

SOUTH AFRICA / JUDGMENT

**Pristine Seafoods (Pty) Ltd v
Collective Dream Studios (10148/2017)
[2019] ZAWCHC 72 (14 June 2019)**
[2019] ZAWCHC 72

COURT

Western Cape High Court, Cape Town

BEFORE

Bozalek

CASE / FILE NUMBER

10148/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

CASE

NO: 10148/2017

DATE:

2019.06.06

In

the matter between

PRISTINE

SEAFOODS (PTY)

LTD Plaintiff

and

COLLECTIVE

DREAM STUDIOS (PTY)

LTD Defendant

JUDGMENT

BOZALEK, J:

This action came before me for the determination of the defendant's second special plea in which it seeks an order that the plaintiff's claim be stayed pending a final determination of the dispute by an arbitrator in terms of clause 13 of certain agreements between the parties.

Counsel for the defendant, Mr Wragge, who appeared together with Mr Elliott, initially indicated that he intended calling no witnesses and would merely argue on the basis of certain admitted documents. Following queries from the Court regarding the factual basis of any findings the Court might be required to make, the following agreement was made between the parties and recorded:

The documents in the plaintiff's bundle, save for one exception, were:

1. generated on the dates reflected on the documents;
2. sent and received by the parties reflected on the documents;
3. are what they purport to be, without admitting the truth of the contents thereof.

On the second day, Mr Christophorou, on behalf of the plaintiff, sought a postponement to consider whether to pursue the issues by way of a stated case and whether to call witnesses. Upon the matter's resumption, he advised that the defendant was not amenable to a stated case and that the plaintiff had similarly elected not to call witnesses. In the result I must determine the issue on the basis of the agreed documentation and other documentation to which I may legitimately have regard. A brief description of the circumstances and history of this litigation is appropriate.

In 2015 Afritex Ventures Limited purchased seven marine fishing vessels in two separate agreements from the defendant. The vessels were delivered to Afritex and are now in Mauritius. Save for one vessel, Afritex paid the full purchase price, some two million US Dollars. It refused to pay the balance of the purchase price in respect of one vessel and avers that the vessels were delivered in defective condition.

On 5 June 2017, Afritex ceded and assigned all its rights and obligations arising out of the agreements to the plaintiff. On 8 June 2017, the plaintiff issued summons against the defendant out of this court, seeking deductions in the purchase price of all the vessels plus damages, i.e. losses incurred as a result of having to effect repairs to the vessels. The claims total some R23 000 000,00. On 25 July 2017, it obtained default judgment against the defendant in respect of all these claims. When the defendant was apprised of this default judgment it brought an application for rescission thereof, which order was finally granted on 14 May 2018. The dispute between the parties had, however, originated as far back as February/March 2017.

It eventually led to the defendant's representative, Mr Halgryn, sending an e-mail to the plaintiff's representative or director, Mr Diamond, if I recall correctly, on 3 March 2017, invoking the arbitration provisions in the agreements, as well as threatening

provisional sentence proceedings against it. In this context, I use the term plaintiff interchangeably with that of Afritex, the cedent.

No such dispute was referred to arbitration until 15 February 2018 when the defendant's attorney wrote to the chair of the Cape Bar Council, asking it to appoint an arbitrator. Advocate Darryl Cooke was duly appointed and convened a meeting of the parties on 21 May 2018. At that meeting

the plaintiff's legal representative argued that the arbitration should be stayed, since it had already launched action in the High Court. Both parties made submissions to the arbitrator on the question whether he had jurisdiction over the dispute. The arbitrator issued an award entitled "Award in relation to jurisdiction" on 19 July 2018 the conclusion of which reads as follows:

"96. To sum up, I consider that I should not exercise jurisdiction at this juncture as:

96.1 The dispute before me is substantially encompassed by the dispute in the High Court action.

96.2 The defendant (plaintiff herein) has established a reasonably strong case for the Court to exercise jurisdiction over all disputes, including the dispute before me.

96.3 The jurisdictional question will be addressed by the High Court pursuant to the special plea to be filed by the claimant.

96.4 In my view it would not be convenient for me to enter upon the arbitration, decide these jurisdictional issues, and persist with the arbitration, in circumstances where the issues are due to be resolved by the High Court.

97. My award is, therefore as follows:

1. the arbitration proceedings are stayed pending the final determination of the claimant's special plea to be filed in case number 10148/2017.
2. Costs will stand over for later determination."

