



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF
APPEAL

From: The Registrar, Supreme Court of Appeal

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

Today the Supreme Court of Appeal (SCA) dismissed, with costs, an application for reconsideration of its decision refusing special leave to appeal. The applicants (SPAR) filed a petition to the SCA for special leave to appeal against a decision of the full court of the KwaZulu-Natal Division of the High Court, Pietermaritzburg, which was dismissed by two judges of the SCA. They then applied for reconsideration of the dismissed special leave to appeal application in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013, which was referred for oral argument by the then Acting President of the SCA.

The core issue referred for reconsideration was whether the *arbitrio boni viri* principle, as expressed by the SCA 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)* [1999] ZASCA 60; 1999 (4) SA 928 (SCA); [1999] 4 All SA 183 (SCA), applied in the present case. In other words, whether discretionary powers permitting unilateral alteration of a term of contract by one party, SPAR in this case, were subject to the *arbitrio boni viri* standard.

In *NBS Boland* the SCA held 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’. And that ‘[i]t is. . . 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 boni viri*’. This standard entails that the relevant discretion be exercised reasonably, honestly and for a proper purpose.

The clause under scrutiny in the present matter concerned an alteration of credit facilities and drop shipment by SPAR, as governed by a contract concluded between them and the first to thirteenth respondents (Giannacopoulos Group). The Giannacopoulos Group comprises entities which are retail members of the SPAR voluntary trading group (the Guild). They all have a common shareholder, the Giannacopoulos Family Trust.

Members of the Guild are granted the right to participate in the trading group under the SPAR trademark names, subject to terms laid down by the Guild. The Guild upholds the integrity and standards of the system, operating under the governance of the board of directors in accordance with its Memorandum of Incorporation and membership rules. Termination of this membership results in the loss of rights to participate in the system. Credit

facilities extended to retailer members of the Guild 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.

The relationship between SPAR and the Giannacopoulos Group extends over 23 years. The Group operates a total of 45 SPAR stores and TOPS liquor stores, employing approximately 2800 individuals. Each of the entities in the Group is governed by a membership agreement between the Giannacopoulos Group and the Guild. In addition, each member of the Giannacopoulos Group concluded a Standard Form of Application for Credit Facilities (Credit Facilities Agreement) with SPAR which enabled a retailer to purchase goods from the SPAR warehouse on credit and utilise 'drop shipment' services. In a drop shipment transaction, the retailer was authorised to contact the supplier directly and place an order. The supplier in turn debited SPAR directly, and SPAR was required to effect payment of these amounts effectively, acting as guarantor of such transactions.

Relevant to the proceedings before the SCA was clause 5 of the Credit Facilities Agreement concluded between SPAR and members of the Giannacopoulos Group, which provides that credit facilities are granted by the seller to the applicant, 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 applicant is obliged to pay the seller within: 19 days from the date of the weekly statement in respect of warehouse transactions; and 31 days from the date of weekly statement in respect of drop shipment transactions.

Both the court of first instance and the full court found that SPAR ought to have exercised its discretion *arbitrio boni viri*. The reasoning of the full court was 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 Giannacopoulos Group were bound to purchase their stock from SPAR and therefore obliged to accept SPAR's credit terms to operate their businesses. It found that the advancing of goods on credit was not a future contract, that was subject to a decision by SPAR whether to enter into such agreement, on each occasion. Instead, it was part of an ongoing relationship between the parties. Because of the reciprocal nature of the trading model, so the full court found, SPAR was obliged to exercise its discretion reasonably and honestly.

Before the SCA, SPAR argued that the Giannacopoulos Group never acquired any contractual rights to credit facilities at all. It contended that the exercise of SPAR's discretion did not determine or impose any contractually binding prestation on the Giannacopoulos Group, who had an election whether to continue with the current arrangement. The argument advanced by SPAR 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 case 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.

The SCA disagreed with SPAR's construction. The Court found that from the plain reading of clause 5, it was apparent that variation had to relate to existing terms (of an 'ongoing' agreement). If the conferral of the power to vary the terms concerned separate credit agreements, which were yet to be concluded, there would be no need to vary or terminate terms. It found that the parties had explicitly agreed 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 of the agreement, therefore, demonstrated 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 to the Group on this basis. 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. SPAR had to exercise its discretion *arbitrio boni viri*.

The SCA distinguished between contractual discretionary powers to vary a term of contract, as in the present case, and a right to cancel a contract. It held that 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.

The Court found that, from the facts, SPAR did not meet the *arbitrio boni viri* standard. Its unilateral discretion to alter the credit and drop shipment terms was not exercised reasonably, in good faith or for a legitimate purpose. Consequently, it was not persuaded that there was any reason to reconsider the decision of the two judges refusing of special leave to appeal.

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