THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1100/2022

In the matter between:

THE SPAR GROUP LIMITED	**FIRST APPLICANT**
THE SPAR GUILD OF SOUTHERN AFRICA NPC	**SECOND APPLICANT**
SPAR SOUTH AFRICA (PTY) LTD	**THIRD APPLICANT**

and

TWELVE GODS SUPERMARKET (PTY) LTD	**FIRST RESPONDENT**
MONOTHENDRE TRADING (PTY) LTD	**SECOND RESPONDENT**
VAMVAKOU SUPERMARKET (PTY) LTD	**THIRD RESPONDENT**
TRIGONA SUPERMARKET (PTY) LTD	**FOURTH RESPONDENT**
ELENA SUPERMARKET (PTY) LTD	**FIFTH RESPONDENT**
EUROTAS (PTY) LTD	**SIXTH RESPONDENT**
MYSTRA (PTY) LTD	**SEVENTH RESPONDENT**
TAYEGATOS SUPERMARKET (PTY) LTD	**EIGHTH RESPONDENT**
VRESTHENA (PTY) LTD	**NINTH RESPONDENT**

MELISANDRE TRADING (PTY) LTD	**TENTH RESPONDENT**
ONEIROI (PTY) LTD	**ELEVENTH RESPONDENT**
PARNONA (PTY) LTD	**TWELFTH RESPONDENT**
ZANELA INVESTMENTS (PTY) LTD	**THIRTEENTH RESPONDENT**
KLEOMENIS GIANNACOPOULOS	**FOURTEENTH RESPONDENT**
CHRISTOS GIANNACOPOULOS	**FIFTEENTH RESPONDENT**
YIANNI GIANNACOPOULOS	**SIXTEENTH RESPONDENT**
HARALAMBOUS GIANNACOPOULOS	**SEVENTEENTH RESPONDENT**

Neutral citation: *Spar Group Limited and Others v Twelve Gods Supermarket (Pty) Ltd and Others* (1100/2022) [2025] ZASCA 07 (30 January 2025)

Coram: **MABINDLA-BOQWANA and KGOELE JJA and BAARTMAN, DOLAMO and MASIPA AJJA**

Heard: 4 September 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and released to SAFLII. The date for hand down is deemed to be 30 January 2025 at 11h00**.**

Summary: Superior Courts Act 10 of 2013 (the Superior Courts Act) – Reconsideration of application for special for leave to appeal – s 17(2)(*f*) of the Superior Courts Act – referral for oral argument – special circumstances to be shown.

Contract law – exercise of unilateral discretionary power to vary terms of contract – whether *arbitrio bono viri* standard applies – whether power exercised reasonably, honestly and for a proper purpose.

ORDER

On application for reconsideration: referred by Petse AP in terms of s 17(2)(*f*) of the Superior Courts Act 10 of 2013:

The application for reconsideration of the application for special leave is dismissed with costs, such costs to include those of two counsel, where so employed.

JUDGMENT

Mabindla-Boqwana JA and Masipa AJA (Kgoele JA and Baartman and Dolamo AJJA concurring):

Introduction

[1] The applicants brought an application for special leave to appeal against a decision of the full court of the KwaZulu-Natal Division of the High Court, Pietermaritzburg (per Moodley J, with Hadebe and Bezuidenhout JJ concurring), which was dismissed by two judges of this Court. Subsequently, the applicants applied for reconsideration of the dismissed application for special leave in terms of s 17(2)(*f*) of the Superior Courts Act 10 of 2013 (the Superior Courts Act). Petse AP referred the application for oral argument in terms of section 17(2)(*d*) of the Superior Courts Act and directed the parties to be prepared to argue the merits of the appeal, if called upon to do so.

[2] Section 17(2)(*f*) of the Superior Courts Act permits the President of this Court, in exceptional circumstances, to refer the decision of the judges refusing the petition

'to the [C]ourt for reconsideration and, if necessary, variation'. This Court effectively reconsiders the application for special leave to appeal. To obtain special leave to appeal, not only must the applicants demonstrate reasonable prospects of success on appeal, they must also show special circumstances warranting a further appeal to this Court. In *Cook v Morrison and Another*,[1] this Court stated that special circumstances 'may include that the appeal raises a substantial point of law; or that the prospects of success are so strong that a refusal of leave would result in a manifest denial of justice; or that the matter is of very great importance to the parties or to the public'.[2]

[3] The issue referred for reconsideration in this case raises a point of law. It is whether the principle of *arbitrio boni viri*, expressed by this Court in *NBS Boland Bank Ltd v One Berg River Drive CC and Others; Deep and Another v Absa Bank Ltd; Friedman v Standard Bank of SA Ltd* (*NBS Boland*),[3] applies in this case. In other words, whether discretionary powers permitting unilateral alteration of a term of contract by the applicants, are subject to the *arbitrio boni viri* standard.

