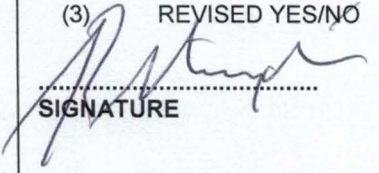


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No: 30282/2020

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED YES/NO
	
SIGNATURE	DATE
	5/09/2022

In the matter between :

**DEVELOPMENT BANK OF SOUTHERN AFRICA
LIMITED**

Plaintiff/Applicant

and

PROLINE TRADING 60 (PTY) LTD

Defendant/Respondent

JUDGMENT

STRYDOM J

- [1] During January 2009 the applicant, the respondent and Cranbrook Property Projects (Pty) Ltd ("Cranbrook") concluded a loan facility agreement. Further addenda were concluded to this agreement. The loan facility agreement as well as the addenda thereto are referred to collectively as the "LFA".

- [2] In terms of the LFA, the applicant agreed to make available to the respondent a loan in the amount of R125,000,000.00
- [3] Further, an event of default of the LFA would occur if, *inter alia*, the borrower fails to repay on demand the principal loan or any interest thereon when due and such failure continues for a period of 14 days.
- [4] The applicant averred that such a default took place and relied on an acceleration clause for payment of the full outstanding balance which at that stage stood at R147,990,239.95.
- [5] In addition to the security provided to the applicant by way of a mortgage bond registered over the properties owned by the respondent, suretyships were provided by Cranbrook and two other legal entities. Further suretyships were provided by six individuals. These parties will be referred to collectively as the "sureties".
- [6] Pursuant to the alleged default in repayment of the loan, the applicant's attorneys gave notice of an event of default and demanded immediate repayment of the loan plus accrued interest.
- [7] Thereafter correspondence and discussion ensued between the parties and their attorneys. According to the applicant no dispute about the respondent's indebtedness in terms of the LFA was raised. This, according to the applicant, explains why the applicant elected not to pursue its claim by way of arbitration as was provided for in clause 8.5 of the LFA. This clause provides for disputes between the parties to be adjudicated by way of arbitration in the following terms:

“Save where otherwise indicated, should any dispute (other than a dispute in respect of which urgent relief may be obtained from a court of competent jurisdiction) arise between the Parties in the widest sense in connection with : (a) the formation or existence of; the carrying into effect of; the interpretation or application of the provisions of; the Parties respective Rights and Obligations in terms of or arising out of; the validity, enforceability rectification, termination or cancellation, whether in whole or in part of; any documents furnished by the Parties pursuant to the provision of, this Agreement or which relates in any way to any other matter affecting the interests of the Parties in terms of this Agreement, that dispute shall, unless resolved amongst the parties to the dispute, be referred to and be determined by arbitration in terms of this clause 8.5, provided that a party to the dispute has demanded the arbitration by written notice to the other Parties ...”

- [8] Despite this clause the applicant elected to institute an action in this court against the respondent on or about 9 October 2020. The reason for this being that the applicant averred that no triable dispute manifested itself at that stage.

- [9] In the founding affidavit applicant went to great length to explain why there existed no triable dispute between the parties before summons was issued. The law in this regard is clear that there should be a dispute between the contracting parties before a matter could be referred to arbitration in terms of an arbitration clause. (See: *Parekh v Shah Jehan Cinemas (Pty) Ltd and Others* 1980 (1) SA 301 (D) at 304 E-F; *Body Corporate of Greenacres v Greenacres Unit 17 CC and Another* 2008 (3) SA 167 (SCA) at 172E- 173A).

- [10] Clause 8.5 of the LFA was couched in the widest terms and it is arguable that non fulfilment of an obligation, to wit, non-payment of a debt fell within the ambit of a triable dispute. There is no need for this court to make a finding on this issue,

save to accept that the view of the applicant, at the time when the summons was issued, was that there existed no genuine dispute between the parties to the LTA.

