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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

CASE NO: A58/2022

Reportable: NO

Of Interest to other Judges: NO

Circulate to Magistrates: NO

In the matter between:

W[....] J[....] V[....] J[....]

Appellant

and

E[....] V[....] J[....]

First Respondent

CAPITEC BANK

Second Respondent

CORAM: LOUBSER, J et MPAMA, AJ

JUDGMENT BY: MPAMA, AJ

DATE HEARD: 10 OCTOBER 2022

DELIVERED ON: 17 NOVEMBER 2022

[1] This is an appeal against the judgment and order of the Magistrate, Bloemfontein (hereinafter referred as the maintenance court) delivered on 18 February 2022 in terms of which the appellant's plea relating to arbitration was dismissed.

[2] The appellant and the first respondent (respondent) were married to each other and their marriage was dissolved by decree of divorce incorporating a settlement agreement issued by this court on 04 June 2015.

[3] For the purposes of this appeal the following clauses in the settlement agreement between the appellant and the respondent are worth mentioning. The appellant undertook or agreed to the following:

“(i) To pay maintenance to the first respondent until respondent's death, remarriage or cohabitation.

(ii) That should any dispute arise between the appellant and respondent regarding their obligations under the settlement agreement, such dispute will be resolved by way of arbitration.”

[4] It is common cause that the appellant failed to pay maintenance as agreed in the settlement agreement. In 2018 the respondent initiated arbitration proceedings for the recovery of the arrear maintenance. An arbitrator was appointed. A pre-arbitration meeting was held and it was attended by the appellant and respondent.

[5] Whilst the arbitration proceedings were still underway, the respondent approached the maintenance court in order to claim payment for arrear maintenance by the appellant on 01 March 2021. At the time the appellant was allegedly in arrears in the amount of R 448 163.20. The respondent had notified neither the arbitrator nor the appellant about this development.

[6] The respondent, still thirsty for the recovery of arrear maintenance sought to obtain an order in the maintenance court for the issue of a warrant of execution

alternatively emoluments attachment or an order for debt attachment in terms of sections 27, 28 and 30 of the Maintenance Act 99 of 1998.

[7] The appellant opposed the application serving before the maintenance court and raised an objection to the jurisdiction of the maintenance court to hear the matter on the ground that in terms of the settlement agreement, the parties must refer their disputes arising from the settlement agreement to arbitration. This objection was dismissed by the maintenance court. Aggrieved by this decision the appellant now approaches this court on appeal.

[8] The appellant in his grounds of appeal attacks the judgment of the maintenance court, essentially on the following grounds:

That the court a *quo* erred in:

8.1 Dismissing the appellant's special plea or point of law.

8.2 Finding that the dispute between the appellant and respondent fell within the purview of a "matrimonial cause or a dispute incidental thereto" as contemplated in section 2 of the Arbitration Act 42 of 1965.

8.3 In failing to apply the legal principle *kompetenz- kompetenz* to the adjudication of the special plea or point of law raised by the appellant.

[9] It is the appellant's case that the maintenance court should have upheld his point of law and dismissed the first respondent's application in that regard.

[10] The respondent opposes the appeal on the grounds that the court was correct to dismiss the point of law raised. In her heads of argument, the respondent argued that the court must decide:

10.1 Whether the parties competently agreed that the dispute concerning the enforcement of the maintenance order must be submitted to arbitration.

10.2 Whether the maintenance court has been validly ousted by the parties.

[11] The appeal is brought before us in terms of section 25 (1) of the Maintenance Act which provides:

“Any person aggrieved by any order made by the maintenance court under the Act may, within such a period and in such a manner as may be prescribed, appeal against such order to the High Court having jurisdiction.”

[12] Most issues are common cause between the parties. First, it is not in dispute that there is a maintenance order against the appellant, in favour of the respondent. Second, it is common cause that the appellant failed to pay maintenance and is now in arrears. It is also not in dispute that the parties had agreed to resolve any issues arising out of their settlement agreement through arbitration.

[13] The issue to be decided is whether the maintenance court misdirected itself when it took a decision that the dispute between the parties falls within the purview of section 2 of the Arbitration Act 42 of 1965. The court must decide if the maintenance court was correct in dismissing appellant’s point of law in this respect.

[14] Section 34 of the Constitution provides:

“Everyone has the right to have any dispute that can be resolved by application of law decided in a fair public hearing before a court, or where appropriate, another independent tribunal or forum”.

[15] Therefore there are various methods to resolve a dispute other than litigation and such methods are entrenched in our Constitution. These methods include arbitration, mediation, amicable settlement and adjudication.

[16] In South Africa domestic arbitration is governed by the Arbitration Act (the Act) and the Act’s preamble reads:

“To provide for the settlement of disputes by arbitration tribunals in terms of written arbitration agreements and for the enforcement of the awards of such arbitration tribunals”.

[17] Section 2 of the Act provides:

“A reference to arbitration shall not be permissible in respect of –

(a) a matrimonial cause or any matter incidental to any such cause;”

[18] Section 7 of the Act provides:

“If any 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 to defend but before delivering any pleadings, or taking any other steps in the proceedings, apply to that court for a stay of proceedings.”