[4] The content of this standard has featured in various judgments of this Court. In *Juglal N O and Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division*,[4] the Court articulated the standard as follows:

'[I]n exercising the discretionary powers inherent in operating and selling the business and the assets the respondent is obliged to act *reasonably* and to *exercise reasonable judgment* (*arbitrio boni viri*).'[5] (Emphasis added.)

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[1] *Cook v Morrison and Another* [2019] ZASCA 8; [2019] 3 All SA 673 (SCA); 2019 (5) SA 51 (SCA).
[2] Ibid para 8.
[3] *NBS Boland Bank Ltd v One Berg River Drive CC and Others; Deep and Another v Absa Bank Ltd; Friedman v Standard Bank of SA Ltd (NBS Boland)* [1999] ZASCA 60; 1999 (4) SA 928 (SCA); [1999] 4 All SA 183 (SCA) para 25.
[4] *Juglal N O and Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division* [2004] ZASCA 33; [2004] 2 All SA 268 (SCA); 2004 (5) SA 248 (SCA).
[5] Ibid para 26.

[5] In *Dharumpal Transport (Pty) Ltd v Dharumpal (Dharumpal)*,[6] it was held that the seller must at the least 'exercise an *honest judgment* in deciding whether the guarantor is sufficient and suitable'. A guarantor could not be rejected from '*pure caprice*'. In *Mount Amanzi Share Block Limited v Body Corporate of Windsor Heights Sectional Title Scheme and Others*,[7] this Court held that:

'The evidence of the appellant detailing how the increase in levies was calculated and apportioned to the respondents, establishes that the appellant exercised its discretion *arbitrio boni viri*, namely both *reasonably and honestly*'.[8]

What is extracted from these decisions is that the *arbitrio boni viri* standard requires the exercise of discretionary powers conferred on a party under a contract, where this standard applies, to be done in good faith, with reasonable judgment and without arbitrariness.

[6] This necessitates an objective exercise. In *Absa Bank Ltd v Lombard*,[9] this Court had to determine whether discretion was exercised 'reasonably'.[10] In that case, the prime lending rate had been increased, prompting the bank to raise the interest rate applicable on a loan. The bank, however, subsequently failed to reduce the interest rate when the prime lending rate had decreased. The Court held that in the absence of any change in the borrower's risk profile, the bank's conduct was *prima facie* unreasonable.[11]

[7] The clause under scrutiny in the present matter concerns an alteration of credit facilities and drop shipment by the applicants, in terms of a contract concluded between them and the first to thirteenth respondents. We refer to the applicants

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[6] *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A) at 707A-B.
[7] *Mount Amanzi Share Block Limited v Body Corporate of Windsor Heights Sectional Title Scheme and Others* [2017] ZASCA 38.
[8] Ibid para 47.
[9] *Absa Bank Ltd v Lombard Absa Bank Ltd v Lombard* [2005] ZASCA 27; 2005 (5) SA 350 (SCA).
[10] Ibid paras 9, 13-15 and 20.
[11] Ibid para 20.

collectively as SPAR and the first to thirteenth respondents as the Giannacopoulos Group. The Giannacopoulos Group are entities which are retail members of the SPAR voluntary trading group, which we discuss below. They all have a common shareholder, the Giannacopoulos Family Trust. The fifteenth, sixteenth, and seventeenth respondents, collectively referred to as the Giannacopoulos brothers, have been the principal persons managing the Giannacopoulos Group's relationship with SPAR. The respondents are collectively referred to as the Giannacopoulos respondents.

Factual background

[8] The first applicant, the SPAR Group Limited, forms part of the SPAR Group of companies that operate and conduct business internationally. It is one of the largest retailers in South Africa. It is the sole shareholder in the third applicant, SPAR South Africa (SPARSA). SPARSA operates, *inter alia*, as a distribution centre of SPAR products through various divisions across South Africa in respect of which it and/or SPARSA grants credit facilities (if approved) to members of the second applicant, the SPAR Guild of Southern Africa NPC (the Guild).

[9] The Guild was established to facilitate, promote and regulate the SPAR voluntary trading group system. Members of the Guild are granted the right to participate in this trading group using the SPAR trademark names, subject to terms laid down by the Guild.

[10] SPAR's operations are governed by standardised agreements that regulate relationships within the group. Acting as a wholesaler, SPAR procures goods at optimal prices, warehouses them, and exclusively distributes them to Guild retailer members at competitive wholesale rates. It ensures that members benefit from favourable pricing and streamlined logistics.

[11] The Guild upholds the integrity and standards of the system, operating under a governing body of directors in accordance with its Memorandum of Incorporation and membership rules. Termination of this membership results in the cessation of rights to participate in the system. Credit facilities extended to the Guild's retailer members are governed by terms outlined in approved credit applications. To secure these debts, SPAR requires notarial bonds and suretyships from Guild members. Additionally, SPAR either holds the leases or sub-leases for the members' business premises or, alternatively, Guild members must cede their lease agreements for these premises to SPAR.

[12] The relationship between SPAR and the Giannacopoulos Group spans some 23 years. The Giannacopoulos Group operates 23 SUPERSPAR and SPAR stores and 22 TOPS liquor stores. The Group employs approximately 2800 individuals. Each of the entities in the Group is governed by a membership agreement between the Giannacopoulos Group and the Guild.

