THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Reportable
Case no: 476/06

In the matter between:

S A BREWERIES LIMITED **APPELLANT**

and

SHOPRITE HOLDINGS LIMITED **RESPONDENT**

Coram: **SCOTT, LEWIS, VAN HEERDEN JJA, MALAN *et* KGOMO AJJA**

Date of hearing: **16 AUGUST 2007**

Date of delivery: **14 SEPTEMBER 2007**

Summary: Sale by appellant to respondent of large retail concern - validity of determination by expert of accounting disputes

Citation: This judgment may be referred to as *SA Breweries v Shoprite Holdings* [2007] SCA 103 (RSA)

SCOTT JA/….

SCOTT JA:

[1] This appeal concerns the determination by an expert of accounting disputes which were referred to him by agreement between the parties. The respondent, to which I shall refer as 'Shoprite', applied in the Cape High Court for an order, broadly stated, declaring the expert to have failed properly to determine certain of the disputes referred to him and directing him, or alternatively an internationally recognized firm of accountants selected by agreement, to determine the disputes in question. The matter came before Davis J who granted the order sought. The appellant, to which I shall refer as 'SAB', appeals with the leave of the Court *a quo*.

[2] It is necessary to set out briefly the factual background to the dispute between the parties and the events leading up to the institution of proceedings in the court below.

[3] On 31 October 1997 SAB and Shoprite entered into a written agreement in terms of which SAB sold to Shoprite the entire issued share capital in both OK Bazaars (1929) Ltd and an associate company, Retail Holdings (Botswana) (Pty) Ltd, and ceded to Shoprite all its claims and those of its subsidiaries against OK Bazaars and the Botswana company. (The latter company plays no particular role in the dispute and I shall refer to both companies simply as 'OK' or 'the company'.) The agreement made provision for the preparation of closing date accounts ('CDAs') in respect of OK as at 31 October 1997. In terms of clause 4.1 the parties recorded that the balance sheet forming part of the CDAs would reflect that the 'ordinary shareholders' funds' of OK together with the ceded claims (referred to in the agreement as the 'sale claims') would amount to the sum of R540 million. Clause 4.2 provided that in the event of the ordinary shareholders' funds and the ceded claims being less than this amount, SAB would be obliged to fund the shortfall by way of a cash loan which would form

part of the claims being acquired by Shoprite. The CDAs were accordingly to form the basis for the determination of the amount, if any, which was to be advanced by SAB. In terms of clause 4.6, any dispute between the parties in relation to the determination of any amount for the purposes of clauses 4.1 and 4.2 (referred to above) and clauses 4.4 and 4.5.1 (the former is quoted in part below) was to be referred for determination to accountants Arthur Anderson who were to determine the dispute 'acting as an expert and not as an arbitrator' and whose decision was to be final and binding on the parties 'save for any manifest error in calculation'. I interpose that the parties chose Arthur Anderson because they were known to be the auditors of Pick 'n Pay and to have particular expertise in retail auditing.

[4] In terms of clause 8.1 of the agreement, the CDAs were to have been prepared and certified by OK's auditors. Clause 8.2 required them to consult with Shoprite's auditors. Any disagreement between them as to the inclusion or exclusion of any amount or the principle or basis of calculation was to be referred to Arthur Anderson who were similarly to determine the dispute acting as an expert and not an arbitrator and whose decision was to be final and binding 'save for any manifest error in calculation'. In the event, the auditors of OK, KPMG, declined to accept the appointment and the parties accordingly agreed that the CDAs would be prepared by OK itself with the assistance of certain employees representing SAB's interests.

[5] The closing date was 31 October 1997 and the CDAs were to have been completed by 31 January 1998. However, during the preparation of the CDAs there were disagreements between the parties as to a range of adjustments and provisions in the CDAs and the completion of the CDAs was delayed. As previously indicated, the adjustments and provisions were relevant to determine whether SAB was required to make payment to OK, by then owned by Shoprite, and if so, in what amount. The parties agreed to pursue the preparation of the draft CDAs as far as possible and then to identify the matters still in dispute for

referral to Arthur Anderson for the latter's determination. Arthur Anderson nominated a senior partner, Mr Edwin Oblowitz, for this purpose. The latter was ultimately cited as the first respondent in the court below but elected to abide the decision of the court. The parties in due course jointly submitted certain disputes to Oblowitz ('the expert') for his determination. The referral was by way of a letter signed by both parties. I shall refer to it as the 'referral letter'.

[6] The referral letter outlined the areas of dispute and the specific issues which had been identified by the parties for determination. It was itself the product of extensive deliberation and negotiation between the parties and in particular their employees who were experienced in the field of accountancy. The items in dispute were listed in appendices three and four to the referral letter. The letter also recorded the procedural rules which were to govern the determination. Each party was to be permitted three sets of written submissions, an initial submission, a response to the other party's initial submission and a counter to the other party's response. There was to be no oral argument. The expert was entitled to request such information or documents in the possession of the parties as he might require and to consult with independent legal advisors should there be matters involving aspects of law or interpretation of the agreement on which he required advice. The expert's determination was to include reasons for his conclusions. As contemplated in the written agreement, the determination was intended by the parties to be final. In addition to the provisions in the agreement to which reference has already been made, the referral letter recorded that 'subject to the expert having acted reasonably, honestly and in good faith, neither party will bring an action or proceedings to make any claim against the expert relating to or arising from his duties hereunder'. Arthur Anderson acknowledged its acceptance of the appointment in a letter dated 14 December 1998. The acceptance was essentially on the terms and conditions set out in the referral letter.

