

SOUTH AFRICA / JUDGMENT

Modiboa Attorneys Incorporated v De Klerk and Another (UM59/2022) [2022] ZANWHC 19 (14 July 2022) [2022] ZANWHC 19

COURT

North West High Court, Mafikeng

BEFORE

R D Hendricks

CASE / FILE NUMBER

UM59/2022

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IN

THE NORTH WEST HIGH COURT, MAFIKENG

CASE

NO: UM 59/2022

Reportable:

NO

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to Judges: NO

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to Magistrates: NO

Circulate

to Regional Magistrates: NO

In

the matter between: MODIBOA
ATTORNEYS INCORPORATED
Applicant
and
CHRISTIAAN
JOHANNES BEAN DE KLERK
First
Respondent
LEZANNE
SWANEPOEL ATTORNEYS INC
Second Respondent
DATE
OF HEARING : 20
MAY 2022
DATE
OF JUDGMENT
: 14
JULY 2022
FOR
THE APPLICANT : ADV.
MOLEFE
FOR
THE RESPONDENT
: ADV.
MAREE

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be 10H00 on 14 JULY 2022.

ORDER

Consequently, the following order is made:

- (i) The rule nisi is discharged.
- (ii) The matter is struck from the roll.
- (iii) The applicant is ordered to pay the costs of the application on a party-and-party basis to be taxed.

HENDRICKS DJP

[1] The applicant is Modiboa Attorneys Incorporated practicing as such in Klerksdorp, in the North West Province. The first respondent is Mr. Christiaan J.B de Klerk, a farmer of the Farm N[....] [....], Remaining Extent of Portion[....], (J[....] Extension [....]) in the North West Province (“the farm”). On the 01st day of September 2020 the applicant and the respondent entered into an agreement called “Agreement Granting Exclusive Marketing

Mandate To Sell.” This agreement was drawn up by an attorney of the applicant and in terms of this agreement, the mandate to sell the farm of the respondent was granted to the applicant. The Farm N[....] was to be sold for R24 million and the applicant would receive a fee of ten percent (10%) for services rendered. During December 2021 the said farm was sold for the aforementioned amount and the service fee amounted to R2.4 million, was duly paid to the applicant. The second respondent is a firm of attorneys acting on behalf of the first respondent.

[2] According to the applicant, it is a Registered Value Added Tax (VAT) Vender and as such needed to charge VAT on the services rendered. This in effect means that over-and-above the 10% charged as a fee in the amount of R2.4 million, it was supposed and in fact duty bound to also charge (or add) VAT at the rate of fifteen percent (15%). Thus,

amounting to an additional amount of R360 000.00 on the R2.4 million charged. This became a contentious issue. After an exchange of communique between them, the applicant on the 17th March 2022 launched the present application on an urgent and ex parte basis. The application comprises a Part A and Part B, the contents of the Notice of Motion reads thus:

“PART A;-

1. THAT the Applicant be granted condonation for non-compliance with the forms and time periods provided for in the Rules and that this application be heard as an urgent application on an ex parte basis in terms of Rule 6(12) of the Uniform Rules of Court.
2. THAT the Second Respondent be forthwith interdicted and/or prohibited from paying over and/or transferring the proceeds of the sale of a property known as Farm N[....] [....], Remaining Extent of Portion [....] (Portion of Portion [....]), Registration Division IP, City of Matlosana (J[....] Extension [....]) North West Province to the First Respondent pending the determination by this Honourable Court of the relief sought in Part B hereof
3. In the alternative to 2 above, that the Second Respondent should, prior to making payment to the First Respondent of the proceeds of the of the sale of a property

known as Farm N[....] [....], Remaining Extent of Portion [....] (Portion of Portion [....]), Registration Division IP, City of Matlosana (J[....] Extension [....]) North West Province, preserve an amount of R360 00000 (three hundred and sixty thousand rand) representing 15% of the amount of R2 400 000.00, pending the determination by this Honourable Court of the relief sought in Part B of this application.

4. THAT the orders sought in 2 or 3 above should act as Interim Orders pending the finalization of the relief sought in Part B of this application.

