

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

CASE NO.: 2889/2017

In the matter between:

PRO-KHAYA CONSTRUCTION CC

Applicant

And

STRATA CIVILS

First Respondent

TONY ASHFORD

Second Respondent

JDM DRILLING (PTY) LTD

Third Respondent

WILLEM HENRIK OLIVIER

Fourth Respondent

JUDGMENT

BESHE J:

[1] The applicant has approached this court seeking an order in the following terms:

1. That the arbitration agreement between Applicant and the:

1.1 first respondent, conducted under the auspices of the second respondent, and

1.2 third respondent conducted under the auspices of the fourth respondent, shall in terms of the provisions of *Section 3 (2) (c) of Arbitration No. 42 of 1965* cease to have effect with reference to any dispute referred.

2. That within 30 days after court having granted an order in terms of paragraph 1 above, the applicant institute consolidated proceedings against the first and third

respondents (jointly and severally) in this court for the relief claimed in the arbitration proceedings (as amplified, where necessary) referred to in paragraph 1 above.

3. That the costs of arbitration be reserved for determination by the trial court in the action proceeding to be commenced.

4. That costs of this application be borne by the applicant save in the event of being opposed in which event the costs of opposition be borne by the party opposing the application.

[2] The first respondent is that party that is opposing the application. Second and forth respondents did not enter the fray. Third respondent opted to abide by the decision of the court. The following background to the application to a large extent seems common cause:

The applicant, a contractor, was awarded a contract by Coega Development Corporation (Pty) Ltd (CDC) in April 2015.

In turn, in May of the same year the applicant in its capacity as a contractor, entered into a domestic agreement with the first respondent in terms of which the first respondent was to be a subcontractor in respect of the contract with CDC. Still in 2015, applicant entered into a domestic contract with the third respondent in terms of which the third respondent was to be another subcontractor in the same contract with CDC.

It appears to be common cause that the work or part thereof, that was done as per the contract with CDC, in particular the fire reticulation

works, was rejected by CDC engineers.

Remedial work was required and was undertaken by the first respondent and completed in respect of which it was paid a sum of R200 000.00 by the applicant.

[3] According to the applicant, this was on the assumption that first respondent was not responsible for the defective work.

[4] Subsequently, a dispute arose between applicant and first respondent regarding payment of first respondent's fees which culminated in the parties agreeing to the arbitration of the dispute before the second respondent. It is also common cause that applicant filed its defence and a counter-claim in February 2017. The counter-claim was *inter alia* for damages suffered flowing from the work that was rejected by CDC. The arbitration proceeded on the 5th and 6th of June 2017. It would also appear that following an objection by the first respondent to the counter-claim forming part of the arbitration, the parties agreed that applicant's counter-claim be separated from first respondent's claim and applicant's defence.

[5] A dispute or disputes arose concerning payment between applicant and third respondent stemming from the same contract with CDC in respect of which third respondent was subcontracted by the

applicant. The applicant and third respondents agreed to refer their disputes to arbitration before the fourth respondent.

[6] It is the two abovementioned arbitration agreements applicant seeks to have terminated.

[7] *Section 3 (2) (c) of the Arbitration Act* provides that:

“(2) The court may at any time on the application of any party to an arbitration agreement, on good cause shown –

(a)

(b)

(c) order that the arbitration agreement shall cease to have effect with reference to any dispute referred.”

[8] The good cause or sound reason for terminating the agreements as contended for by the applicant, as would also appear from the founding affidavit are *inter alia* the following:

- applicant's defence to the first respondent's claim and the counter-claim are inextricably linked.
- if the arbitration were to continue in the agreed manner, it would mean the second respondent will deal with issues in a piece-meal fashion.
- the central issue in both arbitrations concerns the determination of, which of the respondents (1 and 3) was responsible for the

defective work. And that therefore out of necessity the evidence in both instances will overlap.

- it is undesirable to have parallel proceedings before two separate tribunals which could lead to conflicting decision regarding similar or identical issues. As this would (parallel proceedings) will amount to extra costs and potentially cause delays.
- the transcript of the hearing before the second respondent is of very little value due to its extremely poor quality.