[7] Pursuant to the referral letter the parties delivered three sets of written submissions to the expert which were supplemented from time to time with information and documents which, at his request, were supplied by the parties. The determination, consisting of the expert's conclusions and reasons, was signed on 28 February 2000 and received by the parties on 7 March 2000. On 17 April 2000 Shoprite applied to the High Court for an order compelling the expert to furnish additional reasons for certain of his findings. On 10 July 2000 the expert, without conceding that he was obliged to do so, provided the amplified reasons and the application was not pursued. Significantly, Shoprite did not invoke the so-called 'call-back provision' in relation to trade creditors. I shall revert to this provision in due course.

[8] The expert's determination was a disappointment for Shoprite. It had claimed adjustments and provisions to the value of R280 million but those accepted were limited to R57 million together with a contingent liability of R13 million. A dispute arose between the parties as to the interpretation and implementation of essentially two aspects of the determination; the one related to the provision to be raised in the CDAs for trade creditors and the other to an adjustment in respect of the fixed assets of the company. Correspondence was exchanged in which each party advanced its views. A meeting was also held in January 2001 at Edenvale but no finality was reached. Shoprite contended, in addition, that whatever the outcome of the on-going CDA disputes, there would be a substantial shortfall under clause 4.2 of the agreement (referred to in para 3 above). In April 2001 it commenced arbitration proceedings against SAB in which it claimed a declarator to the effect that it was entitled to interest under the Prescribed Rate of Interest Act 55 of 1975 in respect of the unpaid shortfall. The arbitrator dismissed the claim on the ground that Shoprite was not a creditor within the meaning of the Act. Arbitration proceedings were subsequently instituted in the name of Shoprite Checkers (Pty) Ltd (previously OK Bazaars) for essentially the same relief. This claim was similarly dismissed; it was held that

the claimant was not a party to the agreement of sale and therefore was not entitled to the relief it sought.

[9] In the meantime, on 23 August 2002, Shoprite launched the application giving rise to the present appeal. It contended that in breach of his contractual obligation to do so, the expert had failed properly to determine the disputes between the parties in relation to trade creditors and fixed assets, and had failed to produce a determination which was capable of implementation. It argued that the proceedings were not precluded by the provisions of clauses 4.6 and 8.2 of the agreement as to finality since the purported determinations made by the expert were in truth no determinations at all and that the expert had acted unreasonably.

[10] On 12 August 2005 Davis J granted an order at the instance of Shoprite for the discovery of certain documents discovered by SAB in the second arbitration as well as the transcript of the evidence of certain of SAB's witnesses in that arbitration. An order was also granted directing that 'the matter' be referred for the hearing of oral evidence. In the event, three witnesses gave evidence on behalf of Shoprite. SAB called no witnesses.

[11] Against this background I turn to the issue relating to trade creditors. Clause 4.4 of the written agreement contains a formula for calculating the provision to be made in the CDAs for trade creditors. The relevant part reads:

'4.4. For the purposes of the closing date accounts and the Botswana company closing date accounts the following provisions shall be made and the amounts thereof lent by the seller to the company to fund the company within three (3) days after finalization of such closing date accounts, resulting therein that such amounts shall form part of the sale claims being acquired by the purchaser in terms of this agreement:

4.4.1. an amount equal to 80% of the unrecorded and/or unreconciled trade creditors of the group and the Botswana company, calculated as follows:

(A minus B plus or minus C) x 80%

where:

A = the total of creditors statements rendered to the group and the Botswana company

B = the amount owing to creditors according to the books of the group and the Botswana company

C = the timing differences due to different cut off dates between the creditors statements referred to in A and the books of the group referred to in B

and following the procedures set out in 5.1.'

As indicated, the procedures that were to be followed are set out in clause 5.1. It reads:

'5.1. The following procedures will be used by the company and the Botswana company to determine the amount to be lent by the seller to fund the company in respect of the trade creditors of the group:

5.1.1. statements, effective 31 October 1997, will be obtained from all listed suppliers appearing in the companies' books of accounts and the total thereof shall be A in the formula in 4.4.1.

5.1.2. said statements from suppliers will be reconciled to the amounts owing to creditors according to the books of the company and the Botswana company (the latter being B in the formula in 4.4.1). All differences to be listed and shall be represented by (A - B). All records and supporting documents shall be kept of items relating to such differences;

5.1.3. timing differences due to different cut-off dates (indicated by C in the formula in 4.4.1) will be excluded from the lists of differences.'

It is important to appreciate that 'timing differences' arise when credits or debits are processed in the company's books and those of a supplier (creditor) at different times. They do not reflect disputed items. An example would be an undisputed claim raised by the company for a short delivery or goods returned not yet processed by the supplier.

[12] The dispute that arose between the parties concerned the nature of the reconciliation exercise that had to be carried out. Shoprite contended that a limited exercise was required. It pointed to the fact that detailed reconciliations

had not been prepared in the past and argued that given the number of suppliers and the vast volume of transactions involved, a full and detailed reconciliation was impractical and not what had been intended, particularly having regard to the time limit imposed in clause 8.1 of the agreement. It contended that in these circumstances all that was required was that statements be obtained from creditors of balances outstanding and that from these balances be deducted the amounts owing to creditors according to the books of the company. In Shoprite's view there was no need to obtain from creditors detailed open item statements reflecting the composition of the amount of each statement. It stressed that creditors had in the past been discouraged from sending month-end statements to the company. As far as timing differences were concerned it argued that all that was necessary was to identify timing differences in the 30-day period on either side of the closing date and to exclude the amounts so identified from the calculation.

