of the Expert Report.
71. To the extent that any allegation contained in these paragraphs have not been dealt with, same is denied.

AD PARAGRAPHS 61 TO 69

72. I take note of the purpose of the application and what is sought by the applicants. I deny that any case is made for the relief or that the relief is competent.
73. Essentially, the applicants attempt to introduce an appeal process (which has expressly been excluded) before a single arbitrator *alternatively* for a re-hearing of the dispute resolution by another arbitrator, after the fourth respondent gave his Expert Report.
74. I do not understand what point the applicants attempt to make by stating in paragraph 65 that we did not put forward any nominees. The applicants proposed three arbitrators. We were agreeable to the fourth respondent. We communicated that we were agreeable to his appointment.

75. It is impermissible for the applicants to seek a re-hearing of the matter, for all the reasons advanced in this affidavit. The application is unfounded in fact and in law.
76. The applicants should pay the cost of the application jointly and severally.
77. To the extent that any allegation contained in these paragraphs has not been dealt with, same is denied.

AD PARAGRAPHS 70 TO 75

78. The aspect of security was dealt with prior to the determination of the dispute resolution proceedings in terms of the Plan and was specifically furnished in such proceedings. It was not open ended and is not extant.
79. The applicants make no case for the relief sought in the notice of motion, nor do they make a case for a final or interim interdict, or for the provision of security by the respondents. They also make no attempt to deal with the requirements of final or interim interdicts and, significantly, they do not deal with the balance of convenience (or prejudice) and they do not attempt to weigh up the prejudice to the applicants if the relief is not granted with the prejudice to the respondents and the creditors of Edcon, if the relief is granted.
80. Each and every allegation contained in these paragraphs is therefore denied.

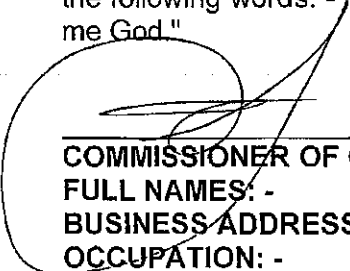
CONCLUSION

81. It is submitted that no case is made for the relief sought.
82. The applicants have made sweeping and serious allegations, levelled against the Expert, a highly respected judge, who has been unduly criticised for no apparent reason and without factual support, in circumstances where it is impermissible for the applicants to do so. This has the effect of the proceedings being vexatious.
83. In the circumstances, it is submitted that a punitive cost order is justified against the applicants.
84. The respondents will accordingly seek the dismissal of the application with costs on the scale as between attorney and client. These costs are to be paid jointly and severally by the applicants.



LANCE SCHAPIRO

SIGNED and SWORN TO before me, at SANDTON on this 9th day of December 2020, by the Deponent who has acknowledged that he knows and understands the contents of this Affidavit and he has declared that he has no objection to taking the oath, and he regards the oath as binding on his conscience and he has uttered the following words: - "I swear that the contents of this affidavit are true, so help me God."



COMMISSIONER OF OATHS
 FULL NAMES: -
 BUSINESS ADDRESS: -
 OCCUPATION: -

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