

SOUTH AFRICA / JUDGMENT

NTGR Engineering Projects CC v Bakubung Minerals (Pty) Ltd (1890/2021) [2025] ZANWHC 126 (25 July 2025) [2025] ZANWHC 126

COURT

North West High Court, Mafikeng

BEFORE

T C Mokhare

CASE / FILE NUMBER

1890/2021

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IN THE HIGH COURT OF
SOUTH AFRICA
NORTHWEST DIVISION –
MAHIKENG
Case No: 1890/2021

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In the matter between: NTGR ENGINEERING
PROJECTS CC
PLAINTIFF
Registration
no:2005/182772/23
and
BAKUBUNG MINERALS
(PTY) LTD
DEFENDANT
Registration no:2002
/017306/07

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses.
The date for the hand-down is deemed to be on 25 JULY 2025 at 10h00 AM
ORDER
1.
The special pleas are dismissed .
2.
The Defendant shall pay the Plaintiff's costs on a party and party basis on Scale B.
3.
The costs shall include the costs of counsel.

JUDGMENT

MOKHARE AJ

- [1] On 21 October 2021, the Plaintiff instituted action against the Defendant. The cause of action arises from a written contract concluded between the parties during 2019. In its Particulars of Claim, the Plaintiff asserts that the defendant is in breach of the contract entitling the Plaintiff to contractual damages in the sum of R3. 758. 220.16(Three Million Seven Hundred And Fifty Eight Thousand Two Hundred Twenty Rand And Sixteen Cents).
- [2] The Defendant is defending the action and it initially, through its erstwhile attorneys filed a plea without a special plea in which it contested the merits of the claim. An amended pleading encompassing a special plea and a plea over was subsequently filed by the Defendant through its current attorneys. It is this special plea which was the subject of the hearing of this matter on 21 May 2025.
- [3] Arising from the special plea are two defences. First, it is contended that by virtue of clause 22 of the contract, which enjoins parties to refer their disputes that arise to arbitration, this court's jurisdiction is ousted, and the parties are obliged to go the arbitration route.
- [4] The matter came before me for the determination of the special pleas. I am indebted to the parties' respective counsel for the comprehensive heads of argument which they filed and the oral submissions they made. The special pleas raised turn on the interpretation of clause 22 of the contract and the approach adopted by the courts over the years on how arbitration clauses in contracts should be construed by courts. For convenience, I reproduce clause 22 below.
- [5] It reads as follows.

"DISPUTE RESOLUTION

22.1. If a dispute arises between the parties in connection with or arising out of the Agreement concerning any of the rights and/or obligations of any party hereto, both parties shall attempt to settle the dispute amicably before the commencement of arbitration. Unless settled amicably any dispute shall be finally settled by arbitration.

22. Unless otherwise agreed, in writing, by both parties:

22.2.1. The dispute shall be finally settled by arbitration conducted in terms of the Rules for the Conduct of Arbitrations, latest edition as published by the Association of Arbitrators Southern Africa;

22.2.2. The dispute shall be settled by a single arbitrator, appointed in accordance with the Rules aforesaid, and whose decision shall be final and binding on the parties.”

[6] Arising from this clause, the Defendant’s special plea of arbitration is raised as follows:

6.1 “firstly, that clause 22 of the Agreement concluded between the parties contained an arbitration clause that referred any dispute between the parties to arbitration;

6.2 secondly, that the Plaintiff has failed to honour/comply with the prescripts of the agreement in so far as it relates to the referral of the dispute to arbitration.”

[7] The special plea of jurisdiction is raised as follows:

7.1 “That the Plaintiff has failed to allege in its particulars of claim that the Arbitrator lacks the requisite jurisdiction or competence to settle the dispute between the parties;

7.2 That the Plaintiff has failed to allege in its particulars of claim that the parties have agreed that the dispute should be referred to this court and not arbitration; and

7.3 That the parties have not consented to this court's Jurisdiction consequently this court does not have jurisdiction to adjudicate this dispute.”