- [11] The respondent, on or about 8 December 2020, filed a plea and a counterclaim. The defendant raised two special pleas, both of which have been subsequently abandoned. The first special plea related to the jurisdiction of this court and it was stated that the applicant's action should have been instituted in the Pretoria High Court where two separate actions were instituted against the sureties who provided suretyships for the repayment of the respondent's debt. In the second special plea it was alleged that the claim should have been referred to arbitration pursuant to the arbitration clause 8.5 in the LFA stipulating that the agreement obliged the parties to submit any dispute to arbitration.
- [12] In the respondent's plea, it is alleged that the applicant breached the LFA in material respects. In particular, the applicant failed to make loan funds available to the respondent when the respondent needed the loan funds for the project. It also pleaded that the LFA stands to be rectified.
- [13] In the respondent's counterclaim, it claims damages as a result of the alleged breaches of the applicant. Damages in an amount of R133,400,000 was claimed.
- [14] The applicant then proceeded to plea to the counterclaim in which a special plea of prescription was raised and, further, a special plea averring that the dispute between the parties should be referred to arbitration in terms of clause 8.5 of the LFA. A plea over the merits was also provided. Whatever doubt could have existed previously about a triable dispute was no longer there. Clearly, on the pleadings as it stood there was now a substantial dispute, which if presented itself before summons was issued would have invoked the arbitration clause.

- [15] There are two ways in which a party to an agreement with an arbitration clause can refer the matter to arbitration. First, when a party instituted court proceedings despite the arbitration agreement, the defendant may apply for a stay of the proceedings brought before the delivery of any pleadings by the defendant or the taking of any step in the proceedings. This will be an application brought in terms of section 6 of the Arbitration Act 42 of 1956 ("the Arbitration Act"). Second, a defendant can raise a special plea (a dilatory plea) for the stay of proceedings, pending final determination of the dispute by the arbitrator. (See: *GK Breed (Bethlehem) (Edms) Bpk v Martin Harris & Seuns (OVS) (Edms) Bpk* 1984 (2) SA 66 (O) at 69 D-F; *Universiteit van Stellenbosch v JA Louw (Edms) Bpk* 1983 (4) SA 321 (A) at 329H; *PCL Consulting (Pty) Ltd t/a Phillips Consulting SA V Tresso Trading 119 (Pty) Ltd* 2009 (4) SA 68 (SCA) at [7].)
- [16] The respondent raised such a plea which was later abandoned by way of a letter from respondent's attorneys. When respondent pleaded and counterclaimed the applicant raised such special plea against the counterclaim of the respondent relying of the arbitration clause for the matter to be stayed pending arbitration. Instead of applying for this in the trial court the applicant proceeded to launch the current application in terms of section 6(1) of the Arbitration Act. The applicant needed not to proceed by bringing a substantive application as envisaged in section 6(1) but could have argued the special plea at the hearing of the action or separately pursuant to the terms of Rule 33(4) of the Rules of this Court. The latter approach would have led to a delay of the referral to arbitration and for that reason the applicant brought a substantive application bringing the terms of section 6(1) into the equation. Should it be found that applicant failed to meet the timeline set in this section, and failed to obtain an extension as contemplated in

section 38 of the Arbitration Act, the applicant will still be entitled to rely on its special plea as no time limitation is applicable in such an instance.

- [17] On or about 14 June 2021, the applicant also filed a replication to the defendant's plea dated 8 December 2020. In this replication it was averred that prior to the proceedings being instituted no dispute was raised by the respondent regarding its indebtedness in terms of the LFA. The terms of clause 8.5 of the LFA was pleaded and it stated that the respondent in its plea now disputed its indebtedness to the applicant. It was then pleaded that the applicant's claim is therefore required in terms of clause 8.5 of the LFA to be determined by arbitration. It was further stated as follows:

"As provided for in terms of clause 8.5.1(a) of the LFA, this special plea constitutes written notice by the plaintiff to the defendant that the plaintiff requires its claim as set out in the particulars of claim to be determined by way of arbitration."

- [18] The respondent was not amenable to refer this matter to be decided by an arbitrator and this gave rise to this application for the dispute between the parties to be referred to arbitration in terms of clause 8.5 of the LFA. The respondent opposed this application and filed an answering affidavit and a counter application. In the counter application an order was sought that the proceedings in this court under Case No. 30282/2020 be transferred in order to be adjudicated by the Gauteng Division, Pretoria where actions were instituted against the sureties. Further ancillary relief was sought as well as costs of this application. It should be noted that the counter application filed by the respondent was not an application for consolidation of this action with the two actions instituted against the sureties in the Pretoria court but merely for the transfer of this matter

to the Pretoria High Court where a consolidation application could be brought by a party who so wishes.