[9] Those reasons were confirmed by *Mr Beyleveld* for the applicant – namely:

The undesirability of two parallel proceedings dealing with similar legal and factual issues which could come to different conclusions yet if proceedings are brought before the High Court the issues can be dealt with in one action. He also urged the court not to gloss over the poor state of the record.

[10] The issue of the separation of applicant's counter-claim from his defence in respect of the arbitration involving the first respondent has since fallen by the way side. According to the applicant (in its replying affidavit), the second respondent made a finding on the 30 August 2017 that the applicant's counter-claim is admissible and forms part of the applicant's defence.

[11] Sans the issue of the counter-claim not forming part of the issues to be dealt with by the second respondent, is there good cause / good strong reasons why the two arbitration agreements concerned should be terminated? First respondent submits that there are no such reasons. First respondent's grounds for opposing the application are succinctly summarised by the applicant in its reply as being:

The fact that the proceedings are at an advanced stage;

There were alternative mechanisms available to the applicant which it did not invoke – it could have requested the consolidation of the two arbitrations. Alternatively it could have applied for the joinder of the third respondent in the arbitration agreement with first respondent. The applicant has failed to show good cause for the termination of the arbitration agreement. First respondent also cited the technical nature of the arbitration, submitting that the arbitrators are best suited to deal with the issues that are being considered in the arbitrations.

[12] Regarding the last mentioned ground, first respondent points out that the second respondent is not only a qualified arbitrator, or to act as such, he is also an engineer who has specific expertise and detailed knowledge of the technicalities associated with the agreement between the parties. That second respondent is well equipped to adjudicate the disputes concerned. It was also pointed out on behalf of the first respondent, that there are no allegations of any unbecoming conduct or

irregularities that are imputed to the arbitrators (second and fourth respondents).

[13] In response to first respondent's assertion that applicant could have invoked article 17.5 of the *Rules of Conduct of Arbitrators*, applicant submits that the article applies only if the party sought to be joined is a party to the arbitration agreement in question. To this, first respondent retorts that the two agreements are factually the same. And that the consent of first and third respondents could have been sought for such joinder.

[14] Counsel for the first respondent *Mr Janse Van Rensburg* pointed out correctly in his practice note that the issue in dispute is whether there is good cause for ceasing the arbitration agreements.

[15] Both parties referred me to a number of decisions where courts had occasion to deal with this issue, which were all very useful. From these decisions the following principles can be discerned:

The applicant bears the onus of showing that sound reasons exist for the relief sought to be granted.¹ In **Metallurgical and Commercial Consultants v Metal Sales Co. (Pty) Ltd**² the following was said "Such onus is not easily discharged. There are certain advantages such as

¹ Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd 2014 (3) SA 265 (GP) at 285.

² 1971 (2) SA 388 T at 391.

finality, which a claimant in an arbitration enjoys over one who has to pursue his rights in the courts, and one who has contracted to allow his opponent those advantages will not readily be absolved from his undertaking. In **Rhodesian Railways v Mackintosh, 1932 AD 359**, *Wessels ACJ* (as he then was), held that “the discretion of the court to refuse arbitration under a submission was to be exercised judicially, and only when “a very strong case” for its exercise had been made out (see page 375). The court was there acting under a different stature from the one before me. But the observation of *Wessels ACJ* is none the less apposite here, because it was based upon a general principle”.

[16] My attention was also drawn to the decision in **Welihockyj and Others v Advtech Ltd and Others**³ where the reasons for the declaring the arbitration agreement of no force or effect appear to have been quite weighty in my view. Those reasons appear at page 756 A – F:

“*In casu* it is, of course, the applicants who desire the exclusion of the arbitration, who stand accused of fraudulent conduct, misappropriation and criminal conduct. These allegations form part of most of the respondents' counterclaims and for this reason alone it would, in my view, be wrong not to allow the applicants the opportunity of having these allegations ventilated in open court and with a right of appeal. Having regard to all the circumstances, it is not, in my view, correct to argue that the *Anton Piller* and the restraining applications would afford the applicants a sufficient opportunity to clear their names. There is another reason for upholding the

³ 2003 (6) SA 737 at 576 A – F.

applicants' contentions. The issues in the respondents' counterclaims also relate to and affect third parties which are not subject to the provisions of the SOB and in respect of which the fourth respondent has no powers of investigation. A court of law will not be curtailed by such factors and would be in a position to adjudicate and conclude all the interwoven issues in one and the same process. The further arguments on behalf of the respondents do not detract from the aforesaid conclusions.