[13] SAB, on the other hand, took the view that what was required by the agreement was a full and detailed reconciliation in which all differences between supplier's statements and the amounts shown on the company's books of account were properly identified and distinguished from timing differences. It argued that the 30-day cut-off period in respect of timing differences contended for by Shoprite would fail to exclude from the calculation timing differences which took longer than 30 days to be processed. SAB's attitude was that a superficial reconciliation and the failure properly to identify timing differences, in particular the timing differences in respect of claims raised by the company, would operate very much to its disadvantage and would result in it having to pay considerably more than was due. It was also aware that in many instances the suppliers would be unable to justify their claims, yet SAB was being called upon to pay 80 per cent of these claims to Shoprite.

[14] The issues in relation to trade creditors referred to the expert were formulated by the parties in the referral letter as follows:

‘You are instructed to determine:

1.1 whether the exercise performed by the Company constitutes a reconciliation as is required by clause 5.1.2 of the Agreement;

1.2 whether the Company has complied with its obligation under 5.1.1 of the Agreement to obtain statements from all its suppliers;

1.3 whether the Company has complied with its obligation under 5.1.2 to list all differences and to keep records and supporting documentation for all items relating to such differences;

1.4 what adjustments constitute “timing differences” for the purposes of determining “the unrecorded or unreconciled trade creditors of the Group” as required under clause 4.4.1 of the Agreement;

- it being agreed that the Expert shall as part of the exercise undertaken in terms of 1.1 to 1.4 above be called upon to determine what the nature of the calculation should be to determine the “unrecorded and/or unreconciled trade creditors” as contemplated by clause 4.4.1;

and

1.5 what further steps, if any, need to be taken by the Company to prepare a reconciliation as required by the Agreement.’

The parties clearly anticipated that the answers given by the expert might be insufficient to resolve their differences regarding the nature and amount of adjustments to be made in respect of trade creditors. This much is apparent from the so-called call-back provision which followed on the questions quoted above. It reads:

‘Dependent on the outcome of your determination, there are likely to be other areas of dispute regarding the nature and amount of adjustments to Trade Creditors. The following will then apply:

i) Any party who wishes to refer any further area of dispute to you, must identify such area of dispute by written notification to you (copied to the other party) within 10 (ten) days of the outcome of your determination having been communicated to the parties.

ii) In such event you will be required to convene a meeting within ten (10) days of receiving such written notification under sub-paragraph (i), at which meeting the parties will be required, in conjunction with you, to agree on the further procedures that are to be followed and time limits to be adhered to by the parties to enable you to

> determine the further areas of dispute. Failing such agreement the Expert shall determine such further procedures and time limits in his sole discretion after consultation with the parties and consideration of their requirements.'

[15] As previously indicated, each party filed three sets of submissions in which they advanced the contentions briefly outlined above. Shoprite sought to justify its cut-off period of 30 days before and after the closing date on the basis that in the context of normal accounting operations transactions not processed by both parties within a period of 30 days before and after the normal accounting month-end, are 'in all probability' in dispute. I interpose that Mr Griffin, Shoprite's group administration manager, subsequently conceded in evidence that the before and after 30-day cut-off period would 'only pick up a portion' of the timing differences. He confirmed that credit notes in response to claims raised by the company were in several instances issued some three months to two and a half years later. With regard to identifying timing differences arising from claims raised by the company which had not yet been processed by suppliers, Shoprite contended that the massive volume of transactions involved and the fact that suppliers' statements were not available for November 1997 'rendered it practically impossible to trace all claims to credit notes on suppliers' November statements'. Accordingly, a sample list of suppliers' claims was selected to be tested and the percentage of claims processed by suppliers was extrapolated to the total claim made by the company. Significantly, Shoprite in its submissions advanced no suggestions in the alternative as to what could be done to identify timing differences in the event of the expert rejecting its cut-off period of 30 days before and after the closing date. SAB similarly advanced no alternative in the event of its claim for a full reconciliation being rejected.

[16] In response to the first question ('whether the exercise performed by the company constitutes a reconciliation as is required by clause 5.1.2 of the Agreement'), the expert noted the absence of a definition of 'reconciliation' in the agreement and referred to the practical problems associated with carrying out a

comprehensive reconciliation as outlined by Shoprite in its submissions. He then proceeded to answer the first question as follows:

'The exercise performed by the Company adequately identifies the totals of "A" and "B" as defined above but does not deal adequately with "C" as defined above, (e.g. claims on suppliers were sampled and not comprehensively determined; only transactions one month either side of cut-off date were considered).
I determine that the exercise performed by the Company does not constitute a reconciliation as required by clause 5.1.2 of the Agreement.'

[17] Turning to the second question (whether the company has complied with its obligations under clause 5.1.1 of the Agreement to obtain statements from all its suppliers), the expert answered as follows:

'Shoprite has represented that the Company has obtained statements from all listed suppliers as required by clause 5.1.1 of the Agreement and that the procedures followed were as detailed below:

". . . to ensure that all listed creditors were accounted for, an extract of the Supplier Database (Cost Book) of the company was obtained;

All creditors were telephonically contacted and requested to submit their statements as at 31 October 1997 to the company. In instances where the statements rendered did not account for the period up to 31 October 1997, an interim statement was requested for the remaining period up to 31 October, 1997;"

SAB did not challenge this representation from Shoprite or query the abovementioned procedures, but asserted that the statements did not contain information in sufficient detail as to enable the determination of the timing differences, and that additional information and supporting documentation were required.

I determine that the Company has complied with its obligations under 5.1.1 of the Agreement to obtain statements from all its suppliers.'

