

SOUTH AFRICA / JUDGMENT

Ambor NO and Others v Oasis Crescent Property Fund and Others (1497/2012) [2012] ZAWCHC 205 (20 March 2012)

[2012] ZAWCHC 205

COURT

Western Cape High Court, Cape Town

BEFORE

Binns-Ward

CASE / FILE NUMBER

1497/2012

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REPUBLIC OF SOUTH
AFRICA

IN THE HIGH COURT

OF SOUTH AFRICA (WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 1497/2012

Before: The Hon. Mr

Justice Binns-Ward

In the matter

between:

ALLEN

JACOB AMBOR N.O.

.....1st

Applicant

PHILLIP

RICHARD JOFFE N.O.

.....2nd

Applicant

KEITH

ALFRED MADDERS N.O.

.....3

rd

Applicant

KEITH

GETZ N.O.

.....4th

Applicant

EUGENE

BERNARD ALFRED STERN N.O.

.....5th

Applicant
AUCTION
ALLIANCE (PTY) LIMITED
.....6th
Applicant
and
OASIS
CRESCENT PROPERTY FUND
.....1st
Respondent
ABSA
BANK LIMITED N.O.
.....2nd
Respondent
(in its capacity as
trustee for the time being of the Oasis Crescent Property Fund)
C
M ELOFF SC 3 rd
Respondent
REASONS FOR

JUDGMENT

DELIVERED: 20 MARCH 2012

BINNS-WARD J:

- [1] In this matter, immediately after hearing argument on 15 March 2012, I directed that orders issue in terms of paragraphs 2-5 of the notice of motion. I indicated that my reasons for doing so would follow later. These are the reasons.
- [2] Paragraphs 2-5 of the notice of motion read as follows:an order in the following terms: 2. Compelling the First and/or Second Respondent to submit to the arbitration proceedings instituted by the Applicants on 25 November

2011 and in respect of which the Third Respondent has been appointed as arbitrator (“the arbitration proceedings”);

3. Authorising and directing the Third Respondent, within seven days of the date of this Order, to convene a pre-arbitration meeting in respect of the arbitration proceedings;
4. Staying the action-under case no. 24804/2011 pending the final determination of the arbitration proceedings;

5. Directing the First and/or Second Respondents to pay the costs of this application on an attorney and own client-scale (Condonation and directions had also been sought in terms of rule 6(12) in respect of urgency, but by the time argument was heard it was no longer in issue that the matter should be heard as one urgency, and I was willing to entertain the application on that basis.)
- [3] There is uncertainty as to whether the Oasis Crescent Property Fund, which is a collective investment scheme, falls properly to be cited in its own right, or through its trustee. As a consequence the Fund was cited as the first respondent and the trustee as the second respondent. Notwithstanding the promise made in paragraph 63 of the answering affidavit filed on behalf of the first and second respondents, no argument was addressed to me as to whether the relief sought should be granted with specific reference to either or both these respondents. In the answering affidavit it was contended that the party properly joined is the second respondent. The orders granted are by their tenor intended to apply against whichever of the two respondents, properly cited, is obliged, qua purchaser, to perform in terms of the agreement of sale which is in issue between the parties. For convenience I shall hereinafter refer to the first and/or second respondents indiscriminately as 'the respondent'.
- [4] The third respondent is the senior counsel who has been appointed as the arbitrator in the arbitration proceedings in which the applicants wish to pursue their claim against the respondent. He has taken no part in the proceedings and abides the judgment of the court.
- [5] The dispute between the applicants and the respondent concerns the validity or enforceability of an agreement of sale in respect of immovable property. The property, which the first to fifth applicants own in their capacity as trustees of the Ambor Trust, was sold to Eden Court Property Company Ltd at an auction conducted by the sixth applicant. The respondent thereafter accepted nomination as substituted purchaser by Eden Court Property Company, as permitted in terms of the conditions of sale. The respondent paid a five percent deposit on the purchase price, but has subsequently purported to rescile from the agreement on the grounds that it was induced to conclude the contract by a material misrepresentation by the sellers in respect of the characteristics of the res vendita. The respondent has gone so far as to allege that the sellers fraudulently, failed to disclose that the property was subject to a registered condition of title requiring any transferee to conclude a non-compensation agreement with the local authority and making any subsequent transfer of the property subject to the approval by the local authority of the transferee. Although I was addressed to some extent, with reference to matters apparent in the documentation given to bidders in the sales pack and in the property's title deed, on the plausibility or implausibility of these allegations, I have found it unnecessary, indeed undesirable, to say anything about the merits of the dispute between the parties.
- [6] The respondent instituted an action in this court under case no. 24804/11, in which it claims repayment of the deposit paid by it on the purchase price of the property and the amount advanced by it in respect of anticipated transfer costs.