[8] These special pleas defences are rebuffed by the Plaintiff on the following grounds:

8.1 That the Defendant's erstwhile attorneys, consented, in writing, to the referral of this dispute to a Court of-law-on the 5th of October 2023;

8.2 That the Defendant's erstwhile attorneys further acted in accordance with the said agreement and did not file any special plea in respect of arbitration or jurisdiction;

8.3 That the Defendant, in a pre-trial conference concluded between the parties, conceded the merits of the Plaintiff claim before this court, further conferring jurisdiction on this court to adjudicate the remainder of the claim i.e. quantum;...”

[9] According to the Plaintiff, the Defendant is estopped from withdrawing its earlier consent and belatedly invoke the arbitration clause in the contract. It is the Plaintiff’s contention that the Defendant has waived its right to invoke the contractual clause of arbitration as a defence to the action in this Court.

- [10] According to the Plaintiff, the proceedings in this Court have reached such an advance stage and that it would not be in the interest of justice to stay them or abort them only to refer the same dispute to arbitration.
- [11] The Defendant has countered the Plaintiff's argument by contending that the arbitration clause precludes early judicial intervention of this Court. Clause 22 of the contract was, in essence, designed by parties to keep any contractual dispute away from the court.
- [12] In *Lufhuno Mphaphuli and Association (pty)Ltd*[1] the constitutional court stated that:
- "The decision to refer a dispute to private arbitration is a choice which, as long as it is voluntarily made, should be respected by the courts. Parties are entitled to determine what matters are to be arbitrated, the identity of the arbitrator, the process to be followed in the arbitration ..."*
- [13] It is not in dispute that clause 22 of the contract between the parties enjoins the parties to refer their disputes to arbitration. This accord well with the Constitutional Court's dictum in *Lufhuno*. However, this dictum is not without qualification.
- [14] In *PCL consulting (Pty)Ltd t/a Consulting SA V Tresso Trading 119 (Pty) Ltd* [2] the SCA stated as follows in paragraph 7:
- "The mere fact that parties have agreed that disputes between them shall be decided by arbitration does not mean that court proceedings are incompetent."*
- [15] The real issue is whether the existence of an arbitration clause in a contract is an absolute bar to the court's jurisdiction to entertain the dispute between the parties.
- [16] In *Parekh v Shah Jehan Cinemas (pty) Ltd and others*[3] the High Court had an occasion to consider this pertinent issue and it expressed itself as follows in paragraph H:
- "An arbitration agreement does not deprive the Court of its ordinary jurisdiction over the disputes which it encompasses. All it does is to oblige the parties to refer such disputes in the first instance to arbitration, and to make it a prerequisite to an approach to the Court for a final judgment that this should have happened. While the arbitration is in progress, the Court is there whenever needed to give appropriate directions and to exercise due supervision. And the award of the arbitrator cannot be enforced without the Court's imprimatur, which may be granted or withheld. But that is by no means all. Arbitration itself is far from an absolute requirement, despite the contractual provision for it. If either party takes the arbitrable disputes straight to Court, and the other does not protest, the litigation follows its normal course, without a pause. To check it, the objector must actively request a stay of the proceedings. Not even that interruption is decisive. The Court has a discretion whether to call halt for arbitration or to tackle the disputes itself. When it chooses the latter, the case is resumed, continued and completed before it, like any other. Throughout, its jurisdiction, though sometimes latent, thus remains intact." (my underlining for emphasis).*
- [17] Having regard to the case law, although an arbitration clause is to be respected by the parties, the court still retains a discretion whether to enforce it or not taking into account the interest of justice. An arbitration clause in a contract does not serve to oust the court's

jurisdiction. Parties cannot agree to oust the court's jurisdiction because the jurisdiction of the court is sourced from the constitution of the Republic of South Africa. The issue is not one of jurisdiction, but one of convenience. That is, is it convenient and taking into account the interest of justice for the parties to be obliged to have their dispute resolved through arbitration and not by court as forum of first instance, even if the parties are desirous of their dispute to be resolved by the court. This question is aptly answered by the latter underlined part of paragraph H of the Parekh Judgment reproduced above. In light of this, it follows that the special plea of jurisdiction cannot succeed.

