



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

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case No.: 4772/2015

In the matter between:

**THE MANGAUNG METROPOLITAN
MUNICIPALITY**

Applicant

and

LESOLE AGENCIES CC

Respondent

In re:

LESOLE AGENCIES CC

Plaintiff

and

**THE MANGAUNG METROPOLITAN
MUNICIPALITY**

Defendant

HEARD ON: 25 May 2017

JUDGMENT BY: DAFFUE, J

DELIVERED ON: REASONS DELIVERED ON 14 JUNE 2017

REASONS FOR JUDGMENT

- [1] I heard an opposed application between the above parties on 25 May 2017 and dismissed the application with costs on the same day, indicating that my reasons would follow in due course. These are my reasons.
- [2] On 12 October 2015 Lesole Agencies CC (“Lesole”) instituted action under case number 4772/2015 against Mangaung Metropolitan Municipality (“the municipality”), claiming damages in the amount of R709 822.62 plus interest and costs in respect of the municipality’s alleged breach of a written agreement entered into between the parties.
- [3] On 26 November 2015 the municipality filed its plea which incorporated two special pleas and a plea on the merits. It is alleged in the first special plea that the relationship between the parties was governed by a written JBCC contract which provided for dispute resolution in the form of arbitration to be conducted by an arbitrator. Consequently, and as the plaintiff did not refer the dispute to arbitration, the municipality pleaded that plaintiff’s claim be dismissed with costs, alternatively that the claim be stayed pending the outcome of the arbitration proceedings.
- [4] After the close of pleadings, the parties exchanged requests for further particulars and responses thereto. On 28 August 2016 and after the close of pleadings a conference in accordance with rule 37

of the Uniform Rules of Court (“the Rules”) was held wherein the municipality recorded that it was suffering severe prejudice due to plaintiff’s refusal that the dispute be adjudicated by way of arbitration. The parties agreed that in the event of the matter not being referred to arbitration, the municipality’s two special pleas would be entertained first. It was also recorded on behalf of the municipality that the matter should be referred to arbitration in terms of clause 40, read with clause 42.7 of the written agreement.

[5] No trial date has been allocated for the hearing of the defended action, but bearing in mind the waiting list for trial-ready matters, there is no reason why the matter should have been enrolled and even finalized by now.

[6] On 20 January 2017 and under the same case number, the municipality caused a notice of motion to be issued, claiming the following relief:

- “1. The respondent’s action against the applicant is stayed, pending the finalization of arbitration proceedings, or determination of the dispute between the parties by way of arbitration.
2. The respondent is directed to enter into negotiations with the applicant within 60 days of date of this order for the conclusion of an arbitration agreement in order to determine the dispute between the parties.
3. The respondent to pay the costs of the application.”

[7] The application is opposed on two so-called primary contentions, to wit

“6.1 Firstly, a proper consideration of the written agreement between the parties reveals there is no obligatory arbitration clause. The municipality has, it would seem purposefully, misread the terms of the agreement throughout.

6.2 Secondly as an alternative postulation, there is no reason why the matter should now be referred to arbitration. Indeed, the municipality seems bent on playing an elaborate game of ducks and drakes with Lesole. It has unlawfully cancelled the agreement, but simply refuses to accept that it is liable for damages because of this unlawful cancellation and change in scope of the works.”

[8] It has always been my understanding that parties provide for dispute resolution by way of arbitration in their agreements in order to have a dispute resolved quickly. No doubt, arbitration procedure is more expensive than litigation in our courts. Arbitrators are being paid handsomely, but because of the nature of the proceedings it is possible to have a dispute resolved speedily and within a few weeks, instead of having to wait for a year or even two or three years to have the dispute finalised in a court of law. However, it also depends on the *bona fides* of the parties and an unambiguous arbitration agreement. The municipality might have achieved finalisation of the dispute by way of arbitration if it acted immediately when the dispute arose. In my view it would serve no purpose at all to refer the matter to arbitration at this late stage of the proceedings, i.e. nearly two years since the dispute has arisen.

[9] A party confronted with a contractual claim emanating from a contract containing a proper arbitration clause, has two options, i.e. either to file a dilatory plea in accordance with rule 22 of the Rules, or to apply in terms of s 6 of the Arbitration Act, 42 of 1965 for relief.