- [7] The applicants, on the other hand, have referred their claim for the enforcement of the sale to arbitration. [8] The applicants' arbitration claim will involve essentially the same issues as those that will arise for determination in the action instituted by the respondent. It goes without saying that it is desirable, if at all feasible, that any scope for conflicting decisions inherent in the determination of these issues in different fora should be avoided. That much is common cause between the parties. It follows then that if the reference to arbitration by the applicants is to be enforced, the action under case no. 24804/11 should be stayed in terms of s 6 of the Arbitration Act 42 of 1965 pending the determination of the arbitration claim.
- [9] The arbitration agreement is contained in clause 23 of the sale agreement. It provides: 23 DISPUTE RESOLUTION: MEDIATION THE ARBITRATION 23.1. Should any dispute, dispute, disagreement or claim arise between the parties, which include the AUCTIONEER, ("the dispute") concerning this agreement then the parties shall, notwithstanding anything to the contrary contained herein, have the right to: 23.1.1. submit the dispute to mediation to be administered by the Arbitration Foundation of Southern Africa ("AFSA"), upon such terms as agreed between the parties and the secretariat of AFSA; and 23.1.2. failing agreement as aforesaid within 7 (seven) days of the dispute being submitted to mediation, the parties shall refer the dispute to arbitration as provided in clause 23.2.2. 23.2. Failing agreement as referred to in clause 23.1.2, the dispute shall be submitted to arbitration for final resolution in accordance with the rules of the AFSA by an Arbitrator or Arbitrators appointed by the AFSA. 23.3. Unless otherwise agreed in writing by all the parties, any such mediation or arbitration shall be held in Cape Town, South Africa. 23.4. The decision of the arbitrator shall be final and binding and the parties to the dispute and may be made an order of the court at the instance of any of the parties to the dispute. The parties hereby exclude all rights of appeal, which might otherwise be conferred upon them by law. 23.5. The parties agree to keep the arbitration (including the subject matter of the arbitration and the evidence heard during the arbitration) confidential and not to disclose it to anyone except for purposes of obtaining an order of court as contemplated in this clause 23. 23.6. The provisions of this clause 23 constitute an irrevocable consent by each party to any proceedings in terms hereof and no party shall be entitled to withdraw therefrom or claim at any such proceedings that it is not bound by such provisions. Such provisions are further severable from the rest of this Agreement and shall remain in effect despite the termination of or invalidity for any reason of this Agreement.
- [10] The respondent participated in the mediation process contemplated in terms of clause 23.1.1, but then refused to accept the reference to arbitration in terms of clause 23.1.2. and 23.2 when mediation did not resolve the dispute. [11] The main ground upon which the respondent opposes the reference of the dispute to arbitration is that allegations of fraud are involved. It is well-established that the courts will entertain sympathetically an application from a respondent or defendant party in contemplated arbitration proceedings to have the arbitration stopped so that the case can be heard in open court. The reason for this approach lies in the policy that, in general, a person against whom allegations of fraud are

made should be allowed the opportunity, notwithstanding any prior contractual commitment to a private arbitration, to vindicate his or her reputation in an open hearing if he or she should so wish. That policy does not, however, apply so as to facilitate the ability of a party making the allegations of fraud to avoid being bound by an arbitration agreement. The position was famously expressed by Sir George Jessel MR in *Russell v Russell*

(1880) 14 ChD 471, at 476-7, as follows: Though I quite agree it is within the discretion of the Court to say, where one of the two partners desires it, that a dispute shall not be referred to arbitration, yet I must consider for a moment which of the two partners does desire to exclude arbitration. Does the party charging the fraud desire it, or the party charged with the fraud desire it? Where the party charged with the fraud desires it I can perfectly understand the Court saying, 'I will not refer your character against your will to a private arbitrator'. It seems to me in that case it is almost a matter of course to refuse the reference, but I by no means think the same consideration follows when the publicity is desired by the person charging the fraud. His character is not at stake, and the other side may say: 'The very object that I have in desiring the arbitration is that the matter shall not become public. It is very easy for you to trump up a charge of fraud against me, and damage my character, by an investigation in public.' There is a very old and familiar proverb about throwing plenty of mud, which applies very much to these charges made by members of the same family, or members of the same partnership, against one another in public. It must be an injury, as a rule, to the person charged with fraud to have it published and I must say that I am by no means satisfied that the mere desire of the person charging the fraud is sufficient reason for the Court refusing to send the case to arbitration. The approach articulated in this passage has been followed in a number of South African judgments: see, for example, *Metallurgical & Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) at 393D-E; *Rawstorne and Another v Hodgen and Another* 2002 (3) SA 433 (W) at 438D – 440C and *Welihockyj and Others v Advtech Ltd and Others* 2003 (6) SA 737 (W) at 755C-756B

