



**IN THE HIGH COURT OF SOUTH AFRICA,
LIMPOPO DIVISION, POLOKWANE.**

CASE NO: 5103/2018

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED</u>
DATE:	29/11/2022
SIGNATURE:	 <u>LITHOLE AJ</u>

In the matter between:

ROADS AGENCY LIMPOPO SOC LTD

Applicant
(Plaintiff in the main action)

and

MATLA CONSULTANTS CC

First Respondent
(First Defendant in the main action)

AXTON MATRIX CONSTRUCTION CC

Second Respondent
(Second Defendant in the main action)

JUDGMENT

This judgment was handed down electronically by circulation to

the parties' legal representatives by email. The date and time for handing down shall be deemed to be the 29 November 2022.

LITHOLE AJ:

Introduction

1. The applicant, Roads Agency Limpopo Soc Ltd (RAL) seeks an order setting aside the dispute resolution proceedings (*inter alia* in terms of section 3(2) of the Arbitration Act, 42 of 1965), including the arbitration agreement contained in Clause 10 of the General Conditions of Contract for Construction Works (2010) ("the GCC"), referred to in paragraph 19.2 of Plaintiff's amended particulars of claim in the Main Action in case number 5103/2018 in this Court.
2. Alternatively, RAL seeks an order that the dispute resolution proceedings/arbitration agreement shall cease to have effect with reference to any dispute between RAL and the second respondent, Axton Matrix Construction Cc (Axton), which has already been referred or which may be referred, by any of the parties in future of dispute resolution in terms of this specific construction contract in issue.
3. Axton opposes the relief sought by RAL. In essence Axton opposes the application on the ground of non-joinder of the interested parties with direct and substantial interest in the relief sought and the separation of power doctrine. Axton further opposes this application on non-compliance with the test as set

out in the judgement of ***Delange v Methodist Church and another* 2016 (2) SA 1 (CC)**.

4. The RAL contend that it is only the specific contract between the parties which is the subject matter of this application, and not all similar contracts between the parties or in the industry, that renders Axton's arguments about non-joinder invalid.
5. It is trite law that for a third party to be joined in the proceedings, he should have a direct and substantial interest in the subject matter which may be prejudicially affected by the judgment of the Court. In considering these two tests, Navsa JA, on behalf of the Court in ***Transvaal Agricultural Union v Minister of Agriculture and Land Affairs***,¹ adopted the following test:

"In Van Winsen, Cilliers and Loots Herbstein & Van Winsen's the Civil Practice of the Supreme Court of South Africa 4th ed at 172 the learned authors supply a useful summary of the approach of the Court in the Amalgamated Engineering case in determining, by way of two tests, whether a third party has a direct and substantial interest in the outcome of litigation. Concerning the two tests, the learned authors state as follows:

'The first was to consider whether the third party would have locus standi to claim relief concerning the same subject-matter. the second was to examine whether a situation could arise in which, because the third party had not been joined, any order the Court might make would not be res judicata against him, entitling him to approach the Courts again concerning the same subject-matter and possibly obtain an order irreconcilable with the order made in the first instance'."

6. This point *in limine* is dismissed.

¹ 2005 (4) SA 212 (SCA) at para 66

7. The first respondent, Matla Consultants Cc (Matla) is not participating in this application. Matla did not file any opposition in this application.

Factual background

8. On 22 August 2018, the Roads Agency Limpopo SOC Ltd ("RAL") issued summons in this Court in case number: 5103/2018 against Matla Consultants CC ("Matla") as the first defendant, and against Axton Matrix Construction CC ("Axton") as the second defendant, claiming an amount of R64 907 543.01 from the defendants jointly and severally, pursuant to damages suffered by the applicant as a result of the defective construction of the D3537 road in the Limpopo Province (the "main action").
9. RAL is an organ of state, which is responsible for the planning, construction, maintenance and control of usage of all provincial roads in the Limpopo Province, and Matla and Axton were respectively the design and supervising engineer and the construction contractor, who had been appointed by RAL during 2013/2014 to upgrade the D3537 road from gravel to tar.
10. In the first special plea, Axton alleged that RAL's claim against it arose from the General Conditions of Contract ("GCC") between the parties, and are time-barred, because of RAL's failure to comply with clause 10.3 of the dispute resolution provisions contained in the GCC, which prescribes that a dispute

notice should be delivered within 28 days of the event giving rise to the dispute that has arisen, failing which the parties have no right to dispute the matter.