[18] The third question (whether the company had complied with its obligation under 5.1.2 to list all differences and to keep records and supporting documentation for all items relating to such differences) was dealt with by the expert in two parts. As to the obligation to list all differences, ie as represented by A-B in the formula contained in 4.4.1 of the Agreement, the expert recorded that:

'Shoprite has represented that the Company has listed all differences represented by (A-B). SAB has acknowledged that this listing was prepared but asserts that it is defective in that the listing does not contain a detailed analysis of the individual differences.'

He concluded:

'I find that the Company has complied with the requirement of the first part of clause 5.1.2 to list all differences represented by (A-B).'

As far as the second part of the question is concerned, the expert found that the company had not complied with the requirement to keep 'all records and supporting documents relating to such differences'. However, the claim in respect of this aspect of the determination was dropped in the light of the evidence adduced at the hearing.

[19] With regard to the fourth question ('what adjustments constitute "timing differences" for the purposes of determining "the unrecorded or unreconciled trade creditors of the Group" as required under clause 4.4.1 of the Agreement'), the expert determined:

'Shoprite has represented that timing differences would include, *inter alia,* the following:

- invoices from creditors in respect of goods not yet received by the Company;
- goods received by the Company for which invoices have not yet been processed in its books;
- payments made by the Company not yet accounted for by creditors;
- post dated cheques not recorded in the Creditors' [Ledger] System ("CLS") which have been accounted for by creditors as payments;

- claims raised by the Company which have not yet been processed by creditors.

SAB's interpretation of "timing differences" (i.e. undisputed entries which have been processed by either the supplier or the Company, but not in the relevant period), would include the abovementioned adjustments as timing differences.

The following additional adjustments should also be taken into account as timing differences:

- credit notes issued by creditors not yet accounted for by the Company.
- payments (other than post dated cheques) recorded by creditors but not yet processed by the Company.

I determine that all the abovementioned adjustments constitute timing differences for purposes of clause 4.4.1 of the Agreement. In determining such timing differences, differences arising from transactions effected in the periods more than 30 days before and after closing date should also be examined.'

[20] The expert then addressed himself to the following further questions:

'. . . as part of the exercise undertaken in terms of 1.1 to 1.4 above [the expert shall] be called upon to determine what the nature of the calculation should be to determine the "unrecorded and/or unreconciled trade creditors" as contemplated by clause 4.4.1;
and
1.5 what further steps, if any, need to be taken by the Company to prepare a reconciliation as required by the Agreement.'

It is necessary to quote his answer in full -

'My determinations in respect of the aforegoing are set out in the subparagraphs numbered 1,2 and 3 below:

1. The CLS [Creditors' Ledger System] download listing should be used for comparison with the creditors' statement balances for purposes of identifying (A-B).
2. A detailed calculation should be made of all timing differences (of the types identified above under 1.4) as at October 31, 1997. The following specific matters should be taken into account when the timing differences are determined:
    - the statement received from each creditor should be examined to ascertain whether or not any post-dated cheques have been taken into account. Where

these have been taken into account, a timing difference should be recorded as the cheques were not taken into account in the CLS balances.

- the Company should determine comprehensively the value of claims for credit raised which have not, to date, been contested by suppliers - the sampling and extrapolation exercise previously performed by the Company is not considered to be appropriate.
- pre-arranged advertising rebates claimed by the Company but not yet recognised on creditors' statements should also be recognised as timing differences.
- the Company should examine transactions which are dated more than 30 days before/after closing date to identify other potential relevant timing differences.
- previous workings should be reviewed and any potential errors and/or deficiencies should be corrected and adjusted - the following specific matters do not constitute a comprehensive listing and further enquiries or investigation by the parties may reveal additional items of this nature:

Shoprite represented that the timing differences had been adjusted for six payment-related differences totaling R2,702m identified by Price Waterhouse. It remains unclear whether the amount of R493 773 in respect of Tongaat Hulett has been appropriately treated as a "cheque" difference on the reconciliation Schedule SC1.20 to Shoprite's third submission. In addition, another difference of R133 833 for Flame Electrical has not, as acknowledged by Shoprite, been included in the timing differences. In respect of the R677 996 timing differences for manual advertising rebates also identified by Price Waterhouse, it is unclear from an examination of the abovementioned Schedule SC1.20 whether they have been included.

3. The above process should generate a comprehensive total for timing differences "C", which when added to - or deducted from - the previously determined (A-B), should yield a balance, 80% of which will constitute the "unrecorded and/or unreconciled trade creditors" provision which the Agreement requires to be made in the CDA.'

[21] From the aforegoing, it is clear that the expert was fully aware of the absence of records and supporting documents relating to past transactions and that detailed reconciliations had not been prepared by the company in the past. Nonetheless, he unequivocally rejected Shoprite's submission that only timing differences arising from transactions effected within the period of 30 days before and after the closing date need be examined. Similarly, he rejected the sampling and extrapolation exercise performed by the company and ruled that the

company should determine comprehensively the value of claims raised by the company which had not, by the date of his determination, been contested by suppliers. By the same token, it is clear from the answers to questions one, two and three that he rejected SAB's contention that there be a full and detailed reconciliation of all differences. The solution, therefore, lay between the two extremes adopted respectively by each party. Common sense would indicate that what was intended for the purpose of identifying timing differences was that transactions before and after the closing date were to be investigated to the extent that it was reasonable and practical to do so. Significantly, a solution along these lines was proposed by Shoprite following the determination. However, in the correspondence between the parties that followed, SAB adopted a stance which senior counsel for SAB found himself obliged to concede was opportunistic and which I would characterize as obstructive. In the result no finality was reached.