5. THAT the costs of the application in Part A be costs in the course of the application in Part B.
PART B;-

4. THAT it be declared that the First Respondent should pay the Applicant the amount of R2 400 000.00 and including Value Added Tax ("VAT") at the rate of 15% in terms of the provisions of section 7 (1) of the Value Added Tax Act 89 of 1991;

5. THAT the Second Respondent be ordered to pay the Applicant the total amount of R2 760 000.00 from the proceeds of the sale of the property currently held in the Second Respondent's Trust Bank Account, Standard Bank Wilkoppies, Account Number [...], Branch Code 051001;

6. That if you intend opposing the application under PART B of the Notice of Motion, you must:

6.1. State that intention in a notice to be delivered to the Applicant's attorneys at the under mentioned address and to the Registrar of the above Honourable Court after 10 days after receipt of the Order in Part A and service of the application on you;

6.2. Appoint in such a notice an address at which you will accept notice and service of all documents in these proceedings; and

6.3. Within fifteen days after you have so given notice of your intention to oppose the application, to deliver your answering affidavit, if any, to the applicant's attorneys at the address mentioned hereunder and to the Registrar of the above Honourable Court.

[3] On the very same day of the launching of this urgent ex parte application, Snyman J granted an order in the following terms:

"1. THAT: The Applicant be granted condonation for non-compliance with the forms and time periods provided for in the Rules and that this application be heard as an urgent application on an ex parte basis in term of Rule 6(12) of the Uniform Rules of Court.

2. THAT: The Second Respondent should, prior to making payment to the First Respondent of the proceeds of the sale of a property known as Farm N[...] [...], Remaining Extent of Portion [...] (Portion of portion [...]), registration Division IP, City of Matlosana (J[...] Extension [...]) North West Province, preserve an amount of R360 000.00 (Three Hundred and Sixty Thousand Rand) Representing 15% of the amount of R 2 400 000.00, pending the determination by this Honorable Court of the relief sought in Part B of this application.

3. THAT: The orders act an Interim Orders pending the return date of 14 APRIL 2022.

4. THAT: The Respondents are called upon to show cause why the Interim Order should not be made final on the 14 APRIL 2022 at 10:00.

5. THAT: The costs of the application in Part A be costs in the cause of the application in Part B."

- [4] This is in fact an order in terms of the alternative to Part A of the Notice of Motion. The matter became opposed and on the return date of the rule nisi of the 14th April 2022, it was postponed to the opposed motion court roll of 20th May 2022, when it was argued and judgment was reserved. Certain points in limine were raised by the respondent which, so it was submitted by Adv. G Maree on behalf of the first respondent, may be dispositive of the matter. In any event, so it was further contended, because the issues in dispute are so intertwined and interdependent between Part A and Part B, the merits may just as well be dealt with as the reverse argument or approach may be more sensical. Part B which is a mandamus must be determined first in order to decide whether Part A should have been granted. I propose to deal with it the conventional way.
- [5] As a starting point Adv. Maree submitted that this application was not at all urgent and should not have been entertained as such. No case for urgency was made out. Much as there are cases of financial or economic urgency in our law, the present case most certainly do not qualify to be classified as one of those cases. This case was proffered to be extremely urgent with the Notice of Motion and accompanying founding affidavit filed and attested to on the very same day that the matter was heard, the 17th March 2022. However, urgency is within the discretion of the presiding officer (Judge) and although there are degrees of urgency, as so aptly pointed out in the case of *Luna Meubel Vervaardigers v Makin and Another* 1977 (4) SA 135 (W), the horse has proverbially speaking bolted. This would however usually have a bearing on the costs in the event that it was reserved but in the present case Snyman J ordered that the costs of the application in Part A be costs in the cause of the application in Part B, this is to say if Part B (- the merits-) is to be determined.

See: *South African Airways SOG v BDFM Publishers (Pty) Ltd and Others* 2016

- (2) SA 561 (GJ) pars [22] & [26].

In *Re Several Matters On The Urgent Roll* 2013 (1) SA 549 (GSJ) at [17].

- [6] As a second point raised in limine is the fact that the present application was launched on an ex parte basis. As to why it was done ex parte, no cogent and plausible reasons were advanced. There are no facts set out in the founding affidavit which substantiate why the application was brought on an ex parte basis. No special circumstances whatsoever were advanced warranting the bringing of this application on an ex parte basis. There is no plethora of case law dealing with this aspect, which needs no repetition.
- [7] Thirdly, it was raised in limine that this Court lack jurisdiction to entertain this application (matter), because of what is contained in Clause 7 of the said agreement. Clause 7 states:

“7.1 If any dispute sounding in money arises between the Seller and the Agent relating to payment of commission in terms of this Agreement or damages consequent upon a breach thereof by either the Seller or the Agent, such dispute shall be submitted to and decided by the Arbitrator appointed by the Association of Arbitrators Southern Africa on request by any of the parties to this agreement.

7.2 The Constitution and Procedural Rules of the Association of Arbitrators Southern are deemed to be fully incorporated in and form an integral part of this Agreement.”