11. The second special plea relates thereto that RAL's attorney, who had acted on behalf of RAL, had allegedly previously given an undertaking that RAL will not institute action against Axton, and which undertaking according to Axton constitute a defence of waiver and/or constitutes a *pactum de non petendo*.
12. Subsequent to the summons, 18 months after the summons was issued, Axton on 10 January 2020, and despite the main action, commenced with a separate adjudication procedure in terms of the dispute resolution provisions of the GCC, wherein Axton claimed the alleged outstanding retention money in respect of the construction contract of R5 257 959.31 from RAL, despite RAL's objections to the adjudication procedure, for the reason *inter alia* that it was commenced with way too late having regard to the stipulations of the GCC, and despite RAL's numerous requests that the claim for retention money should rather be adjudicated in the same forum as in the main action, by way of a counterclaim.
13. The adjudication procedure was persisted with by Axton, and the adjudicator Mr Westcott in respect of the issue of the retention money delivered two decisions, the first on 27 February 2020 and thereafter the second on 7 August 2020.

14. Due to RAL's refusal to abide by the decision of the adjudicator, Axton then on 18 November 2020, referred the dispute between the parties in respect of the retention money to arbitration in terms of clause 10.6.2 of the GCC. RAL launched this application after the dispute was referred to the arbitration. This application was thus launched on 9 December 2020.

RAL (the applicants)

15. This application is brought in terms of section 3(2) of the Arbitration Act, No. 42 of 1995 ("the Act"), which gives a court a discretion to set aside, on good cause shown, an arbitrator agreement, or to order that the arbitration agreement shall cease to have effect with reference to any dispute referred.
16. RAL submitted that good cause exist which is sufficient for the court to exercise its discretion under sections 3(2)(a) to 3(2)(c) of the Act .RAL relies on the submitted grounds which are dealt with below to be the reasons for seeking the relief they sought in this court.
17. First, the dispute resolution provisions and arbitration agreement on which Axton rely do not cover all the parties which have a direct interest in this matter, which is a damages claim against two separate defendants resulting from the defective road designed by Matla, as engineer, and build by Axton as the contractor, who are now, blaming each other for the deficiencies in the road, the main deficiency being the incorrect vertical alignment of the road.

18. RAL contend that to give full effect to the dispute resolution provisions and arbitration agreement will lead to a multiplicity of proceedings, as RAL will have to litigate against Matla in this Court, and against Axton before an arbitrator in an arbitration. The logical next step flowing from the adjudication procedure is now an arbitration procedure if regard is had to the stipulations of the GCC.
19. RAL submitted that It would be inconvenient and expensive for RAL to prepare and present its case on two occasions, namely in the arbitration process against Axton, and in separate court proceedings against Matla.
20. Second ,that, there are several matters in dispute in the main action and only some will fall within the ambit of the dispute resolution proceedings/arbitration agreement, and specific issues such as determination of public and legal policy, and constitutional norms raised by RAL in its independent delictual claim, cannot be conveniently and properly dealt with separately and independently in an arbitration process but should be dealt with by the court where both Axton and Matla are before the court in one hearing.
21. Thirdly ,that ,It is possible that inconsistent findings might be arrived at by two tribunals if there are two tribunals involved, and this would irreparably harm and prejudice RAL (one such finding was already made in the separate adjudication proceedings which reference will be made below, in the adjudication procedure which has been instituted by Axton against RAL subsequent to the issuing of summons in the main action for payment of the retention money. (For instance, in the adjudication proceedings, the adjudicator found the time bar clause in the

GCC not to be applicable when it was raised by RAL in these proceedings, but Axton is now in this main action in its first special plea relying exclusively on this exact same time bar clauses, and where the plaintiff now, in turn, disputes the validity and applicability of the same time bar clause).

22. RAL submitted that a crucial reason why the dispute between the parties cannot be resolved by dispute resolution or in arbitration procedure is the nature of the delictual claim for pure economic loss which was instituted by RAL, and as pleaded in paragraphs 26 to 34 of the amended particulars of claim in the main action. This claim will entail the determination of public and legal policy, possibly the application of constitutional norms, and possibly also the development of the common law, and is thus not a matter which can conveniently be decided by an adjudicator or arbitrator and has the potential of having to be entertained not only in the court but also by the Supreme Court of Appeal and/or the Constitutional Court.
23. They submits that ,there is Compelling considerations of fairness and convenience exist in retaining the full matter in this court, and which make it not suitable for hearing in any other forum than this court.