[13] In addition, each member of the Giannacopoulos Group has entered into a Standard Form of Application for Credit Facilities (Credit Facilities Agreement) with SPAR. This enables a retailer to purchase goods from the SPAR warehouse on credits and utilise 'drop shipment' services. In a drop shipment transaction, the retailer is authorised to contact the supplier directly and place an order. The supplier in turn debits SPAR directly, and SPAR is required to effect payment of these amounts effectively, acting as guarantor of such transactions.

[14] Relevant to these proceedings is clause 5 of the Credit Facilities Agreement concluded between SPAR and members of the Giannacopoulos Group, which provides:

'Credit facilities are granted by the seller to the [a]pplicant, *at the seller's discretion, and a seller may, without notice, at any time vary or terminate such facilities*. Until otherwise notified by the seller, the [a]pplicant must pay the seller as follows:

Warehouse transactions: 19 days from date of weekly statement;

Drop shipment transactions: 31 days from date of weekly statement;

. . .' (Emphasis added.)

[15] Over the few years leading to the institution of the proceedings in the KwaZulu-Natal Division of the High Court, Pietermaritzburg (the high court) in November 2019, the relationship of trust between SPAR and the Giannacopoulos Group soured. SPAR no longer wished to trade with, supply stock, grant credits, guarantee the drop shipment purchases to the Giannacopoulos Group or allow them to continue to trade under the SPAR brand.

[16] The facts leading to the breakdown are not relevant to the determination of the issue in this application, save to mention they included allegations that the Giannacopoulos respondents had violated various labour laws; attempted to circumvent the SPAR trade model by securing direct supplies, demonstrating disloyalty; operated stores in competition with SPAR; and that one of the Giannacopoulos brothers engaged in conduct that allegedly brought the SPAR brand into disrepute. The Giannacopoulos respondents contend that these allegations are rooted in animosity that developed between one of the Giannacopoulos brothers and two directors of the Guild and SPAR. This allegedly arose when the Giannacopoulos brother concerned sourced warehouse products from alternative suppliers instead of SPAR's warehouse suppliers. The facts are comprehensively dealt with in the judgment of the full court.[12]

[12] *Spar Group Limited and Others v Twelve Gods Supermarket (Pty) Ltd and Others* [2022] ZAKZPHC 29; 2022 JDR 1909 (KZN).

[17] In 2019, SPAR issued the Giannacopoulos Group with a notice to terminate their membership in the Guild. This was followed by SPAR launching two *ex parte* applications in the high courts in Pietermaritzburg and Pretoria, allowing them to assume control over the retail stores operated by the Giannacopoulos Group, as a way of perfecting the notarial bonds, which were granted. These orders were, however, overturned by the two courts, granting punitive costs orders against SPAR.

[18] After these *ex parte* orders were set aside, SPAR amended the Credit Facilities Agreement and drop shipment terms. At a meeting held on 23 October 2019, SPAR detailed its rationale for restricting and altering the credit and drop shipment terms for the Giannacopoulos Group as follows:

(a) SPAR's review of the Giannacopoulos Group's financial records revealed significant cash flow difficulties. The Group's liquid assets were reported as R255 million short of its current liabilities, suggesting a substantial liquidity gap, raising concerns about the Giannacopoulos Group's capacity to fulfil its short-term obligations;

(b) multiple instances of returned payments from the Giannacopoulos Group stores heightened SPAR's concerns regarding the Group's ability to maintain timely payments; and

(c) several compliance orders issued by the Department of Labour to various stores within the Giannacopoulos Group, totalling around R14 million, compounded SPAR's apprehension. SPAR also noted a risk of further compliance orders affecting the remaining stores, raising additional concerns over the Giannacopoulos Group's financial stability and regulatory compliance.

These factors, according to SPAR, collectively necessitated immediate adjustments to credit facilities and drop shipment arrangements under the discretionary powers granted in the credit facility agreement.

[19] Arising from the concerns held by SPAR, the meeting resolved as follows:

'9.1 That the credit terms, both in respect of the warehouse account and drop shipment account should be amended from 19 and 31 days to 7 days in respect of both accounts;

9.2 That drop shipment supplier credit limits would be imposed for the top 10 suppliers;

9.3 That documentation would be required from [t]he Giannacopoulos Group and upon receipt of the documentation and an indication of their ability to comply with the revised credit terms would result in the credit terms being reviewed in due course.'

[20] The Giannacopoulos respondents were informed of these decisions on 25 October 2019, marking a significant change in the terms of the Giannacopoulos Group's credit and supplier relationships with SPAR. The Giannacopoulos respondents contended that under the competitive pricing and rebate system, the Guild retail members were permitted to purchase warehouse products from alternative sources if they could secure lower prices to those offered by SPARSA. They further claimed that SPARSA's prices for warehouse products had been significantly higher by over 1.5 percent. They did not dispute that one of the Giannacopoulos' brothers facilitated access to alternative suppliers, leading to revenue losses for SPARSA, which negatively affected the performance bonuses of two directors.

