

SOUTH AFRICA / JUDGMENT

Transasia 1 (Pty) Limited and Another v Arbitration Foundation of South Africa and Another (2018/25821) [2018] ZAGPJHC 548 (13 September 2018) [2018] ZAGPJHC 548

COURT

South Gauteng High Court, Johannesburg

BEFORE

L R Adams

CASE / FILE NUMBER

2018/25821

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IN

THE HIGH COURT OF SOUTH AFRICA
GAUTENG
LOCAL DIVISION, JOHANNESBURG
CASE

NO:

2018/25821

In

the matter between:

TRANSASIA
1 (PTY)
LIMITED First
Applicant
11
MILES INVESTMENTS (PTY)
LIMITED Second
Applicant
and
ARBITRATION
FOUNDATION OF SOUTH AFRICA First
Respondent
UMSOBOMVU
COAL (PTY)
LIMITED Second
Respondent

JUDGMENT

ADAMS J:

[1]. This is an urgent application by the applicants for an order interdicting arbitration proceedings currently pending and conducted by the first respondent in terms of an agreement concluded between the applicants and the second respondent. In their notice of motion the first and second applicants apply for an order inter alia in the following terms:

- (a) 'Directing that the first and second respondents be interdicted from commencing and / or proceeding with the arbitration of the dispute involving the second respondent and the applicants, and which dispute was referred to the first respondent by the second respondent on the 24th April 2018 for the purpose of the adjudication by way of arbitration.
- (b) Directing that the interdict shall be in place pending the finalisation of the second respondent's application for a stay of the applicants' application before the KwaZulu – Natal High Court in Pietermaritzburg under case number: 3163/18P.
- (c) That the costs of this application are to be paid by the respondents on the scale as between attorney and own client, jointly and severally, the one paying the other to be absolved'.

[2]. Central to this application is the issue whether or not the second respondent has elected not to exercise its right to have any dispute between it (the second respondent) and the applicants relating to an agreement, which contains an arbitration clause, referred to arbitration.

[3]. I interpose here to mention that the first applicant played no part in these proceedings. In a short affidavit filed on its behalf the first respondent indicated that it would abide the decision of this court.

[4]. On the 24th of April 2018 the second respondent referred a dispute to the first respondent for the purpose of having such dispute adjudicated in an expedited arbitration.

[5]. On the 12th of July 2018 the applicants launched this application to interdict the arbitration, initially as a normal application, which was later converted to an urgent application. Much was made by the second respondent of the form in which this urgent application was brought before court. In my judgment, there is no merit in the second respondent's objection to the procedure followed by the applicants in pursuing their urgent application. Form should never be valued over substance.

[6]. The salient facts pertinent to this application are as follows.

[7]. At all relevant times there was in place a written agreement concluded during January 2010 between the applicants and the second respondent for the purchase and sale of prospecting rights ('the agreement'). In terms of the agreement the second respondent, as the holder of certain coal prospecting rights in KwaZulu – Natal, had sold to the applicants those prospecting rights.

[8]. The agreement contained a dispute resolution clause 11 which provided as follows:

‘11.1 Any and all disputes arising from or in connection with this Agreement shall be finally resolved in accordance with the rules of the Arbitration Foundation of Southern Africa by a single arbitrator in Sandton appointed by the Arbitration Foundation of Southern

Africa, or its successor.

11.2 The provisions of clause 11.1 shall not preclude any party from obtaining interim relief on an urgent basis from a court of competent jurisdiction pending the decision of the arbitrator’.

[9]. On the 23rd of November 2017 the second respondent purported to cancel the agreement on the basis of a breach by the applicants of certain terms of the agreement. This is disputed by the applicants, who on the 15th of March 2018 launched an application in the KwaZulu – Natal Division of the High Court in Pietermaritzburg for a declaratory

order that the purported cancellation of the agreement is unlawful, null and void and therefore should be set aside. In that opposed

application the applicants also ask for an order akin to one for specific performance by the second respondent of the terms and

conditions of the agreement.

