

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

|                                                                                    |                                 |
|------------------------------------------------------------------------------------|---------------------------------|
| (1)                                                                                | REPORTABLE: NO                  |
| (2)                                                                                | OF INTEREST TO OTHER JUDGES: NO |
| (3)                                                                                | REVISED NO                      |
|  | 1 Sept 2023                     |
| <b>SIGNATURE</b>                                                                   | <b>DATE</b>                     |

CASE NO: 2021/14457

In the matter between:

KATEKANI INVESTMENT

Applicant

and

MEC OF HUMAN SETTLEMENT (GAUTENG)

Respondent

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**JUDGMENT**

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Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 1st of September 2023.

**BADENHORST AJ**

[1] Plaintiff caused a combined summons to be issued against the respondent on 24 March 2021 in which it claims payment of R6 863 570.00 and ancillary relief by way of damages allegedly suffered as a result of an alleged breach of a written building contract for the construction of 200 top structures in Soshanguve Extensions 1, 2 and 3 concluded by the parties on 24 November 2017 (the contract).

[2] The contract contains an arbitration clause which, in relevant part, provides as follows:

*“Any dispute shall, unless resolved amongst the Parties, be referred to and be determined by arbitration save for a Party's right to review; the Arbitrator's finding shall be final and binding on the Parties.”*

[3] That is no doubt why, on 26 November 2019, respondent addressed a letter to the respondent in which it declared a dispute in terms of the arbitration clause. No reply was however forthcoming from the applicant, despite a request for an urgent response. Respondent's follow-up letter on 11 February 2020 putting forward the names of three advocates to serve as arbitrator and again asking for an urgent response was similarly ignored.

[4] On 20 April 2021 applicant delivered a notice to defend the High Court action as well as a notice in terms of Rule 35(12) and 35(14) [*“the Rule 35 notices”*], requiring certain specified documentation *“to enable (applicant) to plead”*.

[5] Applicant failed to file a plea in accordance with the Court Rules. A notice of Bar (delivered on 20 May 2021) was the result.

[6] Rather than filing a plea, the applicant was advised to file an application (on motion) for a stay of the Court action in terms of Section 6 of the Arbitration Act, which provides as follows:

*“6 Stay of legal proceedings where there is an arbitration agreement*

- (1) 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.*
- (2) If on any such application the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement, the court may make an order staying such proceedings subject to such terms and conditions as it may consider just.”*

[7] The respondent presented its argument on the assumption that the application was brought

*“after entering appearance”*. As noted already, these two events occurred on the same day.

I am however proceeding on the assumption (favourable to applicant) that the application followed after the appearance to defend was filed, as suggested by respondent.

[8] Respondent opposes the application on two grounds, first, that respondent is precluded under Section 6(1) from applying for a stay of the action because it took *“a step in the proceedings”* by delivering the Rule 35 notices and, second, that because of its dilatoriness described above, there is sufficient reason for the Court to exercise its discretion against staying the action.

[9] Section 6(1) was considered in *Conress (Pty) Ltd and Another v Gallic Construction (Pty) Ltd* 1981 (3) SA 73 (W). At page 76 Nicholas J (as he then was) said the following:

*“An arbitration agreement is not an automatic bar to legal proceedings in respect of disputes covered by the agreement. If, however, a party to an arbitration agreement commences any legal proceedings in any 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. (Section 6 (1) of the Arbitration Act 42 of 1965.) In the absence of an order for the stay of legal proceedings, such proceedings continue.*

*The respondent has at no stage made an application for a stay. By entering into an agreement of settlement which disposed of the application so far as the merits were concerned, it took a further step in the proceedings and thus precluded itself from making an application for a stay.”*

Only the costs of the (settled) application remained as an issue before the Court. On the basis of the above reasoning the learned Judge rejected an argument that the proceedings before him (for costs of the settled proceedings) should be stayed pending referral to arbitration.

[10] I note that Section 6 (1) contains wording that is similar to the words in Rule 30 which reads as follows (in relevant part):

*“30 Irregular proceedings*

*(1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.*

*(2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if—*

*(a) the applicant has not himself taken a further step in the cause with knowledge of the irregularity; ... “ [underlined]*

[11] The words “*taken a further step in the cause*” in Rule 30 have been interpreted to mean “*some act which advances the proceedings one stage nearer completion*”.<sup>1</sup> According to Erasmus, steps taken in preparation of trial, such as requesting particulars for trial, serving a notice to produce, and convening and attending a pre-trial conference, are further steps in the cause.<sup>2</sup>

[12] There is an obvious difference between the two provisions. The jurisdictional precondition in Section 6 (1) prevents an application for a stay if “*any pleadings or ... any other steps (were taken) in the proceedings*” as opposed to Rule 30 which proscribes a complaint of irregularity once “*a further step*” is taken.

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<sup>1</sup> See Erasmus Superior Court Practice, RS 20, 2022, D1-354.

<sup>2</sup> Relying on Klein v Klein 1993 (2) SA 648 (BG) at page 651 D – E.

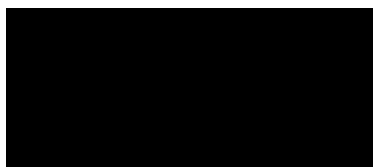
[13] In my view, the “steps” referred to in Section 6 (1), which precludes a stay, are not limited by the qualification attributed to “*steps*” in Rule 30 namely that it must advance the proceedings closer to completion. Any “other steps” taken (besides “any pleadings”) rule out an application for a stay under Section 6 (1).

[14] I conclude that the Rule 35 notices constitute a “*further step in the proceedings*” within the meaning of Section 6 (1) and that applicant no longer qualifies to apply for a stay of the action.

[15] I am also satisfied, in the light of applicant’s dilatoriness, that there is moreover sufficient reason for the Court to exercise its discretion in terms of Section 6 (2) against staying the action.

[16] I accordingly make the following order:

The application to stay the action under case number 14457/2021 is dismissed with costs.



**C H J BADENHORST**  
**ACTING JUDGE OF THE HIGH COURT**  
**JOHANNESBURG**

**APPEARANCES**

|                        |                                  |
|------------------------|----------------------------------|
| DATE OF HEARING:       | 28 August 2023                   |
| DATE OF JUDGMENT:      | 1 September 2023                 |
| APPLICANTS’ COUNSEL:   | Adv O Mooki SC                   |
| INSTRUCTED BY:         | The State Attorney, Johannesburg |
| RESPONDENTS’ COUNSEL : | Adv P Mthombeni                  |
| INSTRUCTED BY:         | Baloyi Katlego Attorneys         |