Axton (the respondent)

24. Axton denies that the relief sought by RAL is competent, and it has instead launched a counter-application, wherein it seeks in essence a declaratory orders that RAL should now pay the retention money allegedly owing to Axton,

to declare the adjudicator's decisions binding on RAL, and to declare that Axton is not liable to RAL for the relief sought in the main action.

25. RAL submits that Axton's counter-application is ill-fated attempt to take a shortcut to circumvent the litigation in the main action which has been instituted already in August 2018. RAL further submitted that Axton is making unfounded and vexatious allegations of fraud, concealment and improper conduct at the side of RAL, as an organ of state, deliberately attempts to create an atmosphere in the hope to gain the sympathy of the court.
26. RAL had appointed Axton in 2014 as construction contractor to construct and had earlier appointed Matla as the responsible engineer, for the design and supervision in respect of the contract, to do the upgrading from gravel to tar of a certain portion of the D3537 road in the Limpopo Province.
27. Axton submitted that practical completion was achieved during December 2016, subject to the remedying of 17 defects in a snag list which was provided by Matla, triggered the defects liability period in terms of the contract of 12 months, which period lapsed during December 2017, entitling Axton to payment of the full retention money of R5 257 959.31 at that stage.
28. RAL submitted that despite what is submitted by the Axton in respect of the practical completion of the works which was achieved during December 2016, Matla, the engineer, in its plea which was filed on 14 November 2019 alleged the following :

- 28.1 Axton had abandoned the site, and the project, before its completion and has performed no construction services between 30 June 2016 and 4 August 2016 (the “first abandonment”) (paragraph 3.3.4 of Matla
- 28.2 ’s plea);
- 28.3 On 9 November, Matla and RAL certified that the project had reached practical completion subject to Axton remedying 17 defects in relation to the works identified in a snag list which accompanied the certificate of practical completion (paragraph 3.3.5 of Malta’s plea in the main action);
- 28.4 According to Matla’s plea, (and that is confirmed by Mr Mabale of RAL who was the project manager) between late November 2016 and about 2 December 2016. Axton finally abandoned the project and the site, and ceased and/or refused to perform any work or services without remedying the identified defects, causing Matla not to issue a final certificate of approval (“the second abandonment”) (paragraph 3.3.6 of Matla’s plea).
29. In essence, Axton blamed Matla, who had allegedly been responsible for incorrectly designing the road, and Matla in turn blamed respondent, who had constructed the road.
30. Axton raised point in limine of non-Joinder which is dealt with *supra*.

Analysis

31. RAL seeks an order setting aside the dispute resolution proceedings, including the arbitration agreement contained in the GCC of the specific construction which had been concluded between RAL and Axton. The application is made in reliance with section 3 (2) of the Arbitration Act 45 of 1965. Section 3 provide that:

"3. Binding effect of arbitration agreement and power of court in relation thereto:

- (1) Unless the agreement otherwise provides, an arbitration agreement shall not be capable of being terminated except by consent of all the parties thereto.*
- (2) The court may at any time on the application of any party to an arbitration agreement, on good cause shown-*
 - (a) set aside the arbitration agreement; or*
 - (b) order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or*
 - (c) order that the arbitration agreement shall cease to have effect with reference to any dispute referred."*

32. Section 3(2)(c) provides that a Court may set aside an arbitration agreement *"on good cause shown"*.

33. In this context the Court's discretion must be judicially exercised and clearly there must be *"good cause"* before a Court will release a party to an arbitration

agreement and refer this to Court. The authorities show that this discretion is seldom exercised.²

34. Such a discretion has however been exercised where:

34.1 Defendant's counterclaim affected third parties not subjected to the arbitration agreement³;

34.2 Allegations of fraud were made⁴;

34.3 There were a number of legal problems relevant and where the technical matters are easily to be resolved by a Court⁵.

35. The other side of the coin is that, a Court will not set aside an arbitration agreement in the absence of good cause ⁶ .