[21] In 2020, SPAR issued a second notice to terminate the membership of each of the Giannacopoulos Group members. After attempts to resolve these restrictions on the quantity and value of goods ordered proved unsuccessful, the Giannacopoulos respondents filed two urgent applications in the high court.

[22] The first application concerned (a) whether the Guild had validly terminated the membership of the members of the Giannacopoulos Group from the Guild in 2019 and/or 2020; and (b) whether the credit terms of the SPAR Group with the Giannacopoulos Group (in respect of the time allowed for repayment in the quantity

they could purchase) was validly amended in accordance with the terms of the approved credit facilities. This application was referred to as the 'termination application' before the high court.

[23] The second application concerned the question whether the imposition of limits on the quantity of goods that the Giannacopoulos Group could purchase from the SPAR Group and its drop shipment suppliers was valid and reasonable and in accordance with the approved credit application. This application was referred to as the 'drop shipment application' before the high court.

[24] Although not formally consolidated, these applications were heard together in the high court by Barnard AJ (court of first instance). Barnard AJ upheld both applications. Both judgments were handed down on 17 July 2020. In respect of the termination application, Barnard AJ granted an order:

(a) setting aside the 2019 and 2020 decisions and notices of termination of the memberships of Giannacopoulos Group; and

(b) setting aside the decision taken on 23 October 2019 by the SPAR Group to vary the credit facilities in terms of clause 5 of the standard terms of the credit application in respect of the Giannacopoulos Group.

Costs were awarded against SPAR.

[25] Barnard AJ reasoned as follows:

'. . . I am not persuaded that the said amendments were done in good faith and I hold the view that regardless of clause 5 of the agreement that fairness would dictate that the process ought to have been undertaken in consultation with the [a]pplicants to so at the very least enable them the chance to address any fears that Spar may have had at the time.

On this score too I have come to the conclusion that the amendments to the credit terms extended to the [a]pplicants are to be set aside.'

[26] As regards the drop shipment application, Barnard AJ granted an order in terms of the notice of motion:

'[D]eclaring the imposition of restrictions by [SPAR] . . . on the quantity of drop shipment supplies to be unlawful and invalid.'

[27] He reasoned that he was unable to find any reasonable and good faith reasons for the restrictions imposed by SPAR. In his view, clause 5 of the credit agreement afforded SPAR a discretion only in relation to the time period for payment and not the quantity or amount of goods that could be purchased by the Giannacopoulos Group. He found the imposition of the restrictions unlawful and invalid.

[28] Barnard AJ granted leave to appeal against both his orders to the full court. The full court, in a judgment penned by Moodley J, dismissed the appeals and approved of the submissions made on behalf of the Giannacopoulos respondents, stating the following:

'. . . Mr Symon pointed out, correctly in my view, that clause 5 should not be construed literally or narrowly, but considered within the context of the reciprocal nature of the contractual relationship between the parties. As retail members of a trading group, the respondents are bound to purchase their stock from SPAR and are therefore obliged to accept SPAR's credit terms in order to operate their businesses. He argued, with merit, that the advancing of goods on credit is not a future contract that is subject to a decision by SPAR, on each occasion, whether to enter into such agreement or not. It is an ongoing relationship and part of a larger whole, which is acknowledged in the appellants' statement that the credit agreement is part of an ''ongoing commercial relationship'' between the parties. I am also in agreement with his proposition that SPAR's discretion must be exercised reasonably and honestly because of the reciprocal nature of the trading model, as I am unable to find cogent authority for the submission that SPAR's discretion under clause 5 of the credit agreement should be exercised unfettered in the following cases.'

[29] The full court relied on two judgments: *NBS Boland*[13] and *Erasmus and Others v Senwes Ltd and Others.*[14] Having regard to these two judgments, it concluded that SPAR was obliged to exercise its discretion to alter clause 5 of the credit agreement *arbitrio boni viri* but failed to do so. It questioned the timing of the reduction in the credit available to the Giannacopoulos Group and found it to be suspect. In its view, this was an attempt by SPAR to assume control of the Giannacopoulos Group's business operations, which it had unsuccessfully sought through the perfection application, through alternative means.

[30] The full court further found that the limitation on drop shipment by SPAR amounted to a sabotage against the Giannacopoulos Group's business. It criticised SPAR's conduct as a demonstration of a lack of *bona fides*. Particularly, the covert approach taken to terminate the Giannacopoulos Group's Guild membership; the perfection of the notarial bond through an *ex parte* application; and subsequent credit reductions. It rejected SPAR's claims of the Giannacopoulos Group's financial instability, finding the assertions regarding their creditworthiness unfounded, especially given that the termination that triggered the notarial bond was deemed invalid.

