

DISPUTES

## The extent of an arbitrator's jurisdiction

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In the recent decision of *Dis-Chem Pharmacies Limited v Dainfern Square (Pty) Ltd & Others*<sup>[1]</sup> the Supreme Court of Appeal (“SCA”) was required to determine whether an arbitration clause in a written lease agreement vested an arbitrator with the requisite jurisdiction to adjudicate an enrichment claim.

The arbitration clause provided as follows:

*“In the event of any dispute or difference or doubt or question arising between the parties as to the interpretation of any provision of this Agreement of Lease or the implementation thereof, and the parties being unable to resolve the issue, then in the discretion of either party, the issue shall be submitted to arbitration in accordance with the provisions of this clause and the decision of the arbitrator/s or the umpire as the case may be, shall be final and binding upon the parties.”*

The lease agreement provided that Dis-Chem would be charged a basic monthly rental, together with an additional amount worked out as a percentage of annual turnover to be paid to Dainfern, the landlord. Dis-Chem was only required to pay the turnover rental to Dainfern if 1.75% of its annual turnover exceeded the basic rental amount.

Dis-Chem paid the turnover rental in 2016, 2017 and 2018, but subsequently alleged that no turnover rental had been payable to Dainfern over the relevant period as 1.75% of its annual turnover had never exceeded the basic rental amount. Dis-Chem argued that when it made payment of Dainfern's invoices it made a *bona fide* (but reasonable and mistaken) acceptance of the correctness of Dainfern's invoices and that Dainfern had consequently been unjustifiably enriched at Dis-Chem's expense.

Dainfern argued that because Dis-Chem's claim was one based in unjustified enrichment and not contract, its claim did not fall within the ambit of the arbitration clause.

The court *a quo* found that, because the arbitration clause did not specifically make provision for a claim based in unjustified enrichment, the arbitrator did not have jurisdiction to entertain such a claim.

Relying on a number of previous decisions<sup>[2]</sup>, the SCA held that a contract must be interpreted “so as to give it a commercially sensible meaning”. Having regard to the purpose of the lease agreement as a whole, the SCA found that if the parties had intended anything other than to have their disputes determined by the same tribunal, they would have expressly provided for such a regime.

Dis-Chem's entitlement to recover the disputed amounts from Dainfern stemmed entirely from the correct interpretation and implementation of the provisions of the lease agreement, which fell within the ambit of the arbitration clause. The SCA referred to the decision in *Zhongji* which held that the words *arising out of* should cover “every dispute except a dispute as to whether there was ever a contract at all” and that there exists a “presumption in favour of one-stop arbitration”.

The SCA therefore upheld Dis-Chem's appeal and found that the arbitrator had jurisdiction to adjudicate Dis-Chem's claim for unjustified enrichment.

[1] [2023] ZASCA 115 (27 July 2023)

[2] See Fili Shipping Co Ltd v Premium Nafta Products and Others [2007] UKHL 40; North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd [2013] ZASCA 76; Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund [2009] ZASCA 154; Zhongji Development Construction Engineering Company Limited v Kamoto Cooper Company Sarl [2014] ZASCA 160



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