

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case No.: 3028/2016

Date Heard: 8 December 2016

Date Delivered: 13 December 2016

In the matter between:

UMMI PROPERTIES (PTY) LTD
(Reg No. 1993/001976/07)

Applicant

And

KNIGHT STREET PROPERTIES (PTY) LTD
(Reg No. 1993/001534/07)

First Respondent

ADV S RORKE SC

Second Respondent

JUDGMENT

EKSTEEN J:

[1] Notwithstanding that the applicant and the first respondent have specifically agreed to refer their dispute to arbitration they have subsequently become embroiled in an acrimonious dispute about whether there is a dispute between them capable of resolution by way of arbitration. By agreement between them the second respondent was appointed as arbitrator. Certain pre-arbitration meetings were held and the second respondent has made a number of rulings. The applicant now seeks an order declaring that no arbitrable dispute is set forth in the statement of dispute and that the second respondent therefore has no *locus standi* as arbitrator for the purposes of adjudicating any dispute between the parties. It seeks a further

declarator that rulings made by the second respondent in the course of the arbitration proceedings between the parties are therefore of no force and effect.

Background

[2] The applicant holds a long-term lease over a property situated in Humewood Port Elizabeth in terms of a notarial lease concluded with Transnet Limited, the owners of the property. The applicant has, in turn, sublet the property to the respondent in terms of a notarial agreement of sub-lease and the respondent has further sublet the property to the Paxton Hotel (Pty) Ltd.

[3] On 31 March 2000 the parties entered into a notarial agreement of variation of the sub-lease. Notwithstanding the conclusion of the variation agreement the provisions thereof were never put into effect until the first respondent demanded in 2015 that the provisions thereof be implemented. The applicant declined to implement these provisions without articulating any reasons for its failure to do so. This prompted Mr Peterseil, on behalf of the first respondent to enquire from Mr Denton, a director of the applicant, whether the applicant accepted that the notarial agreement of variation was binding and enforceable between the parties. Despite repeated approaches he was unable to obtain a direct and unequivocal response from Denton. In the circumstances, on 30 November 2015, the first respondent prepared a document headed "Terms of Dispute" wherein it raised two disputes. The second dispute is headed "The status of the Notarial Agreement of Variation of Sub-Lease". It records:

- '1.1 On 31 March 2000, the Defendant and the Claimant entered into a Notarial Agreement of Variation of Sub-Lease ("*the Variation Agreement*") varying the terms of the Agreement;

...

- 1.3 The Defendant refuses to recognise the validity of *the Variation Agreement*.

2. The Claimant contends that the *Variation Agreement* is valid and binding on the parties and falls to be implemented between them and the *Agreement* to be varied accordingly.'

[4] These "Terms of Dispute" were forwarded to the applicant under the cover of a letter by the first respondent's attorneys of record. They enclosed the statement of the "Terms of Dispute" which were prepared in terms of clause 17 of the notarial agreement of lease and they proposed that the dispute be referred to arbitration. I pause to record that clause 17 of the notarial agreement of lease provides for any dispute of whatever nature in respect of or arising out of the agreement or its termination, interpretation or how so ever to be referred to a referee for decision. The proposal that the disputes set out in the "Terms of Dispute" be referred to arbitration was accordingly at variance with the notarial agreement of lease. Upon receipt and, no doubt, consideration of the disputes raised in the "Terms of Dispute", however, the applicant and the first respondent agreed that the first dispute raised should not be decided by arbitration but rather by the applicant's auditors. This dispute is not material to these proceedings. In respect of the remaining dispute the parties agreed that the matter be dealt with by arbitration and they nominated the second respondent as the arbitrator.

[5] A pre-arbitration meeting was convened on 10 February 2016. The minute of the pre-arbitration meeting records that there is an arbitrable dispute as to “whether or not the notarial agreement was varied”. This prompted Attorney Schoeman, acting on behalf of the applicant, to challenge the existence of such a dispute. On the papers before me it does not appear to be contentious that the recordal is incorrect. It is the enforceability of the notarial agreement of variation of sub-lease which is in issue. Lengthy communications between the attorneys of the applicant and the first respondent followed and the terms of the dispute were redrafted on a number of occasions. The material portions of the current formulation records:

“The status of the Notarial Agreement of Variation of Sub-Lease

1.The material facts are:

1.1 on 31 March 2000, the Defendant and the Claimant entered into a Notarial Agreement of Variation of Sub-Lease (“the Variation Agreement”) varying the terms of the Agreement;

1.2 a copy of the Variation Agreement is annexed hereto marked **KSP2**;

1.3

1.3.1 The Applicant has called upon the Respondent to confirm the enforceability of the Variation Agreement.

1.3.2 The Respondent has, repeatedly, refused to so confirm such enforceability.

1.3.3 In the circumstances the Applicant contends that the inference is to be drawn that the Respondent disputes (on grounds thusfar undisclosed) the enforceability of the Variation Agreement.