[22] The issue in the present case, however, is not whether one or other interpretation of the determination is the correct one but whether the determination is one which is valid in law. Counsel on both sides were agreed that in general the requirements for a valid arbitral award are equally applicable to an expert determination and we were referred to a number of authorities in which these requirements are set out. (See eg David Butler and Eyvind Finsen *Arbitration in South Africa Law and Practice* (1993) p 260-264; H S McKenzie *The Law of Building and Engineering Contracts and Arbitration* 5 ed (1994) p 191-196; Sir Michael J Mustill and Stewart C Boyd *Commercial Arbitration - The Law and Practice of Commercial Arbitration in England* 2 ed (1989) p 284-388 and David St John Sutton and Judith Gill *Russell on Arbitration* 22 ed (2003) p 254-260.) In summary, what is required is that all issues submitted must be resolved in a manner that achieves finality and certainty. The award or determination may therefore not reserve a decision on an issue before the arbitrator or expert for another to resolve. It must also be capable of implementation. On the other hand, what must be determined are the matters

submitted and no more. Depending on the questions, therefore, the determination may not necessarily result in a final resolution of a dispute between the parties. Generally, a court will be slow to find non-compliance with the substantive requirements and an award or determination will 'be construed liberally and in accordance with the dictates of commonsense' (Mustill & Boyd, *supra*, at 570). This, I think, must be particularly so when the questions for determination are themselves lacking in precision. A question as to what steps are to be taken to achieve a particular result is perhaps a good example. A court will, therefore, as far as possible construe an award or determination so that it is valid rather than invalid. It will not be astute to look for defects. As observed by Bingham J in *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 275 Estates Gazette 1134 (Queen's Bench Division (Commercial Court)) in the context of an arbitration award:

'. . . as a matter of general approach, the Courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way expecting, as is usually the case, that there will be no substantial fault that can be found with it.'

Where uncertainty in meaning does emerge regard may be had, as in the case of the interpretation of contracts, to the extrinsic circumstances surrounding or leading up to the award or determination. (*Cf Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at 304.)

[23] Counsel for Shoprite submitted that the expert's determination on the question of trade creditors did not meet the requirements of a valid determination. They pointed to the fact that the expert was fully aware that the majority of suppliers' statements received had 'carried forward' balances, that the company had not maintained proper records and that a comprehensive and detailed reconciliation of all differences was impossible in the circumstances, particularly having regard to the time deadline imposed by the agreement. Once

the 30-day cut-off proposal was rejected, the expert was obliged, so it was argued, to state for what exact period before or after the closing date transactions had to be examined to identify timing differences and how such timing differences were to be identified, in other words, how the exercise was to be performed where the data necessary for the exercise was not available. It was argued further that there was an inherent inconsistency between, on the one hand, the expert's acceptance that the company had complied with its obligation to obtain statements from suppliers and list all differences and, on the other hand, the rejection of a 30-day cut-off period; and that although the expert purported to lay down the steps that had to be taken in order to determine the quantum of timing differences, ie the letter 'C' in the formula, he had in fact failed to do so and the dispute between the parties remained unresolved.

[24] Counsel for SAB, on the other hand, emphasized that the determination was made by an expert in the field of retail auditing and was directed at experienced accountants well versed in the retail industry. Accordingly, so it was argued, the determination had to be construed according to the understanding of such people. Counsel submitted that once the expert had rejected both the expedient of a 30-day cut-off period and the requirement of a comprehensive reconciliation, common sense dictated that what was required was an exercise to identify timing differences to the extent that it was reasonable to do so on the records and information available; that the actual mechanics of such an exercise was not something that ought to present a problem to experienced accountants. In this regard counsel relied heavily on the evidence of Mr Marius Bosman, Shoprite's group financial manager, who testified at the oral hearing. In particular counsel referred to the following passages in the cross-examination of Bosman:

'Counsel: He [the expert] said you must go back and forward more than 30 days.
Bosman: Yes, the expert said that.
Counsel: Now when the expert said that, did you believe it was now impossible for you to carry out his determination?

Bosman: To my mind what the expert meant or how we understood the determination of the expert was to do what was possible and what was practical.'

The evidence continued:

'Counsel: You looked at the expert determination you said, and you said look, it's got an implied limitation. You say you'll do it if it's possible. Is that right?
Bosman: Yes, do it with the documentation that is available.
Counsel: You would like to say, the qualification is do it with what's available, the documentation that's available.
Bosman: Yes, that's correct.
Counsel: So you said to yourself well, I can carry this out if I imply the qualification that I must do it with such documents that I have.
Bosman: That is correct.'

A further exchange reads:

'Counsel: And therefore if they brought a Court action to get you to do what they say the expert determination says, you would defeat the Court action by showing the Court that the expert must have meant exactly what you say he meant.
Bosman: Yes.'

In the light of this evidence counsel for SAB argued that even if one were to ignore the call-back provision (to which I shall turn next), Shoprite could not succeed on the basis on which it had proceeded in the present case, ie that the determination in respect of trade creditors was invalid. Whether it would have any other remedies in law, said counsel, was not a question before the court *a quo* and hence not relevant to the appeal.