[12] The respondent's counsel submitted, however, that the court had a wide discretion to decide in favour of an argument by a party to an arbitration agreement that the character of the case was of a nature that should be heard and decided publicly rather than privately. This may be, but he was unable to give me any precedent for a determination that arbitration was unsuitable merely because the defendant alleged fraud on the part of the claimant. In short, no cogent basis was made out why in the circumstances of the dispute currently in issue this court should depart from the approach followed in the cases mentioned in the preceding paragraph. [13] The policy apparent from the passage from Russell's case, quoted above, has to be seen as evidencing an exception to the general policy of the courts to encourage party autonomy in respect of dispute determination by arbitration. There is, in addition, the fundamental principle that parties should, in general, keep and be held to their agreements (*pacta servanda sunt*).

[14] Various other arguments in support of the respondent's resistance to arbitration were advanced in the papers. While none of them was abandoned by the respondent's counsel, he limited his oral submissions to the question just addressed. In the circumstances I do not intend to address all of the other arguments traversed in the papers and will limit myself to dealing briefly only with those which appeared to be the most salient.

[15] It was contended that the alleged fraud gave rise to a vitiation of the arbitration agreement when the respondent rescinded from the sale upon its discovery. There is no merit in the argument. The express terms of the arbitration agreement make it clear that the arbitration clause stands free and independently of the sale agreement. It is directed at providing the manner of the

determination of any dispute between the parties concerning the agreement (clause 23.1). The stipulation that it is to remain in effect despite the termination or invalidity for any reason of the sale agreement (clause 23.6) confirms that it is intended to pertain in the context of any dispute between the parties concerning the termination or validity of the sale. [16] It perhaps bears observing that the facts in the current matter are quite distinguishable from those which presented in *North West Provincial Government and Another v Tswaing Consulting CC and Others* 2007 (4) SA 452 (SCA), on which the respondent's counsel placed some reliance in his heads of argument. In that matter the court, on appeal, refused to hold the appellant to an arbitration agreement that it had entered into with the respondent. The reason for this was because it was established that the agreement had been made by the appellant in ignorance of the respondent's fraudulent conduct in respect of the matters referred for arbitration. In the current matter, by contrast, the fraudulent conduct alleged by the respondent is very much in dispute. Thus the conditions which led the Supreme Court of Appeal to observe that⁴ it would be offensive to justice' to hold the innocent party to the terms of the tainted product of the other party's

established fraud are entirely absent in the current case. In addition, in *Tswaing* the innocent party had voided the agreement containing the arbitration clause. By contrast in the current case, with full knowledge of the matter in dispute, the respondent engaged in the mediation procedure provided in terms of clause 23.1.1. In now seeking to avoid the follow-on provisions of clauses 23.1.2. and 23.2, it is engaged in trying to reprobate that which, by its conduct, it has already approbated. It is trite that that sort of blowing hot and cold is not countenanced in any circumstances.

[17] There is also no substance in the respondent's contention that the parties' ability to obtain documentation or compel the attendance of witnesses will be constrained in the context of arbitration procedures. To the extent that the Arbitration Foundation of Southern Africa's applicable rules might not do so, these matters can be adequately addressed under the aegis of the Arbitration Act.

[18] Costs were awarded on the attorney and own client scale in terms of the parties' agreement to that effect in terms of clause 15 of the Conditions of Sale.

[19] For these reasons relief was granted in the terms sought in paragraphs 2-5 of the notice of motion.

A.G. BINNS-WARD

Judge of the High Court

[1] In this matter, immediately after hearing argument on 15 March 2012, I directed that orders issue in terms of paragraphs 2-5 of the notice of motion. I indicated that my reasons for doing so would follow later. These are the reasons.

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(Condonation and directions had also been sought in terms of rule 6(12) in respect of urgency, but by the time argument was heard it was no longer in issue that the matter should be heard as one urgency, and I was willing to entertain the application on that basis.)

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- [4] The third respondent is the senior counsel who has been appointed as the arbitrator in the arbitration proceedings in which the applicants wish to pursue their claim against the respondent. He has taken no part in the proceedings and abides the judgment of the court.
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23 DISPUTE RESOLUTION: MEDIATION THE ARBITRATION

23.1. Should any dispute, dispute, disagreement or claim arise between the parties, which include the AUCTIONEER, ("the dispute") concerning this agreement then the parties shall, notwithstanding anything to the contrary contained herein, have the right to:

23.1.1. submit the dispute to mediation to be administered by the Arbitration Foundation of Southern Africa (“AFSA”), upon such terms as agreed between the parties and the secretariat of AFSA; and

23.1.2. failing agreement as aforesaid within 7 (seven) days of the dispute being submitted to mediation, the parties shall refer the dispute to arbitration as provided in clause 23.2.2.