2. Claimant contends that the Variation Agreement is valid and binding on the parties and falls to be implemented between them and the Agreement be varied accordingly.”

[6] The second respondent ruled at a further pre-arbitration meeting that a dispute capable of arbitration exists and put the applicant to terms to file its statement of defence in respect of the variation issue. A statement of defence was eventually forthcoming on 30 May 2016. *In limine* the applicant contended that there can be no arbitration between the parties on the strength of any of the claimant's statement of disputes as the "Terms of the Dispute", fails to articulate an arbitrable dispute. In addition, as a second point *in limine*, the applicant finally reveals its contentions. It pleads that the notarial agreement of variation of sub-lease conferred upon the first respondent a personal right which has become prescribed and is therefore unenforceable.

[7] The only material dispute which emerged from the papers relates to the assertion on behalf of the first respondent that Mr Peterseil had repeatedly approached Denton to admit or deny that the notarial agreement of the variation of sub-lease was valid and binding. Denton did not depose to the founding affidavit. Attorney Schoeman records that to the best of his knowledge the applicant has never been requested to confirm the enforceability of the variation agreement. In answer Mr Peterseil states unequivocally that he asked Denton whether the applicant accepts that the notarial agreement of variation will be enforceable between the parties and that despite doing so repeatedly he was never able to obtain a direct and unequivocal response. Peterseil contended that in the circumstances surrounding his repeated enquiries from Denton and the nature of the equivocation with regard thereto leads inescapably to the conclusion that Denton on

behalf of the applicant does not admit the enforceability of the notarial variation agreement.

[8] Denton thereafter deposed to a replying affidavit. In response to these direct assertions by Peterseil Denton declares:

"I have never, whilst acting on behalf of the Applicant, felt myself obliged to inform Mr Peterseil whether the Applicant was of the view that the Agreement of Variation is enforceable or not. The Applicant has, for reasons which are not germane hereto, simply declined to comply with its terms."

[9] The relief which the applicant seeks is final and in those circumstances the averments made by the respondent must prevail for purposes of the adjudication of the application. (See **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) at 634E-I.) Even if I err in this regard I do not consider that there is any denial by Denton of the essence of Peterseil's averment. The averment by Attorney Schoeman is clearly hearsay and Denton's response is at best evasive.

Application of the facts to the legal principles

[10] In **Parekh v Shah Jehan Cinemas (Pty) Ltd and Others** 1980 (1) SA 301 (D) Didcott J set out an articulate description of arbitration proceedings and its purpose. At 304E-G he stated:

"Arbitration is a method for resolving disputes. That alone is its object, and its justification. A disputed claim is sent to arbitration so that the dispute which it involves may be determined. No purpose can be served, on the other hand, by arbitration on an undisputed claim. There is then nothing for the arbitrator to

decide. He is not needed, for instance, for a judgment by consent or default. All this is so obvious that it does not surprise one to find authority for the proposition that a dispute must exist before any question of arbitration can arise."

[11] Mr **Scott SC**, on behalf of the applicant, contends that the first respondent has failed to properly formulate a dispute, and the terms of such a dispute. Denton articulated the applicant's stance in the replying affidavit. He stated:

"... until the First Respondent sets forth, in its Statement of Claim, a description of the dispute between the parties, that is, their respective and differing or competing views with regard to a particular aspect of the matter, ... there can be no talk of the commencement of arbitration proceedings."

[12] For this contention Mr **Scott** seeks refuge in the decision of **Telecall (Pty) Ltd v Logan** 2000 (2) SA 782 (SCA) where Plewman JA stated at para [12]:

"I conclude that before there can be a reference to arbitration a dispute, which is capable of proper formulation at the time when an arbitrator is to be appointed, must exist and there cannot be an arbitration and therefore no appointment of an arbitrator can be made in the absence of such a dispute. It also follows that some care must be exercised in one's use of the word 'dispute'. If, for example, the word is used in a context which shows or indicates that what is intended is merely an expression of dissatisfaction not founded upon competing contentions no arbitration can be entered upon."