[10]. The second respondent delivered notice of intention to oppose the application in the Pietermaritzburg High Court and also delivered a notice in terms of Uniform Rule of Court 35 (12), which was replied to by the applicants on the 12th of April 2018. Subsequently the second respondent filed an application to stay that application, which application to stay will,

so I was advised, be heard shortly.

[11]. On the 24th April 2014 the second respondent referred the dispute between them and the applicants to Arbitration and since then the Arbitration has been well under way. In its Statement of Claim in the Arbitration the second respondent bases its claim on its cancellation of the agreement. The award which the second respondent seeks in the Arbitration proceedings is that the applicants vacate the mining site to which the coal mining rights relate. There can accordingly be no doubt that the dispute which is the subject of the opposed application in the High Court in Pietermaritzburg is the exact same dispute which the second respondent has referred to Arbitration. Equally true is the fact that the dispute between the parties falls within the terms of the arbitration clause contained in the agreement and quoted above.

[12]. The question then is whether the second respondent is entitled to pursue the Arbitration in the face of the High Court application. Put another way, do the applicants have the right to insist that the Arbitration proceedings be stopped in view of the pending motion proceedings in the High Court.

[13]. Mr Mpofu, Counsel for the applicants, submitted that the second respondent is precluded from instituting the Arbitration proceedings

notwithstanding the fact that the parties agreed that any and / or all disputes would be referred to arbitration, because it (the second respondent) had made an election to go the litigation route in the High Court. This election, so the argument goes, is evidenced by the fact that the second respondent took a further step in the High Court application by delivering a notice in terms of rule 35(12). There is no merit in this argument if for no other reason than the fact that it has to be accepted that by launching an application to stay that application, the second respondent has clearly demonstrated that it has elected to enforce its right to refer the dispute to arbitration.

[14]. As was pointed out by Wallis J in *Aveng (Africa) Ltd (formerly Grinaker – LTA Ltd) t/a Grinaker – LTA Building East v Midros Investments (Pty) Ltd*, 2011

(3) SA 631 (KZD), the approach to arbitration clauses is to respect the parties' autonomy in concluding the arbitration agreement and to minimise the extent of judicial interference in the process. The historical desire of courts to protect their own jurisdiction and their consequent suspicion of arbitration as a means of resolving disputes has been replaced by a recognition that arbitration is an acceptable form of dispute resolution with which the courts should not interfere.

[15]. As was said by O'Regan ADCJ said in *Lufuno Mphaphuli and Associates v Andrews*, 2009 (4) SA 529 (CC):

'[219] 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, whether there will be an appeal to an arbitral appeal body and other similar matters.'

[16]. An arbitration clause is inserted in a contract at the time of its conclusion because the parties contemplate as a matter of commercial convenience that it is desirable to adopt this as a mechanism for resolving the disputes that may arise in the course of their business relationship.

[17]. That brings me back to the issue of whether it is open to the second respondent to insist to proceed to arbitration under the arbitration clause 11. The contention by applicants is that it cannot do so because it has elected not to go the arbitration route by going along with the motion court proceedings in the Pietermaritzburg High Court. The second respondent, so the applicants contend, is now precluded from referring the dispute to arbitration.

[18]. Election is generally regarded as a form of waiver, the onus of proving which rests on the applicants. This requires the applicants to show that the second respondent, with full knowledge of its right to arbitrate, decided to abandon it. As I have indicated above, by no stretch of the imagination can it be said that the second respondent had abandoned its right to arbitrate. After all, it is the one which has launched an application to stay the motion court proceedings – there cannot possibly be a more emphatic indication on the part of the second respondent that it has not elected not to exercise its right to refer a dispute to arbitration.