[19] Considering the pleadings in this matter a strange situation has developed. Initially the applicant, alleging that there was no triable disputes between the parties, instituted action in this court. This was met with a special plea by respondent that the applicant should have referred the dispute for arbitration in terms of clause 8.5 of the LFA. After the respondent filed its plea and counterclaim the applicant now filed a special plea pursuant to the counterclaim averring that the matter should be referred to arbitration as envisaged in clause 8.5 of the LFA. The respondent who had previously pleaded that the arbitration route should have been followed have now abandoned its special plea for the matter to go to arbitration and oppose the applicant's application to stay proceedings pending an arbitration.

[20] The first question for decision by this court is now whether the action in this court should be referred to arbitration at this late hour. A full set of pleadings has been filed in this court and the question is not whether clause 8.5 of the LFA finds application, as it clearly does having regard to all the disputes which now manifested, but rather whether a reference to arbitration could and should be made at this stage.

[21] On behalf of the applicant, it was argued that it is still entitled to enforce the agreement between the parties to have the matter adjudicated by way of arbitration. On behalf of the respondent, it was argued that in terms of section 6(1) of the Arbitration Act the time has come and gone for a referral to arbitration.

[22] Section 6(1) of the Arbitration Act provides as follows:

“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.”

[23] This section, on the face of it, only applies to legal proceedings in convention and not to proceedings in reconvention. Reason for this conclusion is the reference to *“after entering appearance”* which is not a step in the process which would be taken before a plea in reconvention is filed. But the section also states that *“any party”* instead of *“the other party”* may apply for the stay of the proceedings. This would mean that even the party who initiated the legal proceedings can after an appearance to defend was filed *“but before delivering any pleadings or taking any other steps in the proceedings”* apply for a stay of such proceedings. The latter part of the section only relates to a time bar for when the application should be made.

[24] The applicant in this matter only brought this application after the respondent pleaded and counterclaimed. The applicant further pleaded to the counterclaim and a replication was filed. The question now arises whether the time bar precludes this application for a stay.

[25] The applicant argued that section 38 of the Arbitration Act comes to its assistance. This section determines as follows:

“The court may, on good cause shown, extend any period fixed by or under this Act whether such period have expired or not.”

[26] It was argued on behalf of the respondent that this section cannot assist the applicant as the period mentioned in section 6(1) is not a *fixed period*. In my view, section 38, would be applicable. The period mentioned is a "*fixed period*" i.e. between the date of a notice of appearance but before the delivery of any pleading or a further step in the proceedings. The cut-off time has been determined and with reference to the date of the notice of appearance the time period can be established. The date is not fixed in the sense of stipulating days or weeks but rather by way of providing the starting and ending dates within which an application for stay could be launched. This period can be determined with precision and would fall within the ambit of a *fixed period* as contemplated in section 38 of the Arbitration Act.

[27] The court must thus decide whether to period should be extended. The applicant had to show good cause. As alluded hereinabove the applicant was of the view that no disputed manifested itself and the matter should not have been referred to arbitration. Now that it has become clear that such dispute presented itself a referral is sought to arbitration pursuant to clause 8.5 of the LFA as was agreed to between the parties. Against this submission it was argued that the applicant made its election and should be held to it, Moreover, pleadings have closed, and it will be more convenient that the matter remains in the High Court, albeit that it should be transferred to the Pretoria High Court for possible consolidation with the other related matters.

[28] In my view, the time period for bringing the application for the stay of the court proceedings should be extended to allow this application to be considered. The explanation of the applicant regarding its view that no dispute was previously

alluded to by the respondent is accepted. The “*convenience*” consideration referred to by the respondent does not outweigh the fact that the parties agreed to arbitration as the method to adjudicate disputes. The fact that the pleadings have closed is not decisive. These pleadings can be used or copied without huge expense to formulate the statements of claim and pleas of the parties in an arbitration. The court also took in consideration that at some stage the respondent was also of the view that the matter should be referred to arbitration. In my view good cause have been shown to extend the period referred to in section 6(1).

[29] The respondent argued that the applicant has not complied with clause 8.5.8(a) of the LFA which provides that a party who wishes to invoke arbitration must make demand for arbitration “*by written notice to the other party*”. In my view, the written notice contained in paragraphs 5 of the applicant’s replication and paragraph 10 of the applicant’s plea to the counterclaim can serve as written notice that the applicant required its claim and the counterclaim to be referred to arbitration.