In essence the arbitrator made no explicit finding that he had jurisdiction but left it to this Court to determine the question

through the determination of the defendant's second special plea.

The relevant parts of that plea read as follows, paragraph 3:

"The plaintiff's claim arises from an alleged breach on the part of the defendant of the first agreement... and the second agreement described in paragraph 6 of the particulars of claim."

4. Clause 13 of both the first agreement and the second agreement provides:

"Arbitration: 13.1. Should any dispute arise out of or in connection with this agreement or the interpretation thereof, both while in force and after its termination, any party shall be entitled to require, by written notice to the other, that the dispute be submitted to arbitration in terms of this clause 13."

Paragraph 6:

"On or about 3 March 2017, alternatively 16 January 2018, the defendant exercised its right in terms of clause 13 of the agreements, requiring, by written notice that the dispute between Afritex and/or the plaintiff on the one hand, and the defendant on the other, be referred to arbitration pursuant to the provisions of clause 13."

Paragraph 7:

"In terms of clause 13.1 of the agreement, Advocate D Cooke has been appointed by the chairperson of the Cape Bar Council as arbitrator."

Paragraph 9:

"The defendant is entitled to a stay of this action pending the final determination of the dispute by the arbitrator in terms of the agreements."

WHEREFORE the defendant prays that the plaintiff's action be stayed pending the final determination of the dispute by the arbitrator in terms of clause 13 of the first and the second agreements."

The plaintiff's replication to this plea, as far as it is material, reads as follows:

"2.1 The plaintiff admits that on 3 March 2017, the defendant exercised its rights in terms of clause 13 of the agreements and provided Afritex with written notice of its election to refer the dispute to arbitration.

2.2 However, the plaintiff pleads further that on a proper construction and interpretation of the defendant's notice and the relevant portion thereof... the defendant exercised its right to refer a dispute to arbitration only on one issue, namely the condition in which the vessels were delivered to Afritex and, in particular, whether same were delivered in a defective condition or free of defects. For this reason, the defendant exercised its rights and election in terms of clause 13.2.3, to seek the appointment of a suitably qualified person to determine the subject matter of the dispute, which constituted a dispute of "primarily a technical nature", as referred to in clause 13.2.3 of the agreements, and therefore, proposed the appointment of a "senior executive official of SAMSA" to arbitrate on the matter.

2.3 In terms of paragraph 2 of the notice, the defendant exercised its election to proceed on its monetary claim of 30 000 US Dollars, plus interest, by way of provisional sentence summons. The defendant is bound by its election."

The plaintiff also pleads that through an unreasonable delay, the defendant waived its right to arbitrate/is estopped from doing so. But I shall deal more fully with these averments later.

The issues to be determined by the Court, broadly speaking are:

1. The proper interpretation of the arbitration clause, clause 13 of the agreements.
2. Whether on that interpretation, the defendant referred the dispute to arbitration.
3. If so, whether by reason of waiver, estoppel or for some other reason, defendant has forfeited its apparent right to have the dispute arbitrated as opposed to being determined in the litigation already commenced.

Onus:

In argument, the defendant's counsel accepted that as the party relying on the arbitration clause it bore the onus to allege and prove the underlying jurisdictional facts. However, it submitted that whilst it bore this primary onus, it was the plaintiff which bore the burden of establishing countervailing circumstances justifying the ouster of the arbitrator's jurisdiction in the arbitration proceedings. See *Omar v Inhouse Venue Technical Management (Pty) Limited* 2015 (3) SA 146 (WCC) at paragraph 3. I agree with this approach which must be applied against the general background of the settled law, and in this regard I refer to Omar's case at paragraphs 72 and 73, which reads as follows:

"72. . . . It is settled law, nevertheless, that the existence of an arbitration clause does not oust the jurisdiction of a court since the parties to a contract cannot exclude the jurisdiction of a court by agreement.

73. Whether or not an arbitration clause will be enforced by a court and the pending proceedings stayed is a matter falling within the discretion of the court, having regard to the facts and circumstances at hand. The party relying on an arbitration clause bears the onus of persuading the court that the dispute to be referred falls within the parameters of the arbitration clause and that the court should exercise its discretion in its favour."

See also *Foize Africa (Pty) Limited v Foize Beheer BV & Others* 2013 (3) SA 91 (SCA) paragraph 21.

