



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Dis-Chem Pharmacies Limited v Dainfern Square (Pty) Ltd & Others (648/2022) [2023] ZASCA 115 (27 July 2023)

Today the Supreme Court of Appeal (SCA) upheld Dis-Chem Pharmacies Limited's (Dis-chem) appeal with costs including costs of two counsel. It further set aside and substituted the order of the Gauteng Division of the High Court, Pretoria (the high court).

During October 2016 at Johannesburg, Dis-Chem entered into a written lease agreement with Dainfern, the owner of Dainfern Square Shopping Centre. In terms of the lease agreement, Dis-Chem took occupation of shop 27 in the business premises and was liable for payment of monthly rental and turnover rental to Dainfern. A formula for calculation of Dis-Chem's financial year-end turnover rental was expressed in annexure F to the lease agreement.

In May 2020, Dis-Chem lodged a claim with the arbitrator in which it alleged that on 20 May 2016, 19 May 2017 and 22 May 2018, Dainfern claimed payment of turnover rental by issuing invoices in the amounts of R646 258.26, R1 543 300.34 and R2 010 065.97 respectively. Dis-Chem further alleged in the claim that it paid those amounts as they were requested on 1 June of each year, further alleging that when it paid the invoices, it made a bona fide (but reasonable and mistaken) acceptance of the correctness of Dainfern's invoices. Consequently, the total amount invoiced in the three years, being R4 199 624.57 was an overpayment, in circumstances where 1.75% of Dis-Chem's turnover in any one of the relevant periods did not exceed the basic rental as no turnover rental was payable. Therefore, Dainfern had been enriched and Dis-Chem impoverished to the extent of the total amount, and despite demand, Dainfern refused to repay the excess amount. Dis-Chem specifically made an allegation in its claim that Dainfern was unjustifiably enriched.

Dainfern entered a plea, consisting of two special pleas, to the claim. One special plea on jurisdiction, and the other on prescription. First, Dainfern contended that since Dis-Chem had sought an award for payment on the basis of a *condictio*: (a) the claim is one in unjustified enrichment, and not grounded in contract; and (b) the dispute does not pertain to the interpretation of any provision of the agreement of lease or the implementation thereof. Dainfern's plea that the dispute fell beyond the ambit of the parties' terms of the arbitration agreement and consequently the arbitrator had no requisite jurisdiction to determine the dispute. Secondly, Dainfern specially pleaded that the debt in the amount of R646 258.26 allegedly arose more than three years prior to the referral of the dispute to arbitration and has accordingly prescribed. Dis-Chem submitted the matter to the arbitrator who ruled that the central

dispute was one of interpretation of the annexure 'F' to the lease agreement and consequently he had jurisdiction to determine the claim. The arbitrator dismissed Dainfern's plea. Dainfern then applied to the Gauteng Division of the High Court, Pretoria (the high court), which declared that the dispute does not fall within the arbitration clause of the lease agreement and was accordingly incorrectly referred to arbitration by Dis-Chem.

The issue before the SCA was whether, on a correct interpretation of the arbitration clause, the arbitrator had the requisite jurisdiction to adjudicate the claim, essentially for a refund of excess payment of turnover rental, lodged by Dis-Chem, as the tenant, against its erstwhile landlord, Dainfern Square (Pty) Ltd (Dainfern).

The SCA, in dealing with the appeal, reasoned that central to the issue of the arbitrator's jurisdiction, is the interpretation of the arbitration clause 33.1 of the lease agreement. It further reasoned that on a proper construction of the text of clause 33.1 of the lease agreement, the phrase 'any disputes or differences, doubts or question arising between the parties', may be categorised in one or both two instances. First, as it may concern an interpretation of any provision of the agreement of lease; and/or second, as it may concern the implementation of the lease agreement. That being so, the initial step was to consider whether the dispute, difference, doubt or question concerns any, or both the two categories.

The SCA then held that the high court erred in overlooking the nature of the dispute as central to Dis-Chem's claim. The nature of the dispute as described by the arbitrator in his award, was the determination of the correct interpretation of the agreement, in the course of the implementation of the formula relating to the calculation of turnover rental. Until that determination was made, the issue as to whether any party was unjustifiably enriched or impoverished, did not arise. The SCA further held that the conclusion by the high court based on unnamed 'other requirements' amounts to speculation as to what may or may not arise in the course of the arbitration of the dispute. Therefore, the high court's reasoning was grounded on conjecture.

Lastly, the SCA held that the high court erred in granting a declaratory order under circumstances where the merits of the claim had not reached finality and certainty.

In the result, the SCA upheld the appeal with costs, including costs of two counsel where so employed, set aside and substituted the high court's order.

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