

REPUBLIC OF SOUTH AFRICA



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

Case Number: 2021/41489

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED: YES / NO

DATE

SIGN

In the matter between:

ESKOM ROTEK INDUSTRIES SOC LTD

Applicant

and

GEO-X (PTY) LTD

Respondent

JUDGMENT

H A VAN DER MERWE, AJ

- [1] This is an application in terms of rule 33(4), brought by the defendant in the action to which it pertains. The respondent is the plaintiff in the action. The parties are referred to as they are in the action.

[2] The plaintiff's claim is based on a construction contract. Its claim is for specific performance in terms of the contract, for amounts it claims are owing to it, ultimately due to the defendant's inability to grant it access to the construction site, due to the lockdown that followed the outbreak of the Covid-19 pandemic in 2020.

[3] In the defendant's plea, it raised three special pleas. The first is that the dispute between the plaintiff and the defendant should be referred to arbitration, after an adjudication process.¹ The paragraphs of the first special plea that are relevant for present purposes read as follows:

“12. The Plaintiff elected to refer its dispute to adjudication, and is consequently bound by that election.

13. The proceedings under the case number above are subject to a pending adjudication, alternatively, to an arbitral process pursuant to the terms of the Contract.

14. In the circumstances, this Honourable Court has no jurisdiction to determine the Dispute, alternatively, the Defendant seeks a stay of these proceedings, pending the outcome of the adjudication, alternatively, arbitration proceedings.”

[4] The first special plea ends with the following prayer:

“WHEREFORE the Defendant prays that the Plaintiff's claims for CE1 and CE2 be dismissed with costs, alternatively, for the action to be stayed pending the final determination of the Dispute by an arbitrator appointed in terms of the Contract.”

[5] The second special plea is based on certain terms of the contract, which the defendant alleges render the plaintiff's claim premature. The third special plea is also based on the contract. The defendant pleads that determinations made by the “Supply Manager” (called “decisions”) are binding on the plaintiff. For

¹ “Adjudication” in the contract, as in other comparable contracts, has a special meaning that is not to be confused with adjudication in a court of law.

reasons that follow, it is not necessary to analyse the second and third special pleas any further.

- [6] The defendant seeks an order isolating all three special pleas for separate determination in terms of rule 33(4). The following passage from *Erasmus Superior Court Practice*² is quoted with apparent approval in *Tshwane City v Blair Atholl Homeowners Association*:³

“The procedure is aimed at facilitating the convenient and expeditious disposal of litigation. The word convenient within the context of the subrule conveys not only the notion of facility or ease or expedience, but also the notion of appropriateness and fairness. It is not the convenience of any one of the parties or of the court, but the convenience of all concerned that must be taken into consideration.”⁴
(Footnotes omitted.)

- [7] Separation requires careful consideration. In *Denel (Edms) Bpk v Vorster*⁵ it was found:

“Before turning to the substance of the appeal, it is appropriate to make a few remarks about separating issues. Rule 33(4) of the Uniform Rules — which entitles a Court to try issues separately in appropriate circumstances — is aimed as facilitating the convenient and expeditious disposal of litigation. It should not be assumed that that result is always achieved by separating the issues. In many cases, once properly considered, the issues will be found to be inextricably linked even though, at first sight, they might appear to be discrete. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing, particularly where there is more than one issue that might be readily dispositive of the matter. It is only after careful thought has been given to the anticipated course of the litigation as a whole that it will be possible properly to determine whether it is convenient to try an issue separately.”⁶

² (2016) 2 ed at D1-436.

³ [2018] ZASCA 176; 2019 (3) SA 398 (SCA).

⁴ *Id* at para 50.

⁵ [2004] ZASCA 4; 2004 (4) SA 481 (SCA).

⁶ *Id* at para 3.

[8] The first special plea, properly analysed, is for an order for the stay of the proceedings in this Court, pending its determination by way of arbitration proceedings. Adjudication is a pre-cursor to arbitration, but in substance it remains a plea for a stay pending determination by an arbitrator. Mr De Villiers for the respondent argued that despite what is pleaded in the first special plea, the contract does not allow for the disputes to be arbitrated. A reason he cited in support of this submission, is that in terms of the contract, a referral to adjudication and in consequence, arbitration, is time-barred. Mr De Villiers may be right that a referral to adjudication and thus also to arbitration is time-barred, but that does not change the fact that the first special plea remains a reliance on an arbitration agreement. The reliance on the arbitration agreement may be good or it may be bad. That issue is however not for me to decide. If I order a separation, it will be for the court seized with the first special plea to determine whether the facts and the proper interpretation of the contract supports the defendant's pleaded allegation that the "... proceedings under the case number above are subject to a pending adjudication, alternatively, to an arbitral process..." What I have before me is a special plea in which that allegation is made. The only question I am to decide is whether that special plea should be determined separately in terms of rule 33(4).

[9] It remains for me to deal with that part of the special plea that goes to this Court's jurisdiction. It is not correct, as Mr Desai for the defendant conceded, to say that an arbitration provision ousts this Court's jurisdiction, if that term is used in its technically correct sense. Mhlantla J, writing for a unanimous bench, found in *Crompton Street Motors CC t/a Wallers Garage Service Station v Bright Idea Projects 66 (Pty) Ltd t/a All Fuels*⁷ "[i]n any event, it is trite that arbitration does not oust the jurisdiction of courts." The judgment further cites the following authorities: *Parekh v Shah Jehan Cinemas (Pty) Ltd and Others*⁸ citing *Rhodesian Railways Ltd v Mackintosh*;⁹ *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd*;¹⁰ *Walters v Allison*;¹¹ and *Davies v The South British*

⁷ [2021] ZACC 24; 2022 (1) SA 317 (CC); 2021 (11) BCLR 1203 (CC) ("*Crompton Street*") at para 26.