36. The issue of demonstrating good cause is not easily discharged and there must be compelling reasons for doing so.

37. Where relevant parties are parties to the arbitration agreement (being those with an interest in the proceedings) this militates against good cause, or put differently, where some parties relevant are not parties to the arbitration

² ¹² *Metallurgical & Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) 391; *Sera v De Wet* [1974] All SA 295 (T); 1974 (2) SA 645 (T) 649-650;

³ *Welihockyj and Others v Advtech Ltd and Others* 2003 (6) SA 737 (W).

⁴ *Rawstorne and Another v Hodgen and Another* 2002 (3) SA 433 (W).

⁵ *Sera v De Wet supra*

⁶ *De Lange v Methodist Church and Another* 2016 (2) SA 1 (CC) (This decision was not referred to before the Court *a quo* or for reason that escapes me before this Court, in my view, a fundamental omission.

agreement and there is a risk of a multiplicity of proceedings with conflicting decisions and costs, this may demonstrate good cause⁷.

“[49] The requirements of “good cause” was discussed in **Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co. (Pty) Ltd** ⁸, Colman J said the following:

“Such an *onus* is not easily discharged. There are certain advantages, such as 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 ... 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.”

38. The Courts have said further that “*it is not possible to define, and certainly it is undesirable for any court to attempt to define with any degree of precision, what circumstances would constitute a ‘very strong case’*”⁹.

39. RAL relies on the case of **Foize Africa Pty Ltd and Foize Beheer BV and others [2012] ZASCA 123**, where the court dealt with the factors for consideration in excising the discretion. The court said the following:

“(a) Flowing from the sanctity of contracts, it has often been said that a decision not to enforce either an arbitration or foreign jurisdiction clause should only be made where there is a very strong case made out for the parties not to be bound by their agreement.¹¹

⁷ *Airport Company SA Ltd v ISO Leisure OR Tambo (Pty) Ltd supra* [74]; *Metallurgical (supra)* 393G-394B; *Universiteit van Stellenbosch v JA Louw (Edms) Bpk (supra)* 339-342

⁸ 1971 (2) SA 388 (T).

⁹ *metallurgical and Commercial Consultants (supra)* 391E-H

- (b) It is desirable if at all possible to avoid a multiplicity of actions in different courts with the associated potential complication of conflicting decisions.¹² In the present case this may well be a weighty factor bearing in mind that there is no reason why the appellant's claims in respect of all but the first and third respondents cannot be determined in the high court and only those two respondents may seek to invoke clause 10 to have their dispute with the appellant determined elsewhere.
- (c) Moreover, a single action has the undoubted advantage of saving time, expense and costs when compared to a multiplicity of actions. This too may be a weighty factor as the appellant's claims that are capable of being determined in the high court against most of the respondents will involve the same factual matrix and the same witnesses as in the foreign proceedings against the first and third respondents.
- (d) When considering the issue of costs, it should also be remembered, certainly if the cost of litigation in England is any barometer,¹³ that the cost of litigation in Europe may well be astronomical when compared to the cost of litigation in this country. Sight must also not be lost of the likely fees and charges of the arbitrators should an arbitration take place.
- (e) If the dispute involves questions of law rather than of fact, arbitration may well prove to be both inconvenient and impractical. Consequently, regard should be had to whether the dispute is readily capable of being dealt with by way of arbitration. If not, it would count heavily against the enforcement of an arbitration clause"

40. The court further stated that:

"these are some of the relevant factors which spring readily to mind. The list is certainly not intended to be exhaustive. Of course, the discretion to be exercised is fact specific in the sense that each case must be considered in the light of its own discrete facts, with the various relevant factors being afforded whatever weight in the scales is appropriate in the circumstances. Certainly, no hard and fast rules can be prescribed."

41. This matter has not yet been referred to arbitration as yet, in the sense that no arbitrator has been appointed as yet and there is therefore no pending arbitration before the arbitrator, between the same parties based on the same

subject matter. Here RAL is not asking that the arbitration be stayed, it is distinguishable from the matter where there is arbitration pending.

42. Axton contend that the applicant 's case is falling short of the test set out in *Delange v Methodist Church and another*¹⁰. Axton contend that the RAL has made no reference to what it is that “would unjustifiably diminish or limit protection afforded by the constitution”, if the arbitration agreement were to be enforced.