(emphasis added)

[8] It is quite apparent from the wording of this clause that it is peremptory in its terms. The use of the word “shall” is indicative of the fact that it was the intention of the parties to subject any dispute sounding in money to an arbitration process. This is mandatory. Mind you, sight should not be lost of the fact that the applicant’s attorney drafted this agreement. This is all the more reason to give effect to the intention and will of both parties.

[9] In *Zhongji Development Construction Engineering Company Limited v Kamoto Copper Company Sarl* 2015 (1) SA 345 (SCA) the following is stated.

“[38] The process of arbitration must therefore be respected. Zhongji Construction’s application to the high court was accordingly premature and perhaps unnecessary. In Geldenhuys and Neethling v Beuthin<http://www.saflii.org/za/cases/ZASCA/2014/160.html>

- _ftn15 Innes CJ said:

‘Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important. And I think we shall do well to adhere to the principle laid down by a long line of South African decisions, namely that a declaratory order cannot be claimed merely because the rights of the claimant have been disputed, but that such a claim must be founded upon an actual infringement.’

(My emphasis.)

Kamoto came perilously close to infringing Zhongji Construction’s right to arbitration under the main agreement. Nevertheless, the relief which Zhongji Construction sought in the high court related to an abstract or ‘academic’ question of the kind to which Innes CJ referred. The application ought to have been dismissed for this reason alone. The arbitration must first be given the opportunity to have run its course before the court considers any application relating thereto.”

[10] In *Canton Trading 17 (Pty) Ltd t/a Cube Architects v Fanti Bekker Hattingh NO* (479/2020) [2021] ZASCA 163 (1 December 2021), the following is stated in the majority judgment at paragraphs [28] to

[31] and [37] to [38] and paragraph [57] of the minority judgment:

“[28] In North East, this Court, following a line of English cases, recognised that parties may agree that a dispute pertaining to the validity of an agreement is to be determined by way of arbitration, even though the arbitration clause referring the dispute to arbitration forms part of the agreement that is subject to the validity challenge. There is nothing contradictory in this position. The parties enjoy autonomy to agree that categories of dispute arising between them will be submitted to arbitration for resolution, rather than be determined by the courts. Precisely which disputes are to be submitted to

arbitration is a question of what has been agreed, and the interpretation of the parties' written agreement. Generally, the parties intend that all their disputes will be decided under a unitary jurisdiction, either by the courts or by way of arbitration, and not under a bifurcated jurisdiction, where some disputes are determined by the courts and others by submission to arbitration.

- [29] It follows that the parties may agree that disputes arising as to the validity or enforceability of an agreement must be determined by way of arbitration and not before the courts. The arbitration clause that gives expression to this agreement may form part of the written agreement of which the validity or enforceability is disputed. If the arbitrators uphold the challenge to the validity or enforceability of the agreement, their decision vacates their jurisdiction to decide any further dispute arising from the agreement. There is nothing paradoxical about this outcome. The parties agreed that this competence was to be conferred upon the arbitrators. Their exercise of this competence is precisely what the parties intended.
- [30] This reasoning of the second judgment is predicated upon the premise that there was an agreement between the parties as to the disputes that are to be submitted to arbitration. Those disputes may include the enforceability and validity of the agreement. But what if the very agreement to submit these disputes to arbitration is itself subject to challenge? North East affirmed the following dictum in *Heyman v Darwins Ltd*, '[i]f the dispute is as to whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party that denies he has ever entered into the contract is thereby denying that he has ever joined in the submission.'
- [31] Since the submission of a dispute to arbitration requires the consent of the parties, if the very agreement that requires the submission is challenged on the basis that such agreement never came into existence, a dispute exists as to whether there was submission of the dispute to arbitration at all. The problem that then arises is this: who decides the 'existence dispute', the courts or the arbitrators?
- [37] In *Zhongji*, this Court found that the arbitration clause was an agreement distinct from the terms of the agreement of which it formed part. As in the present matter, the arbitration clause referenced the AFSA rules which permitted the arbitrator to decide any dispute regarding the existence, validity or interpretation of the arbitration agreement. The court held that the arbitration agreement must be given effect to and it was for the arbitrator to determine the issues of jurisdiction that had been raised before the high court. *Zhongli* thus recognised and applied the doctrine of separability so as to enforce the arbitration agreement.
- [38] What North East and *Zhongji* make plain is that the parties have wide-ranging autonomy to agree that matters concerning the validity, enforceability and existence of an agreement shall be referred to arbitration. If they have consented to such a referral, then the courts will respect their agreement and will not decide these matters. It will be for the arbitrators to do so. And this holds good, even though the arbitrators will thereby be deciding upon their own

jurisdiction. An arbitration clause may be found to subsist separately from the main agreement of which it forms part, and may thus be enforced, even if there is a challenge to the validity, enforceability or existence of the main agreement. However, where there is a challenge to the arbitration agreement itself, so as to put into question the consent of the parties to have any dispute submitted to arbitration, the court will have to consider how best to deal with that challenge. The court may decide the challenge. But, as discussed above, the court may also decide that it would be preferable to decline the invitation to do so, and under the guidance of the principle of competence-competence, allow the arbitrators the opportunity to first render an award on the question of their jurisdiction.