⁸ 1980 (1) SA 301 (D) ("*Parekh*") at 305D-H.

⁹ 1932 AD 359.

¹⁰ 1977 (4) SA 682 (C).

¹¹ 1922 NLR 238.

*Insurance Co.*¹² The applicable legal principles are described as follows in *Parekh*:

“The exception was based, however, on a fallacy. An arbitration agreement does not deprive the Court of its ordinary jurisdiction over the disputes which it encompasses. All it does is to oblige the parties to refer such disputes in the first instance to arbitration, and to make it a prerequisite to an approach to the Court for a final judgment that this should have happened. While the arbitration is in progress, the Court is there whenever needed to give appropriate directions and to exercise due supervision. And the award of the arbitrator cannot be enforced without the Court's *imprimatur*, which may be granted or withheld. But that is by no means all. Arbitration itself is far from an absolute requirement, despite the contractual provision for it. If either party takes the arbitrable disputes straight to Court, and the other does not protest, the litigation follows its normal course, without a pause. To check it, the objector must actively request a stay of the proceedings. Not even that interruption is decisive. The Court has a discretion whether to call a halt for arbitration or to tackle the disputes itself. When it chooses the latter, the case is resumed, continued and completed before it, like any other. Throughout, its jurisdiction, though sometimes latent, thus remains intact. That all this is so emerges from such cases as *Davies v South British Insurance Co* (1885) 3 SC 416; *Walters v Allison* 1922 NLR 238; *Rhodesian Railways Ltd v Mackintosh* 1932 AD 359; *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* 1977 (4) SA 682 (C).”¹³

[10] To the extent that the judgement in *Bapedi and Associates CC v Tusk Construction Support Services (Pty) Ltd and Another*¹⁴ can be read to mean that an arbitration agreement deprives a court of jurisdiction, properly so-called, it seems to me, with respect, to have been clearly wrongly decided and should not be followed. I am bound in any event by the judgement in *Crompton Street*. In the result, despite what is pleaded in the first special plea, the only issue that can be isolated for separate determination is whether the proceedings in this Court

¹² (1885) 3 SC 416.

¹³ *Parekh* n 8 above at 305D-H.

¹⁴ [2021] ZAGPPHC 630.

should be stayed, pending the outcome of arbitration proceedings, whether it is preceded by adjudication (as meant in the contract) or not.

[11] I am mindful of the judgement in *Marsay v Dilley*¹⁵ in which it was held that a court hearing an application in terms of rule 33(4), should not make a finding on the issue that is sought to be decided separately. The facts of this matter are however distinguishable. Here, given Mr Desai's well-made concession, there is no dispute on the issue and hence there can be no prejudice to the plaintiff. Moreover, here a simple point of law is at stake, not also factual disputes as was the case in *Marsay*. Where it is clear that the issue sought to be referred is bad in law and so doomed to fail, there is no convenience in ordering a separate determination, nor is it appropriate or fair to do so.

[12] To my mind, there are compelling reasons why I should make an order for the separate determination of the first special plea, so far as it concerns arbitration, despite the fact that it seems to be the subject matter of a considerable dispute between the plaintiff and the defendant that may require oral evidence to be resolved. If a separation is not ordered, the first special plea will still have to be determined, but at a trial together with all the other issues. If the point is upheld, it means that every other issue between the parties should not be decided by this Court, but by an arbitrator. It makes little sense for this Court to hear evidence on all the various other issues between the parties, only for it to decide that all those other issues should be decided by an arbitrator. Then all the evidence that was led before this Court, will have to be led again before an arbitrator. That would result in a fantastic waste of time and costs. Moreover, as Mr Desai correctly submitted, an order in terms of section 3 of the Arbitration Act 42 of 1965, that a dispute otherwise subject to an arbitration agreement should not be referred to arbitration, is not lightly granted.¹⁶

[13] For the reasons set out above, the second and third special pleas should not be decided separately. If the first special plea is upheld, those issues are to be

¹⁵ [1992] 2 All SA 327 (A) at 333; 335; 1992 (3) SA 944 (A) at 963C(D); 964H-J (*Marsay*)

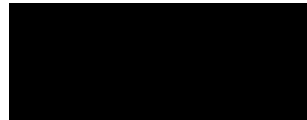
¹⁶ See LAWSA, vo 2, th rd ed. par 95.

decided in arbitration proceedings. If the first special plea is dismissed, it may be another matter, but that is also not a matter I should engage in this application.

[14] Mr Desai submitted that if a separation is ordered, then the proper costs order is to reserve the costs of this application for the court hearing the first special plea. That seems to me to be an appropriate order.

[15] I make the following order:

- (a) The first special plea, excluding the references made therein to this Court's jurisdiction, is to be decided separately in terms of rule 33(4);
- (b) Costs are reserved for the court hearing the separated issue.



H A VAN DER MERWE
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard on: 3 October 2023

Delivered on: 11 October 2023

For the applicant: Adv M Desai

Instructed by: LNP Attorneys Inc

For the respondent: Adv RF De Villiers

Instructed by: Deneys Zeederberg Attorneys