[30] What now remains is to decide whether the action must stayed and referred to arbitration. The court already indicated that the existence of a triable dispute is unquestionable. The parties have bound themselves to an arbitration clause.

[31] Once it is established that there is a dispute covered by a valid arbitration agreement, the onus is on the party wishing to avoid arbitration to show “*good cause*” or “*sufficient reason*” why the arbitration agreement should not be enforced. (See *PDE Construction v Basfour 3581 (Pty) Ltd 2013 (5) SA 160 (KZP)* at 163 [10] and [11].

[32] The onus on that party is the same whatever procedure is used and it is a heavy onus and not easily discharged, because the party is trying to avoid its contractual obligations to arbitrate. (See *University of Stellenbosch v JA Louw Edms Bpk* 1983 (4) SA 321 (A) at 333G – 334C.

[33] In *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd* 1994 (1) All SA 453 (A) at 169, the following apposite finding was made:

“When parties agree to refer a matter to arbitration, unless the agreement provides otherwise, they implicitly, if not explicitly (and, subject to the limited power of the High Court (under s 3(2) of the Arbitration Act) abandon the right to litigate in courts of law and accept that they will be finally bound by the decision of the arbitrator. There are many reasons for commending such a course ... In my opinion the court should in no way discourage parties from resorting to arbitration ...”

[34] In my view, the agreement to refer disputes to arbitration must be honoured. An order in terms of the applicant’s notice of motion to stay the litigation in the High Court pending the outcome of the arbitration proceedings will amount to such enforcement of a valid and binding contractual agreement.

Counter-application for consolidation

[35] Considering that the court has found that the matter should be referred to arbitration, the counter-application for transfer of this matter to the High Court, Pretoria, should also fail. The court when it considered the applicant’s application to stay and referral to arbitration considered the convenience aspect which was alleged by the respondent. The court also took note of the submission made on behalf of the respondent that three separate actions pertaining to the same

dispute should not be heard in different forums. I am of the view that this consideration is not decisively in favour of the respondent as the parties involved in the other actions can submit to the jurisdiction of an arbitrator to allow for a simultaneously adjudication of the entire matter. The parties in the High Court can also apply for a postponement of the other matters pending the outcome of the arbitration award which, if against the applicant, would render the other actions unnecessary.

[36] Consequently, the counter-application should be dismissed with costs.

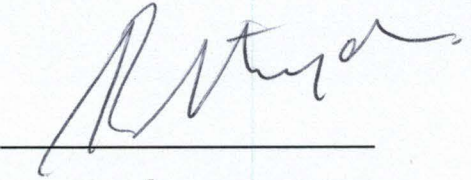
[37] What remains for decision is the respondent's application to strike out the first sentence of paragraph 19 of the applicant's founding affidavit on the basis that it contains information which is irrelevant. It was argued that the first sentence is irrelevant because it refers to privileged information and this privilege protects the information from disclosure. This sentence read as follows:

"The correspondence was largely aimed at attempting to resolve Proline's indebtedness to DBSA by way of a sale of the properties belonging to Proline and over which DBSA held security."

[38] In my view it became relevant in this matter for the applicant to explain why it did not initially elect to apply for the matter to be referred to arbitration. It, however, remained privileged information what the respondent's stance was pertaining to the claim made against the respondent. This sentence contains a general statement and in my view was relevant to explain the election of the applicant not to follow the arbitration route from the outset. Insufficient particularity was provided to conclude that privileged information was divulged in the affidavit. Accordingly, the application to strike should also be dismissed.

[39] The following order is made.

- (1) In terms of section 6(1) of the Arbitration Act, 1965, the proceedings pending under Case No. 30282/2020 are stayed, and the main and counter-claims under Case No. 30282/2020 are referred for determination by arbitration.
- (2) The respondent is to pay the costs of this application.
- (3) The respondent's counter-application is dismissed with costs.
- (4) The respondent's application to strike out is dismissed with costs.



RÉAN STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG

Date of Hearing: 28 July 2022

Date of Judgment: 05 September 2022

Appearances

For the Applicant/Plaintiff: Adv. J. Vorster

For the Respondent/Defendant: Adv. M. P Van der Merwe SC