The issue for reconsideration

[31] As indicated, the issue referred for reconsideration is limited to whether SPAR's unilateral contractual discretionary power was subject to the *arbitrio boni viri* standard, and if so, whether that obligation was met. Counsel for SPAR argued that the alteration of the Giannacopoulos Groups' credit and drop shipment terms was a permissible exercise of its unilateral discretion under the contract, which required no justification. According to him, the Giannacopoulos Group had never

[13] *NBS Boland* fn 3 para 25.
[14] *Erasmus and Others v Senwes Ltd and Others* [2005] ZAGPHC 5; 2006 (3) SA 529 (T); (2006) 27 ILJ 259 (T).

acquired any contractual rights to credit. It was entirely within SPAR's discretion to determine, from time to time, whether to offer credit to its members and, if so, on what terms. SPAR could never impose those terms on its members because it was always up to the members to decide whether to accept the terms SPAR offered them or not. In any event, so counsel submitted, SPAR's exercise of its discretion was reasonable and justifiable in the circumstances of the case.

[32] Both parties' arguments focused on *NBS Boland*.[15] That case dealt with the question whether a clause in a mortgage bond, conferring upon the mortgagee the right to unilaterally increase the original rate of interest payable by the mortgagor, was valid. For the purposes of issues in that case, the Court saw no difference between the clause it had to consider and a clause in an overdraft, conferring upon a banker the right to increase the rate of interest payable on an overdraft amount.

[33] It considered various judgments with opposing views on these types of clauses. Some decisions found clauses allowing unilateral change to interest rates invalid because the rate of interest payable by the lender is one of the essential terms of the contract, which must be rendered certain by the parties' agreement. If it was not fixed, the contract was void for vagueness.[16] Others found such clauses to be valid, (a) because the obligation to pay the interest was not one of the *essentialia* of a contract or (b) the bank's power had to be exercised *arbitrio boni viri*.[17]

[34] The reasoning behind the finding in cases holding the clause to be invalid, was rooted in the rule that the power to fix prestation was void for vagueness. This was drawn from 'the view of Roman Dutch writers in regard to the determination of

[15] *NBS Boland* fn 3.
[16] Ibid para 6.
[17] Ibid paras 7 and 8.

the price in a sale and a rental in a lease'.[18] The Court went on to discuss how various European jurisdictions and the United States treated such clauses and remarked:

'It will thus be seen that the views of our writers that a sale or lease containing a power to fix the price or rental is not only illogical but also sadly out of step with modern legal systems. It is problematical whether we should still follow those rules, and I shall revert to this question. For present purposes it is, however, unnecessary to decide the point. This is so because the above views were not articulated in respect of a contractual power to fix a prestation other than a price or rental, and there is ample reason not to extend the common law rule to other types of contractual discretions, and therefore not e.g. to a discretionary power provided for in a contract of loan.'[19]

[35] The Court summarised its views as follows:

'In sum I am of the view that, save, perhaps, where a party is given *the power to fix his own prestation, or to fix a purchase price or rental, a stipulation conferring upon a contractual party the right to determine a prestation is unobjectionable*. . .

All this does not mean that an exercise of such a contractual discretio[n] is necessarily unassailable. It may be voidable at the instance of the other party. *It is, I think, a rule of our common law, that unless a contractual discretionary power was clearly intended to be completely unfettered, an exercise of such a discretion must be made arbitrio bono viri*.'[20] (Emphasis added.)

[36] The Court thus held that the discretionary powers vested in the mortgagees by the relevant deeds must be subject to this inherent limitation. It left open the question whether such clauses would be contrary to public policy, as the issue before it was solely whether the clause was invalid.

[37] It also recognised that, there may be a situation, albeit unlikely, where 'a stipulation may be so worded that an absolute discretion to fix a prestation is conferred on one of the parties'.[21] It, however, declined to express a view of whether

[18] Ibid para 9.
[19] Ibid para 16.
[20] Ibid paras 24 and 25.
[21] Ibid para 30.

such a stipulation would be invalid, as being in conflict with public policy, or whether the fixing of the prestation may only be assailed when it is done in bad faith.

[38] Interestingly, while the Court declined to answer the question whether the common law rule holding clauses conferring power to one of the parties in sales and leases to fix the purchase price or rental invalid, in passing, it saw no logical rationale for drawing a distinction between such a stipulation with other similar stipulations conferring on a party to a contract a discretion to determine a prestation.

[39] The Court referred to several cases, with approval, to support its view. It is important to briefly mention these cases, as the parties in the present matter differ as to the extent to which the courts in those cases applied the *arbitrio boni viri* principle. According to SPAR, all these cases were confined to instances where one party to a contract was given the power to determine the prestation of the other. Which it submits, is not the case here. While the Giannacopoulos respondents, on the other hand, argue that these cases are not so limited.

[40] First, is *Dharumpal*[22] where a contract of sale had a stipulation that allowed a seller a power to approve a proposed guarantor. The Court saw no reason why a court could not determine whether the seller had exercised the power *arbitrio boni viri* in rejecting the proposed guarantor. Second is *Moe Bros v White*,[23] the plaintiff had agreed to erect a cream operator to the satisfaction of the defendant. The Court held that the plaintiff had undertaken to leave the plant in 'good [working] order to the satisfaction of a reasonable man'.[24]

[22] *Dharumpal* fn 6 at 707A-B.
[23] *Moe Bros v White* 1925 AD 71.
[24] Ibid at 77.