The starting point is the arbitration clause, being paragraph 13.1 of the agreements, the operative part of which I have already quoted. The clause goes on to provide:

"13.2 There will be one arbitrator, who will be, if the question in issue is:

- (i) primarily an accounting matter, an independent chartered accountant.
- (ii) primarily a legal matter, a practising junior member of the Cape Bar with not less than 10 years standing.
- (iii) primarily a technical matter a suitably qualified person.
- (iv) any other matter, a suitably qualified person.

13.3 The appointment of the arbitrator will be agreed upon between the parties to the dispute, but failing agreement between them within a period of 14 days after the arbitration has been demanded, any of the parties to the dispute shall be entitled to request the chairman for the time being of the Cape Town Bar Council, to make the appointment. And who, in making his appointment will have regard to the nature of the dispute."

What stands out in the operative part of clause 13 is that either party may require of the other to submit to arbitration of the dispute even though the other party may prefer litigation. All that is required of a party wishing to exercise its right to arbitrate its dispute is to give written notice thereof to the other party. No reference is made to the time within which a party is to exercise such a choice. This leads on to Mr Christophorou's submission that if one party has already commenced litigation, it has effectively removed or trumped the other party's right to have the

dispute arbitrated.

I disagree with this interpretation of clause 13.1, which I call the "first out of the blocks" approach. Such an

interpretation requires reading into the clause an implied qualification to a party's right to arbitrate, to wit "provided

that the other party has not already commenced litigation arising out of the dispute". It would also give rise to arbitrary

consequences, namely, whoever wished to avoid arbitration could do so by commencing litigation without warning at the earliest

opportunity. This would considerably weaken what, on the fact of it, the clause appears to provide for, namely a clear right to arbitration. Such an implied term or qualification lacks, in my view, business efficacy, furthermore. The modern trend in our law is to give full effect to agreements to arbitrate.

In the majority judgment in *Lufuno Mphaphuli & Associations (Pty) Limited v Andrews* 2019 (4) SA 529 (CC), O'Regan, J stated, inter alia, as follows:

"Private arbitration is widely used both domestically and internationally. Most jurisdictions in the world permit private arbitration of disputes and also provide for the enforcement of arbitration awards by the ordinary courts... Some of the advantages of arbitration lie in its flexibility (as parties can determine the process to be followed by an arbitrator including the manner in which evidence will be received, the exchange of pleadings and the like), its cost-effectiveness, its privacy and its speed (particularly as often no appeal lies from an arbitrator's award or lies only in an accelerated form to an appellate arbitral body). In determining the proper constitutional approach to private arbitration, we need to bear in mind that litigation for ordinary courts can be a rigid, costly and time consuming process, and that is not inconsistent with our constitutional values to permit parties to seek a quicker and cheaper mechanism for the resolution of disputes."

Overall the court held, having regard to Section 34 of the Constitution and the question whether it applied to arbitration, that clause providing that:

"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

That Section 34 must be interpreted on its own language and with integrity and it cannot be concluded, given the general lack of fit between private arbitration and the language of the section, that the section has direct application to private arbitration."

In the recent matter of *Riversdale Mining Limited v Du Plessis & Another* (2017) ZASCA 7, it was held that when business people choose to arbitrate their disputes they generally intend that all their disputes will be determined by the same tribunal. Cachalia, JA stated as follows at paragraph 28:

"The basic principle in the interpretation of arbitration clauses is that they must be construed liberally to give effect to the essential purpose which is to resolve legal disputes arising from commercial relationships before privately agreed tribunals instead of through the courts. When business people choose to arbitrate their disputes, they generally intend all their disputes to be determined by the same tribunal, unless they express their wish to exclude any issues from the arbitrator's jurisdiction in clear language. There is thus a presumption in favour of "one stop arbitration".

I thus favour an interpretation of clause 13 which permits one party to require of the other party to submit a dispute to arbitration,

notwithstanding that the other party may have commenced litigation. Of course, in deciding whether to stay such litigation, the Court exercises its discretion and will have regard to, inter alia, whether the party favouring arbitration, may have waived its right to arbitration or is estopped from asserting such right or merely unreasonably delayed in asserting its right to arbitration. These are issues to which I will return.