[19]. It is now well – established that an arbitration agreement does not oust the jurisdiction of the courts. Where a party to an arbitration agreement commences legal proceedings against the other party to that agreement, the defendant is entitled either to apply for a stay of the proceedings pursuant to s 6 of the Arbitration Act 42 of 1965 or to deliver a special plea relying upon the arbitration clause. Whichever course it adopts the onus then rests on the claimant to persuade the court to exercise its discretion to refuse arbitration. This requires a very strong case to be made out.

[20]. A party to an arbitration agreement who commences litigation instead of proceeding to arbitration does not, merely as a result of adopting that course, abandon its right to have resort to arbitration under the agreement. That being so it is not open to the other party to contend that it has ‘accepted’ the resort to litigation by not itself seeking a stay, and that this ‘acceptance’ debars subsequent resort to arbitration. A corollary of this principle of necessity has to be that a party who is taken to Court in breach of an arbitration clause remains entitled all the more to insist that the court proceedings be stayed and that it (the ‘innocent’ party) be allowed to have the dispute adjudicated in an arbitration.

[21]. Therefore, the election for which the applicants contend cannot be sustained on the basis of agreement. In my view, its involvement in the High Court litigation, instituted by the applicants no less, does not preclude the second respondent from invoking the arbitration clause in the contract. The flip side of this proposition is that the applicants then do not have a right to prevent the first respondent from having recourse to arbitration as contemplated by the arbitration clause in the agreement.

[22]. This then in turn means that the applicants, who seek interim interdictory relief in this urgent application, has not proven at least one of the requirements for an interdict, that being that they have a prima facie right. In light of the arbitration clause the applicants, in my view, do not have the right to have the dispute adjudicated in the High Court. On the contrary, the second respondent has the right to have the dispute adjudicated in an arbitration and is, in my judgment, entitled to a stay of the High Court application. That matter is however not before me.

[23]. I am, in any event, not persuaded that the applicants have satisfied the other requirements for an interim interdict, namely: that they are threatened with immediate and irreparable harm; that they have no alternative remedy, and that the balance of convenience favours them.

[24]. Ms Milovanovic, Counsel for the second respondent, submitted that all of the issues relating to these three requirements for the interdict are closely tied in with the question of balance of convenience and prejudice. I find myself in agreement with this submission. In the bigger scheme of things, it is difficult to perceive of any real harm to the applicants if the second respondent is permitted to proceed with the arbitration, which, in all likelihood, will be finalised a lot sooner than would an opposed application in the High Court. But more importantly, in my view, the applicants have no right to choose a forum against the letter and the spirit of the arbitration clause which they have agreed upon.

[25]. There is, in my judgment, no reason in principle why the applicant can claim an interdict of the arbitration.

[26]. The urgent application of the first and second applicants therefore stands to be dismissed.

Costs

[27]. Counsel for the second respondent has submitted that cost on the scale as between attorney and client should be awarded against the applicants in favour of the second respondent.

[28]. In re: Alluvial Creek Ltd, 1929 CPD 532, the court laid down the principle that, in its discretion to award a punitive costs order, the court should have regard to the proceedings by a party which are vexatious in that they put the other side to unnecessary trouble and expense which the other side ought not to bear.

[29]. I am not persuaded that in the circumstances of this matter a punitive cost order is warranted, and in the exercise of my discretion I intend awarding cost in favour of the successful party on the ordinary scale as between party and party.

Order

In the result, I make the following order:-

1. The urgent application of the first and second applicants be and is hereby dismissed.
2. The first and second applicants, jointly and severally, the one paying the other to be absolved, shall pay the second respondent's cost of this urgent application.

L R ADAMS

Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON: 12th September 2018

JUDGMENT

DATE: FOR THE APPLICANTS: 13th September 2018 Adv D Mpofo SC, together with Adv Cornwell Dauds INSTRUCTED BY: Victor Nkhwashu Attorneys FOR THE SECOND RESPONDENT: Adv A Milovanovic INSTRUCTED BY: Edward Nathan Sonnenbergs Inc

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