[10] In terms of the common law an arbitration defence is raised by way of a special plea, also referred to as a dilatory plea. It is not a plea on the merits and the purpose thereof is to obtain a stay of the proceedings pending final determination of the dispute by way of arbitration. Because of the very nature of the special plea it does not afford a defendant an absolute defence and its purpose is merely to determine the correct forum to which the parties have agreed to submit themselves. The high court's jurisdiction is not ousted by an arbitration agreement. See: *The Rhodesian Railways Ltd v Mackintosh* 1932 AD 359 at 375, referred to with approval in *Aveng Africa t/a Grinaker-LTA v Midros Investments* 2011 (3) SA 631 (KZD) at para [17]. When such a special plea is raised, the onus of satisfying the court that the matter should not be referred to arbitration is on the plaintiff who instituted the action. Such party must convince the court that due to exceptional circumstances the special plea should be refused. It is unnecessary to consider this any further, bearing in mind the present proceedings before me.

[11] The second option available to a party insisting that a dispute should be resolved by way of arbitration is the application of s 6 of the Arbitration Act. The section reads as follows:

“(1) 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.

- (2) If on any such application the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement, the court may make an order staying such proceedings subject to such terms and conditions as it may consider just.”

[12] Although the Arbitration Act has not ousted the common law, it provides for a better and more efficient means of having disputes submitted to arbitration and the enforcement of the awards of arbitrators. As mentioned *supra*, the municipality could have brought an application in terms of s 6(1) of the Arbitration Act as long ago as October 2015 and if it did that and the parties acted *bona fide* at all relevant times, the dispute could have been resolved before the end of 2015 or early 2016. The municipality elected not to take the preferred route provided for in the Arbitration Act.

[13] I do not intend to adjudicate on the JBCC contract and make a finding pertaining to the allegations made on behalf of Lesole pertaining to the alleged lack of a proper arbitration clause in the written contract between the parties. I merely wish to say that there appears to be sufficient room for argument that the parties did not provide for proper arrangements pertaining to arbitration in the event of a dispute between them. There is uncertainty as to whether an arbitration clause forms part of the agreement, but more particularly, there is no indication as to the procedure to be followed in the event of a dispute and who should act as arbitrator in such an event. It is apparent from the notice of motion that the municipality anticipated a problem in this regard and therefore it seeks the relief set out in prayer two of the notice of motion.

- [14] Bearing in mind the animosity between the parties and the stage of the litigation, there is no doubt great uncertainty as to whether they would ever come to an agreement in respect of the person to be appointed as arbitrator to mention just one aspect. The municipality believes that an engineer should be appointed whilst the plaintiff is of the view that the dispute is a pure legal matter, ideally to be adjudicated by the court. The arbitrator may possibly be a senior counsel or attorney if the matter is to be dealt with by way of arbitration. Further disputes in this regard are reasonably foreseeable and this may cause the parties to eventually come back to court to adjudicate these issues.
- [15] The matter is not before me as trial judge in order to adjudicate the first special plea referred to *supra*, but as a judge having to deal with an opposed application presumably brought in terms of s 6 of the Arbitration Act, although the municipality's counsel submitted that the application was brought under the common law. I mentioned *supra* that the pleadings in the action are closed, that further pleadings have been exchanged in accordance with the provisions of rule 21 and that the parties have even conducted a rule 37 conference. Bearing in mind the unambiguous wording of s 6(1) of the Arbitration Act, the municipality is barred from applying at this stage for the stay of the proceedings instituted by plaintiff by way of action. See: *Conress (Pty) Ltd and another v Gallic Construction (Pty) Ltd* 1981 (3) SA 73 (W) at 75H - 76A.
- [16] The fundamental rule pertaining to costs is that it is always in the discretion of the presiding officer which discretion must be

exercised judicially. Furthermore, the general rule is to the effect that the successful party is entitled to his/her costs. There was no reason not to grant costs to the successful party *in casu*.

[17] Therefore I dismissed the application with costs.

J.P. DAFFUE, J

On behalf of applicant: Adv LA Roux
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On behalf of respondent: Adv S Grobler
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