[13] All of this, I think, is uncontentious and Mr **Buchanan SC**, on behalf of the first respondent, does not take issue with these statements. He has referred me, however, to **Peter Ramsden: The Law of Arbitration** at p. 50-51 wherein the author summarises the position in English Law by reference to a judgment of Jackson J in the matter of **Amec Civil Engineering Ltd v Secretary of State for**

Transport [2005] 1 WLR 2339 CA, [2005] EWCA Civ 291. At p. 50-51 the author quotes the *dicta* of Jackson J to the following effect:

- “(a) The word “dispute” which occurs in many arbitration clauses should be given its normal meaning. It does not have some special or unusual meaning conferred upon it by lawyers. Despite the simple meaning of the word ‘dispute’, there has been much litigation over the years as to whether or not disputes existed in a particular situation or not.
- (b) The mere fact that one party notifies the other party of a claim does not automatically and immediately give rise to a dispute. It is clear, both as a matter of language and from judicial decisions, that a dispute does not arise unless and until it emerges that the claim is not admitted.
- (c) The circumstances from which it may emerge that a claim is not admitted are protean. For example, there may be an express rejection of the claim. There may be discussions between the parties from which objectively it is to be inferred that the claim is not admitted. The defendant may prevaricate, thus giving rise to the inference that he does not admit the claim. The defendant may simply remain silent for a period of time, thus giving rise to the same inference.
- (d) ...
- (f) If the claim as presented by the claimant is so nebulous and ill-defined that the defendant cannot sensibly respond to it, neither silence by the defendant nor even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication.”

In **Collins (Contractors) Ltd v Baltic Quay Management (1994) Ltd** [2004] 2 All ER 982, [2004] EWCA Civ 1757, Lord Clarke, after quoting this dictum of Jackson J stated at para 63:

“... I entirely accept that all depends on the circumstances of the particular case. I would, in particular, endorse the general approach that while the mere making of a claim does not amount to a dispute, a dispute will be held to exist once it can reasonably be inferred that the claim is not admitted. ...”

[14] He proceeded at para 64 to state:

“It appears to me that negotiation and discussion are likely to be more consistent with the existence of a dispute, albeit an as yet unresolved dispute, than with an absence of a dispute. It also appears to me that the court is likely to be willing readily to infer that a claim is not admitted and that a dispute exists so that it can be referred to arbitration or adjudication.”

[15] English authority dealing with the requirements for a dispute for arbitration do, of course, have strong persuasive value in our law. See ***The Law of Arbitration in South Africa – Jacobs*** at p. 1-2.

[16] I agree with the views expressed by Ramsden. A party who has bound himself to have his disputes resolved by arbitration cannot, in the face of a patent dispute, avoid arbitration by refusing to engage. Situations may often arise where the contentions advanced by one party may not be known to the other, even though the conduct of the former, viewed in context, demonstrates unequivocally that a dispute exists. I am fortified in this view by the finding of Plewman JA in ***Telecall (Pty) Ltd supra*** at 786I where he held:

“In short a dispute for the purposes of the Act is one in relation to which opposing contentions are or can be advanced.”

[17] This, I think, acknowledges that a valid dispute under the Act may arise even though the contentions of the opposing party supporting the position which he evinces by his conduct are not known to the counterparty. On the facts of the

present matter I think that the prevarication on the part of Denton gives rise to the inescapable inference that the enforceability of the notarial agreement of sub-lease was being disputed and that the referral to arbitration was valid. It follows that in my view the dispute is properly and accurately formulated in the most recent “Terms of Dispute” quoted earlier. The existence of this dispute is ultimately confirmed, albeit *ex post facto*, by the statement of defence filed wherein the applicant contended that the agreement is unenforceable by virtue thereof that it conferred a personal right which has prescribed. This clearly is a matter for the arbitrator to decide.

[18] In the result, the application is dismissed with costs.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv PWA Scott SC instructed by BLC Attorneys, Port Elizabeth

For First Respondent: Adv R Buchanan SC instructed by Rushmere Noach Incorporated, Port Elizabeth