REPUBLIC OF SOUTH AFRICA

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

CASE NO: 17892/20

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

19/8/2021

SIGNATURE DATE

In the matter between:

HERMANUS STEPHANUS ENGELBRECHT N.O.	First Applicant
TERESA ENGELBRECHT N.O.	Second Applicant
HERMANUS STEPHANUS ENGELBRECHT N.O.	Third Applicant

and

RIVELLA TRADING AND INVESTMENTS (PTY) LTD	First Respondent
NEFG AUDIT COMPLIANCE AND LEGAL SERVICES (PTY) LTD (formerly known as N-e-FG HOLDINGS (PTY) LTD)	Second Respondent
N-e-FG FUND MANAGEMENT (PTY) LTD	Third Respondent
THE WEALTH STRATEGIST (PTY) LTD (formerly known as N-e-FG CUSTODIAN SERVICES (PTY) LTD)	Fourth Respondent
N-e-FG ADMINISTRATORS (PTY) LTD	Fifth Respondent
ADRIAAN EVERT PRAKKE	Sixth Respondent

JUDGMENT

WINDELL, J:

INTRODUCTION

[1] This is an application for a money judgment against the first respondent, Rivella Trading and Investments (Pty) Ltd ("Rivella"), and certain ancillary relief pertaining to the transfer of the shares held by the Bordeaux Trust[1] ('the Trust") in the second respondent ("the main application").

[2] The main application is based on a share sale and purchase agreement ("the sale agreement"), which was concluded between the Trust and Rivella on 16 April 2015. In terms of the sale agreement the Trust sold 48,6% of the issued share capital of the second respondent to Rivella for an amount of R33 889 465.92. The purchase price was payable over a lengthy period, with a final payment payable on 1 March 2019. In terms of clause 6.3 of the sale agreement the subject shares were to be held in trust by the second respondent's auditor and released in tranches and transferred to Rivella as and when payments were made. At all material times the applicants (the trustees) represented the Trust. The sixth respondent, Mr Prakke, was a trustee of the Trust at the time of the conclusion of the sale agreement but he subsequently resigned as trustee on 6 November 2019. The third, fourth and fifth respondents are parties identified in the sale agreement as being interested parties, hence their inclusion to the present application.

[3] It is common cause that Rivella had, from time to time, effected payment to the

[1] Formerly known as the Teresa Engelbrecht Trust.

Trust, but not in accordance with the sale agreement. It is also common cause that two written addenda to the sale agreement were concluded between the parties in May 2016 and July 2016 which, *inter alia,* granted Rivella certain indulgences in relation to when payments were to be made (addenda 1 and 2). The applicants aver that notwithstanding the conclusion of the addenda, Rivella failed to effect payment of the requisite amount as undertaken by it. The applicants, therefore, allege that Rivella is in arrears and that the balance due and owing to the Trust, as at 1 July 2020, amounted to R 20 116 103.00. The first to sixth respondents oppose the application.

[4] In the answering affidavit, in opposition to the main application, the respondents, dispute the quantum of the indebtedness on the basis of three further addenda (addenda 3 - 5) which the Trust had allegedly concluded with Rivella, which further regulated payment, interest, and the dates upon which payments became due. The respondents also raised the contractual provision contained in the sale agreement that provides for dispute resolution by means of arbitration proceedings. In the replying affidavit, the applicants asserted that the respondents have not raised a real dispute of fact as far as the merits of the main application is concerned, and as far as the arbitration clause is concerned, contended that the respondents should have launched an application in terms of section 6(1) of the Arbitration Act,[2] and applied to the court for a stay of the proceedings.

[5] The first and second respondents subsequently filed a formal application on 14 May 2021 in which the respondents applied for a stay of the main application and an order that the dispute between the parties be referred to arbitration in terms of section 6(1) of the Arbitration Act in terms of clause 13 of the written agreement, as well as leave to file a duplicating affidavit in support thereof ("the counter-application").

[2] Act 42 of 1965

[6] Prior to the launching of the counter application, on 11 May 2021, the applicants brought an application for leave to file a supplementary affidavit in terms of which the applicants seek to support a notice of intention to amend the capital amount claimed in the main application. Attached to the supplementary affidavit is a notice of intention to amend prayers 1.1 and 1.2 of the notice of motion dated 22 July 2020. ("the amendment application").

THE AMENDMENT APPLICATION

[7] As stated, the amendment application was served prior to the launching of the counter-application.