[57] In *Zhongji* this Court determined that once the arbitration tribunal had been duly appointed in terms of the main agreement, the rules of the Arbitration Association would give the tribunal itself jurisdiction to decide the issues which may be raised before it, including those which had been raised both in the high court and this Court. That in light of an arbitrator's power to determine his or her jurisdiction there was no reason why the dispute about whether or not the claims arising from the appellant's performance in terms of the interim agreement was indeed arbitrable should not be decided by the arbitration tribunal prior to an application to the high court. It was held that the process of arbitration had to be respected. If the high court were to have pronounced on these issues, it would have acted contrary to the provisions of the

arbitration clause by determining issues that are within the auspices of the arbitrator in terms of the arbitration agreement. The

arbitration had to be given the opportunity to run its course before the court considers any application relating thereto.

Accordingly, the appellant's application to the high court was premature and perhaps unnecessary.

[11] In *North East Finance v Standard Bank* 2013 (5) SA 1 (SCA), the following is stated in paragraphs [16], [24] and [25].

"[16] It is in principle possible for the parties to agree that the question of the validity of their agreement may be determined by arbitration even though the reference to arbitration is part of the agreement being questioned. That is suggested in Heyman. Lord Porter said:

' . . . I think it essential to remember that the question whether a given dispute comes within the provisions of an arbitration clause or not primarily depends upon the terms of the clause itself. If two parties purport to enter into a contract and a dispute arises as to whether they have done so or not, or as to whether the alleged contract is binding upon them, I see no reason why they should not submit that dispute to arbitration. Equally, I see no reason why, if at the time when they purport to make the contract they foresee the possibility of such a dispute arising, they should not provide in the contract itself for the submission to arbitration of a dispute as to whether the contract ever bound them or continues to do so. They might, for instance, stipulate

that, if a dispute should arise as to whether there had been such a fraud, misrepresentation or concealment in the negotiations between them as to make a purported contract voidable, that dispute should be submitted to arbitration. It may require very clear language to effect this result, and it may be true to say that such a contract is really collateral to the agreement supposed to have been made, but I do not see why it should not be done.’ (My emphasis.)

[24] I do not propose to recite the principles of interpretation comprehensively. They are well-settled. The court asked to construe a contract must ascertain what the parties intended their contract to mean. That requires a consideration of the words used by them and the contract as a whole, and, whether or not there is any possible ambiguity in their meaning, the court must consider the factual matrix (or context) in which the contract was concluded. See KPMG Chartered Accountants (SA) v Securefin Ltd.

[25] In addition, a contract must be interpreted so as to give it a commercially sensible meaning: Ekurhuleni Metropolitan

Municipality v Germiston Municipal Retirement Fund. This is the approach taken to considering the ambit of an arbitration clause adopted in Fiona Trust. We must thus examine what the parties intended by having regard to the purpose of their contract.

[12] I deem it prudent not to deal with the merits of the application as requested to do so by counsel for the respondent Adv. Maree, but instead to discharge the rule nisi and to strike the matter from the roll. In terms of the agreement (and based on their initial intentions) either party may, if it so wish, refer the matter for arbitration in terms of Clause 7 of the agreement.

[13] Insofar as costs are concerned, I am of the view that it should follow the result. The point in limine with regard to jurisdiction been upheld means that the first respondent is successful insofar as this application, at this point in time, is concerned. Costs should therefore be awarded in favour of the first respondent. The first respondent is ordered to pay the costs of the application. I find no reason to award costs on the punitive scale as between attorney and client as submitted by Adv. Maree. Costs should be on the normal party-and-party scale and be taxed by the Taxing Master.

Order

[9] Consequently, the following order is made:

(i) The rule nisi is discharged.

(ii) The matter is struck from the roll.

(iii) The applicant is ordered to pay the costs of the application, on a party-and-party basis to be taxed.

R D HENDRICKS

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG

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Prepared on 10 October 2026 · Esheria