- [18] I now turn to whether it is convenient to have the dispute referred to arbitration at this stage of the proceedings. I agree with the Plaintiff's submissions that the action in this Court has progressed to an advanced stage and it is ready for trial. In fact, the pleadings have long closed, the parties have discovered, and a judicial pre-trial was held, and the matter was ready for trial. It would not be convenient to stay it and refer the dispute to arbitration taking into account the costs already expended by the parties and the interest of speedy resolution of disputes and finality in matters. The special plea seeking to dismiss the action in this Court cannot succeed.
- [19] What remains is the submission by the Plaintiff that in any event, the Defendant has consented to the jurisdiction of this Court, or it has consented that the dispute be referred to court. To this contention, the Plaintiff relies on a letter from the erstwhile Defendant's attorneys dated 5 October 2021 marked without prejudice. The Defendant has objected to the Plaintiff's reliance on a without prejudice communication between the parties when the parties were engaged in negotiations in an attempt to settle the dispute. The Plaintiff has admitted that the letter is a without prejudice communication between the parties, but disputes that it was in law precluded from disclosing it. The Plaintiff's argument is that the non-disclosure of the letter would mislead the court and create the impression that the Defendant did not consent to referral of the dispute to court, should it not be settled. It was not in dispute that the dispute was never settled. It is also not in dispute that the dispute was not referred to arbitration, instead, the Plaintiff instituted this action in this Court.
- [20] Paragraph 5 of the letter is clear on its terms and requires no interpretation. It states as follows:
- "As far as the forum where this matter can be ventilated is concerned, our client is amenable to this matter being referred to a court of law, should an amicable resolution or settlement not be achieved."*
- [21] It is common cause between the parties that an amicable resolution or settlement of the dispute was not achieved. The Defendant consented that should that happen, the Defendant is amenable to the dispute being referred to a court. Indeed, the Plaintiff on the strength of that undertaking by the Defendant, referred the dispute to this Court by instituting this action. The Defendant did not object, nor bring an application for stay of proceedings. Instead, it filed a plea and only changed its stance later when it filed an amended plea which embodied special plea.

[22] I agree with the Plaintiff's submission that if the contents of the without prejudice letter remained undisclosed to the court, it had the potential for the court to believe that there was a dispute between the parties on referral of the dispute to court, when there was in truth consensus on the issue.

[23] Section 6(1) of the Arbitration Act 42 of 1965 as amended buttresses this point as follows:

"If any party to an arbitration agreement commences any legal proceedings in any court (including any inferior court) against any other party to the agreement in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time after entering appearance but before delivering any pleadings or taking any other steps in the proceedings, apply to that court for a stay of such proceedings."

[24] The Defendant did not object to the commencement of the proceedings in this Court. In fact, the Defendant sanctioned the commencement of proceedings in this Court by the Plaintiff, and entered an appearance to defend and a plea, and did not apply to court for a stay of the proceedings. Such application could only be launched by the Defendant after it had entered appearance to defend but before delivering any pleading or taking any other step in the proceedings.

[25] The only remaining issue is that of costs. Both parties sought punitive costs against each other. I am not persuaded that a case for a punitive costs order was made by either party. Party and party costs are in this case appropriate to be borne by the unsuccessful party. In this case, I am satisfied that costs should follow the event.

Order

[25] Accordingly, the following order is made:

1. The special pleas are dismissed.
2. The Defendant shall pay the Plaintiff's costs on party and party basis on Scale B.
3. The costs shall include the costs of counsel.

T C MOKHARE

ACTING JUDGE

NORTHWEST DIVISION

APPEARANCES

DATE OF HEARING

: 21 MAY 2025

DATE OF JUDGMENT

: 25 JULY 2025

COUNSEL FOR PLAINTIFF

: ADV D THUMBATHI

Instructed by

: PHUTHI PHAKA ATTORNEYS

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Instructed by

: VAN VELDEN DUFFEY INC

[1] (CCT9/07)[2009] ZACC6:2009(4)SA (CC) ;2009(6) BCLR 527 (CC) (20 March 2009) paras 219 and 220.

[2] 2009

(4) SA 68 SCA at par 7

[3] 1980 (1) SA 301 (D) at Par H

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Prepared on 9 October 2026 · Esheria