[8] The first respondent disputes the quantum or the indebtedness on the basis of separate agreements which the Trust had allegedly concluded with it. The purpose of the amendment application is to address the first respondent's contentions in its answering affidavit that further payments have been made by it, which have not been taken into account by the Trust. The respondents oppose the intended amendment and contend, *inter alia*, that the applicants should have filed a notice of an intended amendment in terms of Rule 28 and that the applicant's apportionment of the payments referred to in the notice of motion has to be done with reference to the agreement of 31 March 2018, and not any other prior agreement it superseded. In paragraph 4.8 of the counter-application, Mr Janse van Rensburg, on behalf of the first respondent, however, stated that: *"What is not taken into account by the Applicants is that they have been receiving payments since the start of the pandemic as evidenced in the attached annexures marked Annexures "AB2" to "AB8" as proof of payment".*

[9] Annexures "AB2" to "AB5" do not constitute separate payments. They reflect one payment made on 30 April 2020, which was identified in the founding affidavit in the

main application. Annexure "AB6" constitutes a payment made of R45 000.00 made by the first respondent on 4 August 2020, correlating to the first amount identified in the notice of intention to amend; "AB7", constituting a payment of R45 000.00, was made on 30 September 2020, correlating to the second payment identified in the notice of intention to amend; "AB8", reflecting a payment of R225 000.00, was made on 9 March 2021 and it correlates to the third amount identified in the notice to amend.

[10] The respondents object not only to the proposed amendment but also to the Trust's supplementary affidavit identifying what further payments had been made (the three amounts reflected in the notice of intention to amend) and the dates thereof. The amendment advances the first respondent's case, and not the Trust's. There is no prejudice to the respondents, and no reason why the court should not deal with the amendment application during these proceedings. In any event, the Trust was duty bound to disclose the payments to the court, which it has now done. The amendment is allowed.

THE COUNTER-APPLICATION

[11] The respondents seek an order in terms of section 6(1) of the Arbitration Act that the main application be stayed pending the resolution of the dispute by way of arbitration proceedings in terms of clause 13 of the agreement.

[12] The applicants contend that the respondents have failed to adduce any evidence as to why the counter-application has been launched so late, and in the absence of any evidence to this effect, the counter-application cannot be entertained.

Late filing of counter-application

[13] Section 6(1) of the Arbitration Act prescribes that upon legal proceedings being commenced against a party, the other party to an arbitration agreement should, before delivering of pleadings or before taking any other step in the proceedings, apply to court for the stay of the proceedings. It is common cause that the respondents did not apply for the stay of the proceedings after the main application was served on them, and it was only when the non- compliance with section 6(1) was pertinently raised by the applicants in the replying affidavit, that the respondents filed a substantive application for a stay of the proceedings.

[14] Clause 13.1.1 of the sale agreement, states that *"any party shall be entitled to demand in writing that the dispute be referred for arbitration within 7 (seven) days after agreement could not be reached"*. The respondents contend that despite this provision, the applicants did not grant the respondents such an opportunity and summarily launched the application against the respondents. It is contended that had the applicants complied with their contractual obligations formulated in clause 13.1.1, the respondents would have made the election within seven (7) days to have the matter referred to arbitration within their rights in terms of clause 13 of the agreement. The respondents state that they were, from their perspective, compelled to oppose the application and raise the issue in their answering affidavit. It is contended that on a proper reading of the answering affidavit the respondents adopted the stance that should the application not be dismissed, it should be stayed and referred to arbitration. The applicants submitted that the respondents have elected to reply to the applicants' application and are now bound to the proceedings and are precluded from moving the relief in the counter application to refer the disputes to arbitration.

[15] In the matter of *Rhodesian Railways Limited v Mackintosh*[3], the court held that the provisions of section 6(1) are not obligatory but permissive, and does not derogate from the practice of pleading the submission clause either by way of a preliminary special plea or by way of defence. In *Foize Africa v Foize Beheer BV* [4], the Supreme Court of Appeal stated as follows:

> *"As already mentioned, a party wishing to raise an arbitration or foreign jurisdiction clause as a reason to stay a court from exercising jurisdiction, should do so by way of a dilatory plea. As in motion proceedings the affidavits served as both pleadings and evidence, in such case as this it would be necessary to place the relevant facts upon which reliance is placed before a court by way of an affidavit".*

[16] Thus, even if the respondents have elected not to file a substantive application for the stay of the proceedings, they would not have been precluded from relying on the arbitration clause, because they have raised it as a defence in the answering affidavit in opposition to the main application. In any event, the respondents have now filed a substantive application in which they ask the court to exercise its discretion and refer the matter for arbitration. The applicants are not prejudiced by the late filing of the counter-application. They were well aware, even prior to the counter-application being launched, that the respondents are, *inter alia*, relying on the arbitration clause. As a result, the applicants have filed a replying affidavit as well as opposing papers and heads of argument in opposition thereof. I am therefore satisfied that the counter-application is properly before this court.