[41] The third case is *Holmes v Goodall and Williams Ltd*.[25] In that case, the employer suggested that a dismissed employee had agreed to perform their contractual obligations to the complete satisfaction of the employer. The Court rejected the argument, holding that 'to their complete satisfaction' must mean that 'a reasonable man must be completely satisfied'.[26]

[42] In the fourth case, *Bellville-Inry (Edms) Bpk v Continental China (Pty) Ltd*,[27] the court held that a clause conferring contractual power to renew a lease '[f]or as long as the lessee in his sole discretion is satisfied that there is kaolin available on the property in economically workable quantities', was not void for vagueness because the power had to be exercised *arbitrio boni viri*.[28]

[43] In the fifth case of *Remini v Basson*,[29] the court held that the power to resile from a loan agreement, which was also contested for its validity, could only be exercised *arbitrio boni viri*.[30] The parties referred to the common law rule stipulated in *NBS Boland* as the '*NBS Boland* rule'. We shall henceforth refer to the rule as such.

Does the '*NBS Boland* rule' apply in this case?

[44] As stated, Counsel for SPAR contended that the '*NBS Boland* rule' applies only when a contractual power has been given to one party to fix the prestation, ie *to impose duties binding on the other party*. It does not apply to the exercise of any other discretionary contractual power. In the present case, he contended, because the Giannacopoulos Group never acquired any contractual rights to credit facilities at

[25] *Holmes v Goodall and Williams Ltd* 1936 CPD 35.
[26] Ibid at 40.
[27] *Bellville-Inry (Edms) Bpk v Continental China (Pty) Ltd* 1976 (3) SA 583 (C).
[28] Ibid at 591E-H.
[29] *Remini v Basson* 1993 (3) SA 204 (N).
[30] Ibid 210H-I.

all, the exercise of SPAR's discretion does not determine or impose any contractually binding prestation on the Giannacopoulos Group, who have an election whether to continue with the current arrangement.

[45] The argument advanced by SPAR's counsel was that the granting and acceptance of a credit facility (referred to in clause 5), each time, constituted a new contract. This was unlike the situation in *NBS Boland*, where there was an existing contract in place, under which there was an obligation to pay interest by the mortgagor. In that case, the bank had to exercise the power to fix the prestation, ie interest to be paid by the mortgagor, reasonably and in good faith.

[46] The key issue then is whether the premise of SPAR's argument is correct. Can the Credit Facilities Agreement that SPAR entered into be understood on the basis that it afforded SPAR an opportunity to make discrete offers of credit, from time to time, which the Giannacopoulos Group were free to accept or decline. If this premise is correct, then the '*NBS Boland* rule' is not engaged. To make an offer carries no duty to ensure that the offer is reasonable, it is simply a basis for negotiations that may be accepted, rejected or elicit a counteroffer.

[47] SPAR had concluded the Credit Facilities Agreement with the Giannacopoulos Group as to the terms upon which it extended credit (and other facilities) to the Giannacopoulos Group. It sought to alter the terms on which credit would continue to be given. If, by so doing, SPAR was altering the performance due by the Giannacopoulos Group under the *existing contract*, then the '*NBS Boland* rule' is of application, because the Giannacopoulos Group was required to comply in order to continue receiving credit. On this construction, the conduct of SPAR is a unilateral alteration of the performance due from the Giannacopoulos Group. If,

however, the conduct of SPAR can be understood as simply an offer to enter into a new contract then the '*NBS Boland* rule' would not apply.

[48] We take the view that SPAR's construction is incorrect. We need not repeat in detail the trite principles of application to the interpretation of a contract. Suffice to say, consideration must be given to the language used, the context and purpose of the document. The Giannacopoulos Group members completed applications for credit facilities which contained 'Standard Terms of Sale'. Clause 5, together with other clauses, form part of these terms. Some of these applications were completed some twenty years ago. These applications were accepted by SPAR. It seems to be uncontested that the credit terms remained unchanged for all that period, until 2019. Although the parties could not point to a specific period at which the standard form applications were completed and accepted, counsel for SPAR accepted during argument that there was an *existing contract*.

[49] The nature and existence of the contract seems to be accepted by SPAR in their papers. In SPAR's preliminary answering affidavit, dated 11 November 2019, the deponent states that each of the entities in the Giannocopoulos Group were required to apply for credit facilities and for that purpose completed credit application forms. Further, that each of these entities were bound by the terms of the credit application. And further that, but for the provisions of the credit application, they would have no right to purchase goods from SPAR on credit 'and that the right to credit extended in terms of the credit application, on its approval, is a right that came into existence simultaneously with the right afforded to [SPAR] to vary or terminate the credit facility in accordance with [clause 5]'.