23.2. Failing agreement as referred to in clause 23.1.2, the dispute shall be submitted to arbitration for final resolution in accordance with the rules of the AFSA by an Arbitrator or Arbitrators appointed by the AFSA.

23.3. Unless otherwise agreed in writing by all the parties, any such mediation or arbitration shall be held in Cape Town, South Africa.

23.4. The decision of the arbitrator shall be final and binding and the parties to the dispute and may be made an order of the court at the instance of any of the parties to the dispute. The parties hereby exclude all rights of appeal, which might otherwise be conferred upon them by law.

23.5. The parties agree to keep the arbitration (including the subject matter of the arbitration and the evidence heard during the arbitration) confidential and not to disclose it to anyone except for purposes of obtaining an order of court as contemplated in this clause 23.

23.6. The provisions of this clause 23 constitute an irrevocable consent by each party to any proceedings in terms hereof and no party shall be entitled to withdraw therefrom or claim at any such proceedings that it is not bound by such provisions. Such provisions are further severable from the rest of this Agreement and shall remain in effect despite the termination of or invalidity for any reason of this Agreement.

[10] The respondent participated in the mediation process contemplated in terms of clause 23.1.1, but then refused to accept the reference to arbitration in terms of clause 23.1.2. and 23.2 when mediation did not resolve the dispute.

[11] The main ground upon which the respondent opposes the reference of the dispute to arbitration is that allegations of fraud are involved. It is well-established that the courts will entertain sympathetically an application from a respondent or defendant party in contemplated arbitration proceedings to have the arbitration stopped so that the case can be heard in open court. The reason for this approach lies in the policy that, in general, a person against whom allegations of fraud are made should be allowed the opportunity, notwithstanding any prior contractual commitment to a private arbitration, to vindicate his or her reputation in an open hearing if he or she should so wish. That policy does not, however, apply so as to facilitate the ability of a party making the allegations of fraud to avoid being bound by an arbitration agreement. The position was famously expressed by Sir George Jessel MR in *Russell v Russell*

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The approach articulated in this passage has been followed in a number of South African judgments: see, for example, *Metallurgical & Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) at 393D-E; *Rawstorne and Another v Hodgen and Another* 2002 (3) SA 433 (W) at 438D — 440C and *Welihockyj and Others v Advtech Ltd and Others* 2003 (6) SA 737 (W) at 755C-756B

- [12] The respondent's counsel submitted, however, that the court had a wide discretion to decide in favour of an argument by a party to an arbitration agreement that the character of the case was of a nature that should be heard and decided publicly rather than privately. This may be, but he was unable to give me any precedent for a determination that arbitration was unsuitable merely because the defendant alleged fraud on the part of the claimant. In short, no cogent basis was made out why in the circumstances of the dispute currently in issue this court should depart from the approach followed in the cases mentioned in the preceding paragraph.
- [13] The policy apparent from the passage from Russell's case, quoted above, has to be seen as evidencing an exception to the general policy of the courts to encourage party autonomy in respect of dispute determination by arbitration. There is, in addition, the fundamental principle that parties should, in general, keep and be held to their agreements (*pacta servanda sunt*).
- [14] Various other arguments in support of the respondent's resistance to arbitration were advanced in the papers. While none of them was abandoned by the respondent's counsel, he limited his oral submissions to the question just addressed. In the circumstances I do not intend to address all of the other arguments traversed in the papers and will limit myself to dealing briefly only with those which appeared to be the most salient.

[15] It was contended that the alleged fraud gave rise to a vitiation of the arbitration agreement when the respondent resciled from the sale upon its discovery. There is no merit in the argument. The express terms of the arbitration agreement make it clear that the arbitration clause stands free and independently of the sale agreement. It is directed at providing the manner of the

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established fraud are entirely absent in the current case. In addition, in *Tswaing* the innocent party had voided the agreement containing the arbitration clause. By contrast in the current case, with full knowledge of the matter in dispute, the respondent engaged in the mediation procedure provided in terms of clause 23.1.1. In now seeking to avoid the follow-on provisions of clauses 23.1.2. and 23.2, it is engaged in trying to reprobate that which, by its conduct, it has already approbated. It is trite that that sort of blowing hot and cold is not countenanced in any circumstances.

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