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[3] 1932 AD 359 at 371. See also *PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd* 2009 (4) SA 68 (SCA) at 72A – C; *Yorigami Maritime Co. Limited v Nissho-Iwai Co. Limited* 1977 (4) SA 682 (C) at 692H; *Delfante & Another v Delta Electrical Industries Limited* 1992 (2) SA 221 (C) at 226F – H. Erasmus Superior Court Practice: 2nd Edition, Vol. 2, p. D1-273.

[4] 2013 (3) SA 91 (SCA) at 102G-H. Also see *Absa Bank Limited v Kernsig* 17 (Pty) Ltd 2011 (4) SA 492 (SCA) at par. 23.

The arbitration clause

[17] In terms of clause 13.1 of the sale agreement under the heading "Dispute resolution", the parties agreed that any dispute arising from any matters relating to the agreement, or the validity or meaning or execution thereof, must be solved by means of arbitration in accordance with the procedures stipulated in clauses 13.1.1 to 13.3.

[18] The respondents contend that the parties were bound to the provisions of the agreement and in particular clause 13. Thus, so it is argued, where in the ordinary course of the suit the party pleads a defence that he is entitled to have the dispute settled by arbitration, the court will exercise its discretion to refer the matter to arbitration.[5] The applicants contend that the counter-application is *mala fide* and was launched solely for the purposes of delay. It is submitted that it is common cause that the three addenda put up by the first respondent in order to resist the main application were not signed by all the parties to the agreement, as required. Accordingly, there is no arbitrable dispute between the parties.

[19] Section 3(2) of the Arbitration Act, provides that:

> *"The court may at any time on the application of any party to an arbitration agreement, on good cause shown order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration".*

[20] The decision to refer a dispute to private arbitration is a choice respected by the courts in accordance with the principle *pacta sunt servanda.*[6] On the other hand, the mere existence of the arbitration clause is not an automatic bar to the institution of

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[5] *Stocks Construction OFS (Pty) Ltd v Metter-Pingon (Pty) Ltd* 1978 (4) SA 35 TPD at 38 C-E.
[6] *Lufuno Mphaphuli & Associates (Ptv) Limited v Andrews* 2009 (4) SA 529 (CC) at 592 E

legal proceedings in respect of arbitrable disputes,[7] and an agreement to arbitrate does not deprive a court of its jurisdiction over the dispute covered by the agreement.[8] The party resisting the stay of court proceedings (in this instance the applicants) bears the *onus* of convincing the court that the stay should be refused. The applicants must show good cause within the meaning of sub-section 3(2). It is trite that such *onus* is not easily discharged.[9]

[21] The discretion of the court to refuse arbitration, is to be exercised judicially, and only when a very strong case had been made out. In *Universiteit van Stellenbosch v JA Louw,*[10] the court held that there should be "compelling reasons" for refusing to hold a party to its contract to have a dispute resolved by arbitration. The court also remarked that the cases in which the discretion against arbitration was exercised are "few and exceptional".

[22] In *Foize Africa,*[11] the Supreme Court of Appeal considered when and under which circumstances the court should exercise its discretion that civil proceedings in a court should be stayed pending the outcome of an arbitration. It held that no hard-and-fast rule can be laid down as to the stage at which a court should exercise its discretion to enforce an arbitration clause. In each given case much will depend upon the particular facts and circumstances of the case as well as the stage at which and the manner in which the issue of enforcement of a clause in question is raised. The mere fact that the respondent raises the issue when the applicant seeks interim relief as a precursor to the trial proceedings does not, in itself, preclude the court from exercising its

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[7] *Delfante v Delta Electrical Industries Ltd* 1992 2 SA 221 (CPD) at 226 E-G.
[8] *Parekh v Shah Jehan Cinemas (Pty) Ltd* 1980 (1) SA 301 (D).
[9] *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co. (Pty) Ltd* 1971 (2) SA 388 (W) at 391 E – H.
[10] (1983) 4 SA 321 (RD) at 333 G.
[11] 2013 (3) SA 91 (SCA) at 100G-H and 100-101 H-I.

discretion to enforce the arbitration clause at that stage.