[25] The question that arises is whether it is in any event open to Shoprite to rely on an alleged breach of contract on the part of the expert for failing to determine properly the dispute referred to him and indeed to impugn the determination for lack of certainty notwithstanding its failure to invoke the call-back provision (quoted in para 14 above). It will be recalled that the clause

provided for a mechanism for resolving 'other areas of dispute regarding the nature and amount of adjustments to trade creditors' that were likely to arise 'dependent on the outcome of [the] determination'. Any party who wished to refer any 'further area of dispute' to the expert was entitled to identify the area of dispute by written notice to the expert within a period of 10 days of the determination. In the event of either party doing so, the expert was required to convene a meeting within 10 days at which the parties would be required to agree on the procedure to be adopted to enable the expert to determine the further areas of dispute and in the absence of agreement the necessary procedures were to be decided by the expert. Counsel for SAB emphasized that Shoprite in its submissions to the expert had advanced no alternative to the 30-day cut-off period it proposed to identify timing differences and yet its complaint was that the expert, after rejecting this proposal, had failed to determine precisely how far back and how far forward the company had to go to identify timing differences. Counsel argued that if the implied limitation accepted by Bosman was unacceptable to Shoprite or if it felt that the limitation was unclear, its remedy was to invoke the call-back provision. Having failed to do so, said counsel, Shoprite could not now seek to impugn the determination for lack of certainty.

[26] The court *a quo* rejected SAB's contentions on two grounds. As to the first, Davis J held that the call-back provision 'was intended to deal with additional areas of dispute, that is other than those which flowed from the determination itself'. He held that the disputes as to how far beyond the 30 day period OK was to go and how the timing differences were to be determined were disputes that flowed from the determination itself and were therefore not 'further areas of dispute'. I cannot agree. The learned judge's conclusion, in my view, is inconsistent with the plain wording of the call-back provision. It refers to 'other' or 'further' areas of dispute which are 'likely' to arise 'dependent on the outcome of your [the expert's] determination' and which are disputes 'regarding the nature and amount of adjustments to trade creditors'. As counsel for SAB point out, if

the interpretation of the learned judge was correct and the call-back provision was intended to deal only with additional areas of dispute which did not flow from the determination itself, it is difficult to imagine how these could ever be 'dependent on the outcome of the determination'. The disputes in issue clearly related to 'the nature and amount of the adjustments to trade creditors' and the questions giving rise to those disputes were not questions specifically asked in the referral letter but arose from the determination. The very object of the call-back provision was to enable the parties to have such 'further disputes' determined by the expert.

[27] The second ground on which the court *a quo* rejected SAB's reliance on the call-back provision was that the provision would not be applicable if the expert's determination failed to comply with the substantive requirements of law (as the learned judge found to be the case). In other words, so counsel for Shoprite contended, if the determination was invalid because it failed properly to answer the questions put to the expert, then in law there was no determination at all and accordingly no primary jurisdictional fact to trigger the call-back provision.

[28] When formulating the questions to be put to the expert, the parties clearly anticipated that the answers might not resolve the dispute relating to trade creditors and that there were 'likely to be other areas of dispute' that required determination arising from the answers to the five questions posed. Significantly, the provision for follow-up questions applied only to the determination in relation to the dispute concerning trade creditors and not to any of the many other disputed items raised in the referral letter. Shoprite's objection to the determination was ultimately that it lacked certainty and finality because it provided no clear answer to a question that was inherent in those that were formulated in the referral letter, namely precisely how the letter 'C' in the formula in clause 4.4.1 of the agreement was to be determined in the event of the 30-day cut-off proposal not being accepted by the expert. If, however, the determination had to provide answers to all possible areas of dispute 'regarding the nature and

amount of adjustments to be made in respect of trade creditors' before the call-back provision could be invoked, that provision would serve no purpose. But, as I have indicated, the parties clearly anticipated that further areas of dispute regarding the issue of trade creditors could arise from the determination. In these circumstances, the construction placed on the call-back provision by the court *a quo* strikes me as over-technical and one that could not have been what the parties intended. It follows that in the absence of the expert being required to answer follow-up questions as envisaged in the call-back provision he cannot, in my view, be held to have failed to fulfill his mandate to determine properly the dispute referred to him; nor, I think, can his determination be impugned on the ground of such a failure.

[29] Shoprite also advanced as a reason for not invoking the call-back provision that SAB would have objected to such a referral and this would have frustrated the process. But it is clear from the terms of the provision that either party was entitled to invoke the provision without the agreement of the other and that SAB could not have prevented the process had it been correctly and timeously invoked. There is accordingly no substance in this argument. It follows that the appeal on the issue of trade creditors must succeed.

[30] I turn now to the expert's determination in respect of the fixed assets of the company. The fixed assets register ('FAR') was a register containing the details of fixed assets of OK and was kept in compliance with the requirements of the Companies Act. The value of the assets should in principle be reflected in the fixed assets account of the company's general ledger ('GL') and the value of fixed assets reflected in the FAR and the GL should be the same. The GL in part determines the CDAs and, as explained above, could therefore have an effect on any shortfall payable by SAB in terms of clause 4.2 of the agreement. At the time of the preparation of the draft CDAs, the value of assets reflected in the GL exceeded that reflected in the FAR by some R8.8 million. Shoprite claimed that there should be a write-off of assets shown in the GL in this amount to reflect the

assets which it claimed were missing from the company at the closing date. SAB contended that the FAR was unreliable and that the difference between the FAR and the GL did not warrant a downward adjustment of the GL.

[31] In an attempt to verify the reliability of the FAR, the company selected 26 stores (out of a large number of retail outlets) and conducted an investigation into the reliability of the fixed asset register of each. Errors were discovered and it was found that in some cases assets had been moved from one store to another resulting in discrepancies in their respective fixed asset registers. The discrepancies were consolidated in order to derive an overall figure for the 26 stores and the result was then extrapolated across the entire company. SAB did not accept the result of this sampling exercise.

[32] The adjustment to the draft CDA proposed by Shoprite, and disputed by SAB, was recorded as item 12 of appendix 3 to the referral letter. The item reads:

'Write off assets not physically identified on FAR on sample basis R8,8m.'