43. In this matter the factors that the court takes into consideration when excising its discretion are the following:

43.1 The dispute is between the RAL, Matla, and Axton. Matla is not part covered by the dispute resolution proceedings and arbitration agreement. In essence Matla cannot be forced to be part of the arbitration process. RAL would, if this application is dismissed, must institute its claim for damages against Matla in court and against the Axton in the arbitration proceeding or dispute resolution proceedings. This will result in multiplicity of proceedings, witnesses, and evidence.

44. The other issue which must be considered by the court is whether the RAL has satisfied the test as set out in *Delange*. RAL must show this court that if the arbitration agreement is enforced, that it “*would unjustifiably diminish or limit*

¹⁰ 2016 (2) SA 1 (CC)

protection afforded by the constitution". The only place where the court found that RAL has attempted to deal with the test set out in Delange is when it addressed the issue of whether the new constitutional dispensation has upset the long-standing principle of outlaw.

45. RAL contend that the majority of the constitutional court when considered the impact of the section 34 of the constitution on private arbitration, found that section 34 does not directly apply to private arbitrations. The constitutional court would be relevant whether arbitration agreement, for instance, contain a provision contrary to public policy, in light of the values of the constitution, in which instance the agreement will be null and void to that extent.¹¹

46. In ***Lufuno Mphaphuli & Associates (Pty) v Andrews and Another*** the Constitutional Court held in this regard that:

"Courts should be respectful of the intentions of the parties in relation to procedure. In so doing, they should bear in mind the purposes of private arbitration which include the fast and cost-effective resolution of disputes. If courts are too quick to find fault with the manner in which an arbitration has been concluded, and too willing to conclude that the faulty procedure is unfair or constitutes a gross irregularity within the meaning of section 33(1), the goals of private arbitration may well be defeated."

¹¹ Lufhuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another [2009] ZACC 6 at Paras 218-220.

Axton's Counter Application

47. Axton lodged a counter application in this matter that RAL be ordered to make payment of the following sums to the Axton (within 30 days of this order) in accordance with its undertaking to do so, dated 11 June 2018:

47.1 Payment in the sum of R5 257 959.31 (Incl. VAT), being the retention money withheld by RAL in respect of the construction contract between Axton and RAL (which is the subject of these proceedings) and admitted by or on behalf of RAL on 11 June 2018 as owing to Axton;

47.2 Payment of the sum of R125 913.66 (incl. VAT) being the difference between the sum of R1 630 617.18 (incl. VAT) admitted as owing by or on behalf of RAL on 11 June 2018 in respect of a payment certificate, and the sum of R1 504 703.52 (incl. VAT) paid by RAL to Axton on or about 17 January 2019;

47.3 Payment of interest at the prescribed rate of interest, *a tempore morae*, from 11 June 2018, in respect of the sum payable in terms of prayers 1.1 and 1.2 above.

48. In the alternative to prayer 1 above:

48.1 The decisions delivered by Mr Bryan Westcott ("the adjudicator") on or about 27 February 2020 (in respect of the merits) and on or about 7

August 2020 (in respect of the quantum), copies of which are annexed, are binding on the applicant (Axton) and the second respondent (RAL);

48.2 The second respondent (RAL) is hereby ordered to pay the following to the applicant (Axton) within 30 days of this order:

48.2.1 the sum of R2 440 031.05 (including VAT), being the different between the retention amount of R5 257 953.31 (incl. VAT) withheld by RAL and the sum of R2 450 372.40 (excl. VAT) authorised for deduction by the adjudicator on or about 7 August 2020;

48.2.2 the sum of R127 684.01 (exclusive VAT), being the 50% share payable by RAL for the costs of adjunction proceedings in terms of the adjudicator's decisions; and

48.2.3 payment of interest at the prescribed rate of interest, *a tempore morae*, from 11 June 2018, in respect of the sum payable in terms of prayers 2.1 and 2.2 above.

49. That it be declared that the applicant (Axton) is not liable to the second respondent (RAL) for any claims for the alleged defects:

49.1 In respect of the construction agreement concluded between it and the second respondent (RAL), concluded on or about 26 May 2014 (referred to *inter alia* paragraph 19 of the particulars of claim in the main action

under ca number 5103/2018 – under contract no. RAL/T547/2014 for the upgrading (gravel to tar) of road 03537 from Harry Openheimer (N11) to Pudiyakgopa to Bakenberg, 18km in the Waterberg District of Limpopo Province; and

49.2 Including in respect the claims set in the second respondent's (RAL) particulars of claim, in particular the follow paragraphs to the extent that they relate the applicant (Axton):

49.2.1 19 to 25; and

49.2.2 26 to 34.

