



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

Date: 01 December 2021

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

*Canton Trading 17 (Pty) Ltd t/a Cube Architects v Fanti Bekker Hattingh N O (479/2020) [2021]
ZASCA 163 (01 December 2021)*

Today the Supreme Court of Appeal (SCA) upheld the appeal against an order of the Free State Division of the High Court, Bloemfontein (Naidoo ADJP and Daffue and Reinders JJ sitting as court of appeal.) with costs.

The appellant, Canton Trading 17 (Pty) Ltd (Canton Trading), rendered professional architectural services to the respondent, Qwaha Trust (the Trust). After sometime, the Trust alleged that former had failed to perform its duties and Canton Trading's services were terminated. In terms of the (unsigned) Professional Service Providers Agreement (PSP) concluded between the parties, the Trust proposed that a mediator be appointed to resolve the dispute. If mediation failed, arbitration would result. Notwithstanding the agreement, Canton Trading refused to participate in the arbitration.

Issues that the first court, the full court and this Court (respectively) had to determine are: whether the court had the discretion to decide the question whether the parties consented to refer a dispute to arbitration when there is a dispute of fact as to their consent, the discretion of the high court to adjudicate the question of the existence of an arbitration agreement and whether the application of a robust approach to adjudicate disputes of facts was necessary in the circumstances.

The SCA was of the view that the high court erred in the assessment of probabilities based on the evidence before it and making a determination whether there had been an agreement to arbitrate. Rather, the high court should have considered whether the application should have been dismissed or whether a challenge to the existence agreement could not have been established through referral for evidence.

The majority judgment, upheld the appeal with costs and substituted the order of the full court with an order that the appeal is upheld with costs and the matter is remitted to the high court for determination whether the application should have been referred to evidence or whether it should be dismissed.

In a separate dissent, the minority held that, the PSP concluded between the parties read with the rules of the Arbitration Foundation of Southern Africa (AFSA) delineated the powers of the arbitral tribunal, which included the tribunal's determination of its own arbitral jurisdiction. Accordingly, it was not open

to the high court to decide the issues that fell within the aegis of the arbitral regime. It was premature for the Trust to have approached the high court to compel Canton Trading to submit to arbitration. 2

However, in light of Canton Trading's rigid stance, in flatly refusing to submit to arbitration, the inherently pragmatic approach, actuated by dictates of justice and common fairness to the parties, would be to issue an order which compelled Canton Trading to submit to arbitration. In the result, the minority would have upheld the appeal in part.

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