[50] In our view, clause 5 cannot be interpreted in isolation from the other terms contained in the document. The preamble of the Standard Terms of Sale reads:

'The applicant is aware that the seller acts as a wholesaler of goods and a provider of services and, as such, may make a profit on its trading with the applicant. The applicant further confirms that he is aware that the seller plays an active role in securing dropshipment trading deals (that is the securing of discounts and rebates) and in providing credit to the applicant for dropshipment transactions and that a portion of the dropshipment deal (that is a portion of such discounts and rebates) is retained by the seller as the seller's profit.'

[51] Clause 1 governs incidental credit agreements and obligations to pay promptly. Clause 3 regulates default and clause 5 deals with terms of credit. Other clauses regulate terms such as certificate of indebtedness, charge for goods returned, allocation of payment in advance, SPAR reserving ownership of the goods sold and an undertaking the applicant for credit makes, that it may not pass any notarial bonds over its movable assets, nor pledge any of its assets without SPAR's written consent. An applicant also agrees to give SPAR such security (as including Special and General Notarial Bonds and Suretyships) for the applicant's indebtedness from time to time, as SPAR may in its discretion require. These clauses are indicative of a fixed arrangement applicable, once SPAR approves an application submitted by an applicant.

[52] As stated, in terms of clause 5:

'Credit facilities are granted by the seller to the [a]pplicant at the seller's discretion, and a seller may, without notice, at any time, vary or terminate such facilities. Until otherwise notified by the seller, the [a]pplicant must pay the seller as follows:

Warehouse transactions: 19 days from date of weekly statement;

Drop shipment transactions: 31 days from date of weekly statement;

. . .'

[53] From the plain reading of clause 5, it is apparent that variation must relate to existing terms of an 'ongoing' agreement. If the conferral of the power to vary the

terms concerned separate credit agreements yet to be concluded, there would be no need to vary or terminate terms of a hypothetical future agreement.

[54] The parties explicitly agreed on terms upon which credit facilities for warehouse and drop shipment transactions would be regulated, even though the discretion as to whether to grant the credit facility remained with SPAR. Once the credit facility was approved, the Giannopoulos Group became bound to perform under the agreed terms. The binding nature demonstrates that the credit terms were not merely negotiable offers but part of a pre-existing contractual framework. Not only was there an agreement to grant credit, but credit, over a long period of time, was extended on this basis to the Group. And further, the grant of credit and drop shipment was part of the larger framework of rights and obligations that bound members of the Guild. By exercising its discretion, to vary credit terms, SPAR directly impacted on obligations of the Giannocopoulos Group under the existing agreement. In those circumstances, we do not see how the exercise of SPAR's discretion does not determine or impose any binding obligation on the Giannocopoulos Group.

[55] If SPAR's construction were to be correct, the question is this: how did SPAR lawfully terminate the existing contract? Plainly, the notion that the Giannacopoulos Group was at liberty to reject an offer for credit rests upon the assumption that there was no existing contract by which it was bound, or that such contract was or could be lawfully terminated by SPAR. If the Giannacopoulos Group remained bound by the agreement, and hence subject to the unilateral change of terms, which we have found it was, then the '*NBS Boland* rule' must be found to govern how SPAR was required to act in making the changes in the agreement.

[56] Counsel for SPAR submitted that this Court should be mindful of the weight of authority holding the principle that exercise of contractual discretionary power is ordinarily not subject to requirements of reasonableness or fairness. In this regard he referred to *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others*,[31] *Bredenkamp and Others v Standard Bank of SA Ltd*,[32] *South African Maritime Safety Authority v McKenzie*[33] and *Old Mutual Limited and Others v Moyo and Another*.[34]

[57] In our view, this weight of authority deals with a distinct issue, which is that a court cannot refuse to enforce a contractual term because it views it as unreasonable, unfair, not in good faith or unduly harsh. These considerations are not self-standing grounds to invalidate a contract at common law.

[58] Contractual discretionary powers to vary a term of contract must be distinguished from a right to cancel a contract. Exercise of a power to cancel a contract eliminates parties' reciprocal rights and obligations without creating new ones, while discretionary power to unilaterally alter terms and obligations of another party in a contract, alters the terms of the original bargain. Although, discretionary power in cases such as the present and in *NBS Boland* are provided for in a contract, the law treats them with presumptive scepticism. Instead of invalidating them, they are allowed by constraining them with an obligation that they be exercised *arbitrio boni viri*.

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[31] *Baedica 231 CC and Others v Trustees for the time being of the Oregon Trust* and Others [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC).
[32] *Bredenkamp and Others v Standard Bank of SA* Ltd [2010] ZASCA 75; 2010 (4) SA 468 (SCA); 2010 (9) BCLR 892 (SCA); [2010] 4 All SA 113 (SCA).
[33] *South African Maritime Safety Authority v McKenzie* [2010] ZASCA 2; 2010 (3) SA 601 (SCA); [2010] 3 All SA 1 (SCA); (2010) 31 ILJ 529 (SCA); [2010] 5 BLLR 488 (SCA).
[34] *Old Mutual Limited and Others v Moyo* and Another [2020] ZAGPJHC 1; [2020] 4 BLLR 401 (GJ); [2020] 2 All SA 261 (GJ); (2020) 41 ILJ 1085 (GJ).