The question put to the expert to resolve the dispute was formulated in the referral letter as follows:

'You are instructed to determine:

4.1 whether the adjustments reflected under items 11 to 14 on Appendix 3, which affect the values at which fixtures and fittings and computer equipment are stated in the draft Closing Date Accounts, are in accordance with the Agreement.

If not, what adjustments should properly be made and what further steps, if any, does the Company have to take?'

[33] In its submissions to the expert Shoprite contended that the FAR was reliable. Its claim for an adjustment of R8.8 million was in fact dependent on the reliability of the FAR. In support of this contention it relied on both the sampling exercise referred to above and a warranty in the agreement of sale as to the

reliability of the FAR. However, in its second submission to the expert, Shoprite referred to, and quoted from, a letter dated 24 April 1997 addressed by KPMG (OK's auditors) to the audit committee of the company in support of the proposition that no reliance could be placed on the unqualified nature of the audit report on the March 1997 accounts of the company. The relevant passage in Shoprite's submission to the expert reads as follows:

'4.16.1 The expert is referred to paragraph 6 of the letter by KPMG to the Audit committee of the Company annexed hereto marked Schedule "SC4.3" which records:

"The fixed assets records of the group are inadequate at this stage to properly support the balance reflected in the General Ledger. In addition fixed assets with a net book value of R5,5 million relating to closed stores have not yet been written off. We are however satisfied that the balance is conservatively stated taking into account the significant adjustments in prior years, but have included the R5,5 million in our schedule of audit differences. Management are aware of the problem and will address it when circumstances permit."

4.16.2 It is submitted that the unqualified audit report to the March Accounts by KPMG clearly relied upon the fact that management were made aware of the problem and had undertaken to address it by:

- the formation of a fixed asset project committee tasked with the setting up of an accurate fixed asset register with meaningful descriptions and values to enable adequate physical verification to take place;
- the move of the fixed assets register into the Millenium fixed assets computer software package.

4.16.3 To Shoprite's knowledge the Company's erstwhile management had not complied with such undertakings as at the Closing Date. In the light thereof no reliance can be placed on the unqualified nature of the said audit report. In support hereof Shoprite annexes hereto a memorandum of matters arising from the audit for the year ended 31 March 1997 by KPMG, marked schedule "SC4.4".'

The above notwithstanding, Shoprite persisted in the contention that the FAR should be accepted as being more reliable than the GL and that the value of

fixed assets reflected in the GL should be reduced by R8.8 million so as to bring it into line with the FAR.

[34] The expert answered as follows:

'As indicated above, SAB represented that the FAR is inaccurate. Furthermore, both parties acknowledge the processing of a large write-off in 1995 which was reflected in the audited financial statements for the financial year in which such write-off was made. It is impractical for me to determine whether or not the R8,8m should be adjusted for in the CDA.

I determine that adjustment, if any, should be made in terms of Item 12 in respect of specific assets which have been acquired (or scrapped) in the financial years following that in which the R87m write-off had been made, and that steps be taken by the parties to establish this.'

(It is necessary to explain that the words 'as indicated above' is a reference to the KPMG letter dated 24 April 1997 to which the expert referred in some detail when dealing with item 11 of appendix 3 which is not in issue.)

[35] The expert's amplified reasons for his determination read:

'I concluded that it was impractical for me to determine whether or not the CDA should be adjusted by the claimed R8,8m in respect of assets not physically identified but still reflected in the fixed asset register ("FAR"). My reasons were stated in the original Determination, namely that the FAR was accepted by both parties as inaccurate and that a large write-off of R87m had already been processed in the general ledger in 1995 without the corresponding write-offs being specifically recorded at the time in the FAR. While sympathetic to the submission by Shoprite that there might be assets included in the general ledger incapable of substantiation, I was concerned that the sampling exercise performed in order to estimate the R8.8m proposed adjustment had been based on the information contained in the FAR, a register which was accepted by both parties as being deficient. The possibility exists that amounts included in the proposed R8,8m adjustment may already have been covered by the R87m write-off in 1995, and I therefore determined that the CDA should be adjusted only for those "missing" assets which could be clearly identified as not having been written off in the R87m (namely those "missing" assets acquired after the write-off date or those assets acquired before that date which could be shown to have been scrapped after that date without corresponding adjustment in the general ledger). In

other words, my Determination accepted the principle that the “missing” assets be adjusted for, but aimed to ensure that there was no “double-counting” in respect of the quantum of the write-off proposed in applying the principle.

I considered Shoprite’s submission based on the warranty by SAB that the Company’s books and records had been properly maintained. However, I was required by the terms of my engagement to make determinations in respect of certain specific adjustments proposed in respect of fixed assets. The fact that the FAR was not properly maintained did not, in my opinion, entitle Shoprite to claim as an adjustment an amount not otherwise capable of substantiation. In my deliberations on fixed assets, I examined the submissions of the parties and the evidence presented in order to determine whether or not the proposed adjustment had been adequately substantiated. I concluded that it had not.’

[36] It will be observed that there were essentially three questions put to the expert in respect of the adjustment reflected in item 12 of appendix 3. They were: first, whether the adjustment was in accordance with the agreement, second, if not, what adjustments were to be made and, third, what steps, if any, was the company to take. The expert clearly rejected the contention that there should be an adjustment in the amount of the difference between the GL and the FAR. The answer to the first question was therefore unequivocally ‘no’. The answer to the second question was similarly unequivocal. The adjustments, if any, said the expert, were those in respect of specific assets which were acquired or were scrapped in the financial years following 1995, being the year in which the R87 million write-off was made. The answer to the third question put to the expert was that steps were to be taken ‘by the parties’ to establish (ie identify) such assets as had been acquired or scrapped during the period previously referred to. Counsel for Shoprite argued that it was this answer that rendered the determination uncertain and incapable of implementation. However, before dealing with counsels’ submission on this issue it is necessary to consider briefly two subsidiary criticisms levelled at the determination.