The next issue is whether the defendant, in fact, exercised its right to require the dispute to be submitted to arbitration. The determination of this issue requires an examination of the relevant correspondence and the nature of the dispute. On 3 March 2017, Halgryn, on behalf of the defendant, addressed the plaintiff's predecessor in title as follows:

"2. Be that as it may, without any admissions being made and purely as a matter of caution, we hereby demand that you/your client makes payment within seven days from receipt hereof, of the arrears now overdue and payable in the amount of 30 000 dollars plus interest at the rate of 15.5% per annum from date of expiry of said demand until date of payment, failing which provisional sentence summons will be issued you/your client."

Then in paragraph 4 he continued:

"It is absolutely denied these Vessels were delivered to your clients in a defective condition as now alleged. On the contrary, you/your clients examined the vessels on various occasions and these had to be in the required good order and condition, in order for the Mauritian authorities to register them in your client's name."

And he stated crucially as follows in paragraph 5:

"In terms of the dispute in paragraph 4 above, and this matter as a whole if or as applicable and without prejudice to our right to proceed as per paragraph 2 above, we hereby demand in terms of para 13 of the original agreement between us that the matter proceeds to arbitration, and request a senior executive official of SAMSA, Cape Town, as the most suitably qualified person in

terms of clause 13.2.3 to arbitrate this matter, be agreed upon. Failing you/your client's agreement within 14 days after this demand, in terms of clause 13.4, we shall request the Chairman of the Cape Town Bar Council to appoint an Arbitrator with due regard to the nature of this dispute between us and you/your client."

Read as a whole, it would appear that Mr Halgryn had in mind to refer the question of the alleged defective condition of the vessels to arbitration before a SAMSA official, who would be well qualified to deal with this technical question. Mr Halgryn appeared to recognise, however, that it might not be feasible to proceed with arbitration of part of the dispute and litigation of another part, namely provisional sentence proceedings, in relation to the short payment of one vessel in the amount of 30 000 dollars. Hence the somewhat obtuse wording in paragraph 5, beginning with the words "in terms of the dispute" and ending with the words "paragraph 2 above".

This raises an argument made on behalf of the plaintiff, namely that at best for defendant, it only referred the narrow technical dispute to arbitration and not the claims and counterclaims which the parties now seek to assert against each other and which have been pleaded in the litigation. In my view this argument ignores the qualification which Mr Halgryn introduced in the e-mail when he triggered the arbitration clause in relation to the issue of the defective state of the vessels. Secondly, the argument seeks to hold the defendant to an early formulation of the dispute in circumstances where later correspondence broaden its ambit.

The next relevant item of correspondence was a further e-mail dated 7 April 2017 which again threatens provisional sentence proceedings but which takes the matter no further. On July 7, 2017, Mr Halgryn e-mailed Afritex's manager or director, again referring to his intention to pursue arbitration proceedings in South Africa. Some six months later, the defendant's attorney wrote to the plaintiff's attorney and confirmed its invocation of its right to arbitrate per the 3 March 2017 e-mail and suggested a number of members of the Cape Bar as possible appointments as arbitrator. He cited as justification the fact that "the dispute between the parties is primarily a legal matter". He noted that failing agreement on the choice of arbitrator, the chair of the Bar Council would be asked to make the appointment.

This is, in fact, what happened since there appears to have been no reply to the aforesaid letter so that on 15 February 2018 the defendant's attorney wrote to the chairperson, asking her to appoint an arbitrator and copying that letter to the plaintiff's attorney.

In the letter the attorney described the dispute and the procedure followed in the following terms:

"6. A dispute between Afritex and our client arose in early 2017 over whether the vessels were delivered by our client to Afritex in a defective condition.

- --

8. On 3 March 2017, our client invoked the provisions of the arbitration clause in the agreements and demanded that the dispute between Afritex and our client be referred to arbitration.
12. As the dispute between the parties was primarily a legal matter, clause 13.2.2 of both agreements requires that a practising junior member of the Cape Bar of not less than 10 years standing be appointed as arbitrator.
14. We mention that the dispute is commercial in nature and includes aspects of maritime law."

In paragraph 2.1 of its replication to the defendant's special plea, the plaintiff admitted that the defendant exercised its rights on 3 March 2017 in terms of clause 13 of the agreements and provided Afritex with written notice of its election to refer a dispute to arbitration. It then pleaded as per paras 2.2 and 2.3 which I have quoted, that it only referred a narrow technical issue to arbitration by a senior official of SAMSA and exercised an election to proceed by way of provisional sentence summons for its claim for 30 000 dollars.