[19] The appellant contended first that when the parties got divorced on 4 June 2015, a “matrimonial cause” between the parties ceased to exist and the matrimonial cause is now *res judicata*. It was argued that on this basis the maintenance court erred in finding that this is a matter excluded from arbitration by section 2 of the Act.

[20] The court was referred by the appellant to the case of **BROOKSTEIN v BROOKSTEIN 2016(5) SA 211 (SCA)** where it was held:

“After the order was granted, there was no longer any matrimonial cause to speak of. Neither was there anything incidental to such cause, as all matrimonial issues were disposed of when the court granted the order incorporating the settlement agreement. Consequently, there cannot be any issue still outstanding relating to the marriage. The inevitable result is that the marriage and all its natural consequences came to an end, and anything relating thereto, such as proprietary consequences, became *res judicata*”. It is the appellant’s view that the arbitrator, not the court must decide the issue of dispute between the parties.

[21] Second, the appellant argued that the parties enjoy autonomy to agree which categories of disputes arising between them will be submitted to arbitration for

resolution, rather than that being determined by court. The court was referred to the case of **CANTON TRADING 17 (PTY) Ltd t/a CUBE ARCHITECTS v FANTI BEKKER HATTINGH NO (479/2020) [2021] ZASCA 163** at para 28 where it was said:

“.....The parties enjoy autonomy to agree that categories of dispute arising between them will be submitted to arbitration for resolution, rather than be determined by the courts. Precisely which disputes are to be submitted to arbitration is a question of what has been agreed, and the interpretation of the parties ‘written agreement. Generally the parties intend that all their disputes will be decided under a unitary jurisdiction, either by the courts or by way of arbitration, and not under a bifurcated jurisdiction, where some disputes are determined by the courts and others by submission to arbitration.”

[22] The respondent contended that the wording of section 2 (a) of the Arbitration Act is wide enough to keep a dispute about the enforcement of a maintenance order out of the realm of arbitration. It was further argued that if the effect of the arbitration clause is to force the parties to refer the present dispute to arbitration, it was made an order of court *per incuriam*.

[23] The appellant contended that the maintenance court has failed to apply the principle kompetenz- kompetenz. This is a German law concept, which is well established in international arbitrations referring to a tribunal’s ability to rule on issues of its own jurisdiction.

[24] Following this approach of kompetenz- kompetenz, a court may be inclined to allow an arbitrator to decide questions of jurisdiction without necessarily vacating its power to ultimately determine the question of arbitrator’s jurisdiction.

[25] The SCA recognised this principle of kompetenz- kompetenz in the case of **CANTON TRADING 17 (PTY) Ltd** supra and referring to its previous judgments including the case of **NORTH EAST FINANCE (PTY) LTD v STANDARD BANK OF SOUTH AFRICA LTD 2013 (5) SA 1** on para 35 held:

“The other approach is based on the principle of competence- competence also known as ‘Kompetenz- Kompetenz’ (referring to its German origins), or the principle of ‘competence de la competence ‘. This principle has a positive and a negative aspect. The positive aspect is largely uncontroversial. Arbitrators enjoy the competence to rule on their own jurisdiction and are not required to stay their proceedings to seek judicial guidance. The negative aspect of the principle may be formulated as follows. Where the dispute has already been referred to an arbitrator, the court will not rule upon the validity, existence or scope of the arbitration agreement, but will leave these questions of jurisdiction for the arbitrator to decide, at least initially. But, even if the dispute has not yet been referred to arbitration, the court may be disinclined to decide the question of jurisdiction, unless the arbitration agreement is manifestly void...”

[26] It follows that parties are free to decide between themselves as to which disputes are to be arbitrated and which disputes are to be sent to court. In instances where the parties have elected to refer their disputes to an arbitrator, the principle of competence-competence requires that the arbitrator must decide or rule on the issues of its own jurisdiction should there be an objection.

[27] In the maintenance court, when the respondent referred the matter to the maintenance court, the appellant objected to the court’s jurisdiction. The question of whether the arrear maintenance is a matter falling within the purview of section 2 of the Act or not cannot be decided by the maintenance court but by an arbitrator since the parties had agreed to refer their disputes to an arbitrator. The arbitrator must decide its own issues of jurisdiction.

[28] It is so that our courts have a responsibility to ensure that maintenance orders are observed and they guard over maintenance matters, especially those involving minors, jealously. Nevertheless, the decision of the maintenance court to pronounce on the forum upon which the dispute between the parties may be heard amounted to misdirection as the parties had agreed to refer their disputes to arbitration.

[29] In the circumstances, I accordingly make the following order:

1. The appeal is upheld with costs
2. The maintenance court's decision is set aside and replaced with an order in terms whereof the appellant's point of law relating to arbitration is upheld.

L.MPAMA, AJ

I agree and it is so ordered

P.J. LOUBSER, J

On behalf of Appellant:

Instructed by:

Adv.R Van der Merwe

Messrs Hendre Conradie Inc.

Bloemfontein

On behalf of Respondent:

Instructed by:

Adv. J Van der Merwe

Messrs Symington De Kok

Bloemfontein