50. In respect of both prayers 1, 2 and 3 (all including sub-paragraphs) above, the second respondent (RAL) shall pay costs of this application:

50.1 on a scale of attorney and client in the case of opposition thereof; and

50.2 jointly and severally with any other respondent, on the scale of attorney and client, in the event of opposition by any other respondent.

51. The counterclaim is based on the two decisions of the adjudicator who was appointed pursuant to clause 10.5 and 10.6 of the construction clause. The adjudicator adjudicated a dispute referred to him by Axton and delivered two decisions ,on merits and quantum. RAL participated in the adjudication proceedings .RAL submits that it has participated in the adjudication despite its objection to the procedure. The adjudicator has ordered RAL, to pay Axton a

sum of R2 564 944,37. RAL admitted in its founding affidavit that it was ordered to pay Axton the sum of R2 564 944,37 by the adjudicator.

52. RAL is opposing this application on the basis that this counter application cannot be decided on affidavits alone without oral evidence because there is substantial factual dispute between the parties.

53. The factual dispute between the parties as submitted by RAL are in essence among others the following:

53.1 The factual dispute of whether or not Ms Mangena, the attorney acting for RAL at that stage had indeed validly bound RAL by an alleged undertaking not to institute action against Axton or admitted liability by way of acknowledgement of debt.

53.2 Whether it is Axton or Matla or both parties, which are to be blamed for the defective road.

53.3 The dispute whether Axton is entitled to the portion of the retention money awarded to it by the adjudicator or the full retention money it is claiming in the counter application.

53.4 Dispute of whether or not RAL, admitted liability in an email written by the attorney on 11 June 2018 to Axton's attorneys, and by making payment on progress certificate and released the retention.

54. Axton disputes that there is real dispute of fact and that Plascon Evans is not applicable in this matter. They contend that letter of Ms Mangena if it was made without prejudice, that privileged was waived by RAL when disclosing that letter in its replying affidavit. They further contend RAL contention (in order to establish a factual dispute of facts) for any factual context which admission of liability of 11 June 2018, it has not raised a genuine dispute of fact. Axton Submitted that RAL has made payment pursuant to the alleged "without prejudice" undertaking.
55. Axton contend that the deponent of the replying affidavit is MR Machaba who is neither the Ms Mangena nor the author of the letter of 11 June 2018. According to Axton the real dispute can only arise on the letter dated 11 June 2018, if the deponent was the author of the same letter.
56. The trite principle of law in motion proceedings is that affidavits constitute both evidence and pleadings. It was stated by Hams JA, in the ***National Director of Public Prosecutions vs Zuma, 2009 (2) SA (SCA)***, at paragraph 26, that:
- "Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special, they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if then respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched, or so clearly untenable that the court is justified in rejecting them merely on the papers."*

57. There is real dispute of facts in this counter application. For one it is not quite clear how much is Axton entitled to in the retention money. Axton is claiming different amount to the amount awarded by the Adjudicator. Based on the facts it is impossible to decide on paper as to whether it is Matla or Axton or both the parties, which are to be blamed for the defective road complained about. There is real dispute which cannot be decided on paper.
58. This principle that applicable if there is dispute of facts is called the “Plascon Evans Rule” which was developed in the matter of ***Stellenbosch Farmers Winery Ltd v Stellenbosch Winery (Pty) Ltd***¹² and applied in the ***Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty)Ltd***.¹³
59. The court held in the matter of ***Moosa Bro & Sons (Pty)Ltd v Rajah***¹⁴ “the presence of a dispute of fact in an opposed application, and the nature thereof, will often be the determining consideration in deciding whether viva voce evidence should be ordered”.
60. In the matter of ***Room Hire Co (Pty)Ltd v Jeppe Street Mansions (Pty)Ltd***¹⁵, it was held that the ‘principle’ ways in which a dispute of fact may arise are set out as follows:
- (i) When the respondent denies all the material allegations made by the various deponents on the applicant’s behalf and produces or will

¹² 1957(4)SA234(C)

¹³ 1984(3)SA623(A)at 634

¹⁴ 1975(4) SA 87 (D) at 91D

¹⁵ 1949(3) SA 115 (T) at 1163

produce, positive evidence by deponents or witnesses to the contrary. He may have witnesses who are not presently available or who, though adverse to making an affidavit, would give evidence viva voce if subpoenaed.