It is common cause that the plaintiff commenced no such provisional sentence proceedings. On the material before me, furthermore,

no case has been made out that the defendant only referred a limited technical issue to arbitration. Firstly, the 3 March 2017 e-mail was qualified as I have described and not exhaustive of the defendant's right to refer a dispute to arbitration. Secondly, in later correspondence the defendant's attorneys took a broader view of the dispute and acted on that in his letter to the chairperson of the Cape Bar Council. Thirdly, there was no binding election to pursue provisional sentence proceedings, merely qualified threats to do so, which came to nothing.

In paragraph 2.5, the plaintiff advances further reasons in support of its prayer for dismissal of the defendant's second special plea which reads as follows:

"1. In any event, the defendant did not take any steps to prosecute the referral to arbitration until 15 February 2017, constituting an unreasonable and unjustifiable delay and thereby waived its right to proceed with its dispute by way of arbitration proceedings.

2. By 8 June 2017, the plaintiff had instituted the above action out of the above honourable Court and thereby exercised its own right not to refer its dispute, as pleaded in the particulars of claim, to arbitration as envisaged in clause 13.
3. The defendant failed to take any steps to procure the stay of the above action until it filed its special plea dated 9 July 2018."

These averments relating to delay, waiver and estoppel and require that further background circumstances be considered which involve

principally the present action which the plaintiff commenced in the Cape High Court. This was commenced on plus/minus 8 June 2017, unbeknown to the defendant. Service was effected upon the defendant by leaving the summons under a stone on a vacant erf in Hout Bay. This is

according to the official return of service. Default judgment was taken on 25 July 2017. The summons encompass three claims. Claim A sought reductions in the purchase price of each of the vessels by the cost of repairs to all seven vessels, each of which was alleged to have been delivered in a defective condition. Claims B and C sought damages as a result of the vessels being non-operational whilst they were being repaired. Defendant's counsel estimated, without contradiction, that the value of the rescission judgment, which was expressed in dollars, was of the order of R23 000 000,00.

It is worth mentioning that a reading of the summons makes it plain that the defendant's claims cannot be determined without a determination

of whether the vessels were delivered in a defective state or not, the so-called technical issue which the plaintiff maintains was the only dispute referred by the defendant to arbitration. It is thus plain that the technical issue and the claims for reductions of purchase price and damages, and the defendant's claim for short payment for the Noelle Marie and its further counterclaims are indivisible from the so called technical issue. Needless to say it would hardly be feasible or cost-effective for a court or arbitrator to determine part of the overall issue such as that relating to the condition of the vessels and leave the balance to some other forum.

Coming back to the chronology of the litigation, upon hearing of the default judgment the defendant brought an application for rescission thereof on 15 September 2017 which was initially opposed and finally only granted on 14 May 2018. Prior to that date the defendant could obviously not enter into the main case and, for example, file a dilatory plea asking that the proceedings be stayed, which step it ultimately took on plus/minus 20 September 2018. Notwithstanding that default judgment was only granted on 15 May 2018, by 15 February 2018, as described earlier, the defendant's attorney was taking active steps to have an arbitrator appointed to determine the dispute.

Apart therefore, for the delay between 3 March 2017 and when it came to hear on 9 August 2017, that is according to the application for rescission, of the default judgment taken against it by the plaintiff, there is no question of any unreasonable or unjustifiable

delay on the part of the defendant in pursuing its election to arbitrate the dispute. I should add that the bundle of documents and the court papers suggest further that between March 2017 and a year later when the arbitration was pursued in earnest, legal proceedings relating to the vessels were also being heard in Mauritius.

In paragraph 2.5.4 and 2.5.5 of the plaintiff's replication to the defendant's second special plea, the plaintiff pleads

“In the circumstances the defendant has waived its right to invoke the arbitration provisions of clause 13 insofar as the dispute relating to the defendant's conditional counterclaim... is concerned and has waived its right to prosecute its dispute as delineated in its written notice dated 3 March 2017, by way of arbitration proceedings, by virtue of the inordinate and unjustifiable delay between the period 3 March 2017 and 15 February 2018.”