[23] The applicants, with reliance on *SA Sentral Ko-öp Graanmaatskappy Bpk v Shifren en Andere,*[12] contend that the respondents defence is without legal substance as the non-variation clause in the original agreement between the parties precludes an amendment which is not in writing. It is submitted that there is therefore no real dispute, valid in law and that the court should refuse to refer the matter to arbitration.

[24] The respondents contend that the facts as set out in the answering affidavit, clearly establish that after the first and second addenda were concluded, that the sales agreement was further amended in terms of the correspondence exchanged between the parties by e-mail. It is submitted that the variation was effected in writing facilitated by Mr Prakke on behalf of both parties and that the Electronic Communications and Transactions Act[13] gives legal recognition to transactions concluded electronically by e-mail. Relying on the matter of *Spring Forest Trading 599 CC v Wilberry (Pty) Ltd t/a Ecowash & Another,*[14] in which the SCA found that an amendment to an agreement can be effected by way of e-mail and that the names at the bottom constitutes sufficient detail for purposes of signature, it is submitted that there is a *bona fide* dispute that is not capable of being resolved on paper. It is further contended that the first respondent's version is corroborated by the correspondence exchanged between the parties (referred to in the answering affidavit) and by Mr Prakke, the intermediary who represented both parties in the execution of the agreement. It is also argued that the mere fact that the parties have executed the contract on the amended terms as agreed upon in the correspondence over a period of more than two (2) years, confirms that

[12] 1964 (4) SA 760 (A).
[13] No. 25 of 2002
[14] (2015) (2) SA 118 (SCA) at par [15]- [17] the court considered whether the exchange of e-mails met with the writing and signature requirements where parties have agreed to amend their agreement in writing only and by signature of the parties. The court found that e-mail exchanges are governed by Electronic Communications and Transactions Act No. 25 of 2002 and that the e-mails satisfied the requirement of writing.

such an agreement was indeed entered into.

[25] 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[15] rule that when in motion proceedings dispute of facts arise on the affidavits, a final order can be granted only if the facts stated by the respondents' answering affidavits together with the admitted facts in the applicant's founding affidavit justify such an order. It may be different if the respondent's version consists of bold or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, farfetched or so clearly untenable that the court is justified in rejecting them merely on the papers.

[26] Taking into account the facts set out in the answering affidavit and the correspondence referred to by the respondents, I am satisfied that there is a *bona fide* dispute of fact raised on the papers. The first respondent contends that, in addition to the conclusion of the first and second addenda, the parties concluded three other addenda, dated, respectively, 15 April 2017, 28 February 2018 and 20 April 2018. The applicants deny this allegation. There is therefore clearly a dispute with regard to the question of how many addendums were entered into which resulted in a re-calculation of the outstanding amount and interest.

[27] The applicants have failed to show "good cause", as to why the current dispute, should not be referred to arbitration. As Cameron J observed, in *Brisley v Drotsky*,[16] courts are required to respect the parties' contractual autonomy, as it informs, *inter alia*, the constitutional values of dignity and equality. There is an arbitrable dispute and

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[15] *Plascon-Evans Paints (TVL) v Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 620
[16] 2002 (4) SA 1 (SCA)

in the absence of any special circumstances why the parties' choice of arbitration, as a dispute resolution mechanism, should not be respected, the court should exercise its discretion in favour of the respondents to refer the matter to arbitration.

[28] In the result the following order is made:

1. The application to amend the main application is granted.

2. The counter-application is granted and the main application is stayed.

3. The matter is referred to arbitration in terms of clause 13 of the sales agreement.

4. Costs of the amendment and counter-application to be costs in the arbitration.

L. WINDELL

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for the hand-down is deemed to be 19 August 2021.

APPEARANCES

Counsel for applicants:	Advocate M. Segal
Instructed by:	Witz Incorporated
Counsel for respondents:	Advocate M.A. Badenhorst SC
Instructed by:	M.J. Pretorius Attorneys

Date matter heard:	31 May 2021
Judgment date:	19 August 2021