(ii) When the respondent admits the applicant's affidavit evidence but alleges other facts which the applicant disputes.

(iii) When the respondent concedes that he has no knowledge of the main facts stated by the applicant, but denies them, putting the applicant to the proof and himself gives or proposes to give evidence to show that the applicants and his deponents are bias untruthful or otherwise unreliable, and that certain facts upon which the applicant relies to prove the main facts are untrue. The absence of any positive evidence possessed by the respondent directly contradicting the applicants' main allegations does not render the matter free of a real dispute of fact.

61. Axton is seeking the final relief in this counter application, the relief can only be granted if the facts as stated by the respondent (RAL) together with the admitted facts in the applicant's (Axton) affidavits, justify the granting of such relief, which is not the case in this matter.

62. RAL seek that the court struck allegation which are scandalous, vexatious defamatory and considered to be new information from Axton replying affidavit. This application is made in terms of rule 6(15) of the uniform Rules of Court. The allegation which are scandalous ,vexatious defamatory and new information from Axton replying affidavit are struck out.

CONCLUSION

63. The “*onus*” to demonstrate “*good cause*” in an Application is not easily met. This means no more nor less that the applicant, in this matter it would be RAL, has to make out what has been referred to as a “*persuasive case*”¹⁶. Our Courts, correctly, have not defined precisely what circumstances constitute a “*persuasive case*” (otherwise put “*a very strong case*”)¹⁷. Here the arbitration agreements are valid and the contrary has not been contended. This requires a consideration of the merits of each matter. This must overall result in a just and equitable outcome. A party will not be held to an arbitration agreement that will result in an unfair or unreasonable outcome¹⁸. The Courts will however hesitate to set aside an arbitration agreement absent misconduct or irregularity unless “*a truly compelling reason exists*”¹⁹.
64. In the Constitutional era good cause embraces an enquiry into whether the arbitration agreement, if implemented, would “*unjustifiably*” diminish or limit protections afforded by the Constitution. This enquiry appears to have been

¹⁶ Delange Supra

¹⁷ Delange Supra

¹⁸ Delange Supra

¹⁹ Delange Supra

ignored by the RAL entirely in their heads and factual allegations, probably arising from the failure to appreciate the significance of the Constitutional Court's judgment in ***De Lange*** (*supra*), to which they did not refer to.

65. Importantly, absent the infringement of Constitutional norms, Courts will hesitate to set aside an arbitration agreement untainted by misconduct or irregularity unless a "*truly compelling reason exists*".²⁹
66. RAL failed to prove that if the arbitration agreement, is implemented, it would "*unjustifiably*" diminish or limit protections afforded by the Constitution. It only raised the point that it would lead to multiplicity of proceedings which it would be inconvenient and expensive for RAL.
67. Now turning into the counter application by Axton. The counter application is moulded with dispute facts, the principle of Plascon Evans apply to the counter application.

Costs

68. RAL is requesting that the order be granted in terms of prayer 1, alternatively, prayer 2 of the notice motion with costs including costs of senior counsel. Further requested that the Axton Counter application be dismissed with costs on an attorney and client scale, including the costs of senior counsel.

69. Axton seeks that RAL's application be dismissed with costs, including costs consequent upon the employment of counsel.
70. Axton further seek a relief as sought in the notice of motion of the counter application and that RAL pay Axton's costs in the counter application. It is trite that the issue of costs are on the discretion of the court.

Order

The following order is made:

1. RAL's application is dismissed with costs, including the costs consequent upon the employment of counsel.
2. Axton's counter application is dismissed with costs including the costs consequent upon employment of senior counsel.



PP ✓ TC LITHOLE
ACTING JUDGE
LIMPOPO DIVISION OF THE HIGH COURT
POLOKWANE

APPEARANCES

On behalf of the Applicant:
with:
Instructed by:

Adv D Mills SC
Machaba Inc .

On behalf of the 2nd respondent: Adv S Tshikila
Instructed by: Orelowitz Inc.

DATE OF HEARING : 04 AUGUST 2022

DATE OF JUDGMENT : 29 November 2022