[37] It was argued that the expert erred in finding that the FAR ‘was accepted by both parties as inaccurate’; it was also argued that the determination

contained no express or implied finding that the FAR was unreliable. The point that was made was that while this was not an appeal from the determination, the 'error' gives 'some insight into the question whether the determination is certain or not'. I cannot agree. The observation that both parties accepted the inaccuracy of the FAR was clearly based on Shoprite's reliance on the KPMG letter to which the expert referred when dealing with item 11 of appendix 3. In any event, the implication that the expert found the FAR to be unreliable is readily apparent. This much is clear from his rejection of the sampling exercise and the concern he expressed that amounts included in the proposed R8.8 million adjustment may already have been covered by the R87 million write-off in 1995.

[38] A further criticism levelled at the determination was the statement that it was 'impractical' for him to determine whether or not the R8.8 million 'should be adjusted for in the CDA'. The suggestion was that the expert was declining to determine whether the adjustment referred to in item 12 was properly made. I do not think this is what the expert intended to convey. In my view, all that he was saying was that the adjustment could not be made on the basis presented to him and that any adjustment would have to be made with reference to specific assets that had been acquired or scrapped. I should add that various other criticisms were levelled at the determination but as these, in the main, concerned the correctness or otherwise of the expert's findings on fact, it is unnecessary to deal with them.

[39] I return then to the answer given to the third question. Counsel for Shoprite referred in the first place to the words 'the parties' and argued that this implied that the parties had to agree on a procedure to identify the assets in question. In support of such an implication counsel referred to correspondence in which this had been conceded on behalf of SAB (although the concession was later withdrawn) and argued that as there was no common ground between the parties on the point of departure for the exercise, the answer left the dispute unresolved. In my view, the argument sets too much store by the use of the word

'the parties'. The question put to the expert was what steps, if any, were to be taken by 'the company'. The reason for the reference to 'the company' was that the company, by then owned and controlled by Shoprite, held all the relevant material. SAB on the other hand, held none of the records and was not in a position to assist in pursuing any steps which the expert may have proposed. Following the determination, SAB was for the same reason unable to assist with the steps directed by the expert, namely to identify missing assets which had been acquired or scrapped subsequent to 1995. This much was conceded by Mr Douglas King who is the head office manager of Shoprite and who testified on its behalf at the oral hearing. I accordingly agree with counsel for SAB that the expert did not refer to 'the parties' in contradistinction to 'the company', but in contradistinction to himself. While the use of the words 'the parties' may have been less than precise, they do not justify the inference that the parties were required to agree upon a procedure for identifying missing assets.

[40] The main thrust of Shoprite's criticism of the determination, however, was that the expert failed to answer the third question, ie he failed to provide guidance as to how assets were to be identified or as counsel put it, he failed to provide a 'roadmap' and 'left it to the parties to resolve the dispute themselves'. In support of this submission much was made of subsequent correspondence to demonstrate the stance taken by SAB in the past and how it differed from that adopted by SAB in the present litigation. But it is necessary to emphasize that the question in issue is not what SAB might have said or done in the past, or which of two possible constructions of the determination may be the correct one, but whether as a matter of law the determination is certain and final and capable of implementation.

[41] As pointed out above, a court will be slow to find non-compliance with the substantive requirements of a valid determination and will construe a determination liberally and in accordance with the dictates of common sense. It will not examine the determination with a meticulous eye in an endeavour to find

some fault. The expert in the present case was not asked to specify a particular procedure that had to be followed (assuming it was possible for him to have done so) but to give an answer to the less precise question of what steps had to be taken. The answer he gave was that the steps to be taken were those necessary to identify assets that were missing and had been either acquired or scrapped after the write-off in 1995. The answer was not addressed to lay persons or lawyers but to experienced accountants in the employ of the company and Shoprite. They were told exactly what they had to look for and it was made clear that in doing so reliance was not to be placed on the FAR. In these circumstances, I cannot agree that the determination was rendered invalid for want of directions as to how to go about tracing the missing assets.

[42] The fact that the determination made it necessary to identify specific assets rather than rely on the FAR made the task undoubtedly more onerous. Shoprite's accountants hardly needed the expert to tell them what they had to do. Shoprite's real complaint was the onerous nature of the exercise required by the determination rather than its uncertainty. As Bosman conceded in evidence, the acquisition and scrapping of assets would normally be recorded in documents. Typically, written authority would be required for the acquisition of an asset and the greater the amount involved the more senior would be the person authorizing the expenditure. The same would apply to the scrapping of an asset. The exercise required by the determination involved the laborious task of tracing the documents evidencing the acquisition and scrapping of specific assets subsequent to 1995. This was hardly what Shoprite would have wanted from the determination. But that is what the determination required and that, in my view, was both certain and capable of being carried out. It follows that the appeal against the court *a quo's* finding on the issue of the company's fixed assets must likewise succeed.

[43] The appeal is upheld with costs, including the costs occasioned by the employment of two counsel. The order of the court *a quo* is set aside and the following is substituted in its place:

> 'The application is dismissed with costs, including the costs occasioned by the employment of two counsel.'

D G SCOTT
JUDGE OF APPEAL

CONCUR:

LEWIS JA
VAN HEERDEN JA
MALAN AJA
KGOMO AJA