[37] As far as the applicants' claim in convention is concerned, it appears that the respondents' defence thereto relates, to a large degree, to the fact the applicants owe a much larger amount to the respondents as a result of the counterclaims. To some degree the allegations of fraudulent conduct, misappropriation and criminal conduct are also interwoven in both claims in convention and reconvention. In my view, it would be impractical and undesirable to direct that the applicants' claim shall remain the subject-matter of the arbitration before the fourth respondent whilst that process shall cease to have effect in respect of the respondents' counterclaims. As regards the costs thus far incurred in the arbitration for which orders have not already been issued, I am of the view that such costs should be costs in any future High Court proceedings."

This prompted *Mr Janse Van Rensburg* to submit that **Welihockyj's** matter is distinguishable from the present application because *in casu* there are no allegations of fraud. Granted, as *Mr Beyleveld* pointed out that the alleged fraud was not the only reason why the court exercised its discretion to terminate the arbitration agreement. Whilst I agree with *Mr Beyleveld*, there was also the issue of, amongst others, respondent's counter-claims relating to third parties outside of the Sale of Business Agreement. But we also know that the issue of the exclusion of the

counter-claim *in casu* is no longer relevant. That leaves the complaint about the piecemeal adjudication of the issues between the applicant, first and third respondents or the undesirability of parallel proceedings as well as the poor state of the record.

[17] It was submitted on behalf of the first respondent that the poor record could be rectified by reconstructing it or filling the missing words with notes from all the parties. That this cannot be a good enough reason to terminate an arbitration.

[18] I am inclined to agree with first respondent's counsel in this regard. This is not an insurmountable difficulty and one that warrants the termination of the arbitration.

[19] Applicant agreed to the institution of the two proceedings. One has already proceeded on two previous dates and is at an advanced stage. Bearing in mind that the parties have a right to the expeditious adjudication of their disputes and have a right to finality, will it be in the interest of the parties – especially applicant, and first respondent to halt these proceedings. Are there strong good reasons to do so? Applicant alleges that it is undesirable to have parallel proceedings which may render different conclusions. But is that not the nature of adjudication / litigation? Will those conclusions not be based on the evidence before

the respective arbitrators? The arbitration agreements were concluded as far back as 2016, what it is that belatedly alerted the applicant to the “undesirability of having two parallel proceedings”? Had the applicant been concerned with issues of convenience and cost effectiveness, in my view, it would have explored the possibility of getting the assent of first and third respondents to a consolidation of the arbitrations or joinder earlier in the process. First respondent complains that seeking termination of the agreements smacks an attempt on the part of the applicant to escape the shortcomings of his case in the arbitration proceedings underway. The applicant has been heard to be complaining of poor legal representation at some stage during the arbitration process. So, first respondent’s suspicion that this is an attempt to escape the shortcomings in applicant’s case is not farfetched.

[20] Be that as it may, applicant’s complaint in this regard was as regards the separation of his counter-claim from the arbitration proceedings, which it claims is interlinked with its defence. That is no longer relevant or no longer applies because the second respondent has agreed to deal with applicant’s counter-claim.

[21] I am not persuaded that there are compelling reasons to terminate the two arbitration agreements.

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

**NG BESHE
JUDGE OF THE HIGH COURT**

APPEARANCES

For the Applicant	:	Adv: A Beyleveld SC
Instructed by	:	FRIEDMAN SCHECKTER ATTORNEYS 75 Second Avenue Newton Park PORT ELIZABETH Tel.: 041 – 395 8412 Ref.: Mr Friedman/ps/L09902
For the Respondents	:	Adv: E Janse Van Rensburg
Instructed by	:	JOHANN VILJOEN & ASSOCIATES C/o WIKUS VAN RENSBURG ATTORNEYS 36 Western Road Central PORT ELIZABETH Tel.: 041 – 582 2205 Ref.: Mr Wikus Van Rensburg
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