[59] It is not necessary to determine whether the '*NBS Boland* rule' applies only to cases concerning exercise of discretion, where power has been given to one party to determine the prestation of the other party. This is because, on the facts of this case, SPAR's exercise of its discretion impacted on the Giannocopoulos Group's performance, such that it had to be exercised *arbitrio boni viri*. Against that finding, the next question is whether SPAR exercised its discretionary power *arbitrio boni viri.*

Did SPAR exercise its power *arbitrio boni viri*?

[60] The context governing the contractual arrangement between the parties is important in answering whether SPAR acted reasonably, in good faith or for a legitimate purpose. As stated, SPAR acknowledged that the Giannocopoulos Group entities were bound by the terms of the credit application. But for the provisions of credit through these agreements, they would have no right to purchase goods from SPAR. It is not disputed that, prior to the variation, the credit terms had been in existence for a long period and in some cases for over 20 years. The Giannacopoulos Group managed and arranged its businesses around these credit terms. Crucially, there was no evidence that they had defaulted on their obligations to SPAR or had any outstanding debts at the time the credit terms were altered.

[61] The Giannacopoulos Group challenged the legitimacy of the reasons proffered by SPAR to justify the variation. They submitted that the comparison of current liabilities against current assets as a measure of financial stability was unsustainable in the retail sector. This was because supermarkets typically have a high rate of cash turnover, with sales generating cash quicker than the credit period offered by suppliers. As a result, the Group asserted that they comfortably met their current liabilities and there was no evidence to suggest otherwise. Additionally, they argued that SPAR's adjustment of payment terms did not appear to address its liquidity

concerns. Significantly, SPAR did not terminate the Credit Facilities Agreement but instead elected to vary its terms. Viewed on its own, a tightening of credit terms for liquidity purposes may appear reasonable, although this could exacerbate the position of the Giannacopoulos Group. But, viewed in the context of other measures implemented by SPAR and the timing thereof, alteration of the credit terms does not appear to have been in good faith.

[62] Another reason for the variation, advanced by SPAR, concerned debits that were returned by ABSA Bank. According to SPAR, these demonstrated financial instability within the Giannacopoulos Group. However, the Group contested this, explaining that this was a once off occurrence not indicative of a pattern. They attributed this to a decision by ABSA Bank to reduce their overdraft facility after being informed by SPAR about the purported termination of the Groups' Guild membership. They further contended that their stores were, at that time, recovering from the execution and subsequent reversal of the *ex parte* orders which created operational and financial instabilities. Given that the returned debit orders were an isolated incident, this could not have been a justifiable reason to vary the terms of the Credit Facilities Agreement.

[63] As to the drop shipment limits suddenly imposed by SPAR, no reasonable basis was offered for such action. Both parties agreed that historically, the Giannacopoulos Group was entitled to purchase goods sufficient for its requirements. Prior to October 2019, there had never been any limits. The limit on the drop shipment was imposed while warehouse supplies remained unlimited, which was illogical and undermined the reasoning that reduced drop shipment limits where necessary, to mitigate financial risk or manage credit exposure.

[64] SPAR did not provide any evidence to show that the Giannacopoulos Group had or was likely to purchase excessive stock beyond its ability to sell. In any event, a default by the Giannacopoulos Group would lead to SPAR executing on their security, an outcome which could lead to the Giannacopoulos Group losing its businesses. To compound matters, the timing of the variation affected the peak festive season. Shortage in stock led to customer complaints and negatively impacted on the Giannacopoulos Group's revenue.

[65] Taking all these facts into account, there is merit in the contention by the Giannacopoulos Group that the sudden alteration by SPAR of the credit terms had no reasonable basis and was not executed for a legitimate purpose. One cannot resist the conclusion that the alteration of the credit and drop shipment terms was part of a concerted effort by SPAR to throttle the Giannacopoulos Group out of its businesses, since it had failed to sustain the execution of the *ex parte* orders and to terminate their membership from the Guild. The findings of the full court to this effect, therefore, cannot be faulted. For these reasons, we are not persuaded that the requirements for the granting of special leave to appeal were met and that the decision of the two judges who refused the petition should be varied.

[66] In the result, the following order is issued:

The application for reconsideration of the application for special leave is dismissed with costs, such costs to include those of two counsel, where so employed.

N P MABINDLA-BOQWANA

JUDGE OF APPEAL

M B S MASIPA

ACTING JUDGE OF APPEAL

Appearances

For the applicants:	W H Trengove SC with S F Pudifin-Jones and S S Mdletshe
Instructed by:	Garlicke & Bousfield Inc., Umhlanga Honey Attorneys, Bloemfontein
For the respondents:	S Symon SC with D Watson
Instructed by:	Fluxmans Inc., Johannesburg Lovius Block Attorneys, Bloemfontein