It is trite that a court will not likely find that a party has waived its rights. This appears from *Borstlap v Spangenberg & Andere* 1974 (3) SA 695 (A), where Corbett, JA stated as follows:

"Dit is herhaaldelik deur ons howe beklemtoon dat duidelike bewys van 'n beweerde afstanddoening van regte geverg word, veral waar op 'n stilswyende afstanddoening staatgemaak word. Dit moet duidelik blyk dat die betrokke persoon opgetree het met behoorlike kennis van sy regte en dat sy optrede teenstrydig is met die voortbestaan van sodanige regte of met die bedoeling om hulle af te dwing. Soos hoofregter Innes die vereistes in *Laws v Rutherford* 1924 AD 261 op bladsy 263 gestel het:

"The onus is strictly on the appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it. Waiver is a question of fact, depending on the circumstances. It is always difficulty, and in this case especially difficult to establish."

In my view, having regard to the court record, the correspondence and other documentation before the Court, and since no evidence was placed before the Court by the plaintiff, the latter has not come close to establishing a waiver of the right to arbitrate the entire dispute on the part of the defendant. As far as the defence of estoppel is concerned, as Mr Wragge pointed out, it is neither fully pleaded nor proved by any evidence from the plaintiff. There is no allegation or averment as to what representation or misrepresentation was made by the defendant, that the plaintiff relied on such representation and how it was prejudiced thereby.

Finally, I must deal more fully with the arbitrator's award in the light of paragraph 3 of the plaintiff's replication to the defendant's second special plea, which reads as follows:

"The plaintiff admits that Advocate Cooke was the appointed person by the Cape Bar Council as arbitrator, but pleads that the appointment was premised on an irregular referral to arbitration by the defendant for the reasons set out above."

2:

"Notwithstanding the foregoing, the plaintiff pleads that the award handed down by the arbitrator, dated 19 June 2018, is binding on the parties by virtue of the following facts and circumstances:

- (i) The parties voluntarily attended an arbitration meeting on 21 May 2018 before the arbitrator.
- (ii) The parties advanced arguments to the arbitrator on the question of, inter alia, the compliance with the prerequisites of the arbitration agreement.
- (iii) The parties submitted themselves to the findings and rulings of the arbitrator and even submitted written arguments, in support of their contentions, to the arbitrator.
- (iv) The parties accepted the arbitrator's award dated 19 June 2018 and did not review same."

As I have found, Advocate Cooke's appointment was not premised on an irregular referral to arbitration. As far as the award being binding on the parties, it is difficult to know what point is being made by this averment. The only point which the arbitrator purported to address was whether he had jurisdiction over the referred dispute. Having regard to his award, the arbitrator did not explicitly determine this question. In fact, at paragraph 81 he stated as follows:

"I, therefore, do not purport to decide the jurisdictional question. Indeed, I do not think I would be able to decide the point without hearing evidence and legal argument."

Thus, accepting for argument sake that the arbitrator's award is binding on the parties, it decided nothing, but merely referred the jurisdictional question to this court. To the extent that paragraph 3 of the replication suggests that the arbitrator's

opinions or musings contained in the body of his award's reasoning or discussion, some of which were adverse to the defendant, were binding on the defendant, this is clearly not the case.

Ultimately a party to a curial or arbitral process is bound by the award or order of that party. In the instant case, no adverse award was made. In fact, by separating out the second special plea in these proceedings for early determination, the defendant has done exactly what the arbitrator envisaged in his award, namely leaving it to this court to determine whether the arbitrator or the court should exercise jurisdiction over the dispute as a whole. Whereas in this case the parties agreed to utilise arbitration to resolve their disputes, special circumstances must exist before a court will override that agreement and assume jurisdiction over the dispute. For all the reasons I have given, the plaintiff has failed to establish any such circumstances. I see no reason why the existing arbitrator should not proceed to deal with the dispute referred to him.

In the result, the defendant's second special plea must be upheld. As far as costs are concerned, they must follow the result.

This matter necessitated four days of argument over two sessions. The defendant seeks the costs of the two counsel they engaged.

This was resisted by Mr Christophorou, an attorney with the right of appearance, who single-handedly and very competently presented the plaintiff's case in court. Notwithstanding this fact, the matter is reasonably weighty and certainly involves claims which may eventually exceed approximately R30 000 000,00. In the circumstances, I consider that the costs of two counsel are justified.

The order made is as follows:

1. The defendant's second special plea is upheld and the plaintiff's action is stayed pending the final determination of the dispute by the arbitrator in terms of clause 13 of the first and second agreements.
2. The plaintiff is to pay the defendant's costs in the determination of the said plea, such costs to include the costs of two counsel.

BOZALEK, J

JUDGE OF THE HIGH COURT

DATE: 14 JUNE 2019

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Prepared on 14 October 2026 · Esheria