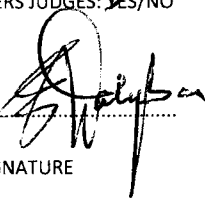


/SG

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DATE: 10/4/15
CASE NO: 15863/2015

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHERS JUDGES: YES/NO
(3)	REVISED
10/4/2015	
DATE	SIGNATURE

In the matter between:

GP SMITH LETTING CC

APPLICANT

And

JACOBS AND VAN ASWEGEN PROPERTY
DEVELOPERS CC

1ST RESPONDENT

GERHARD MARÉ

2ND RE SPONDENT

JUDGMENT

MAKGOBA, J

[1] This is an urgent application brought by the applicant for an interim interdict to suspend arbitration proceedings scheduled for 20 April 2015 pending the finalisation of a review application already instituted by the

applicant under case number 88292/2014 (“the review application”) in this court.

- [2] The applicant herein is the defendant in the arbitration and the first respondent herein is the claimant in the arbitration. The second respondent is the arbitrator. The application is opposed only by the first respondent.

Basis for the Application

- [3] The applicant alleges that during the conduct of the arbitration facts came to light which necessitated the applicant making a review application during December 2014 for a order reviewing and setting aside certain decisions of the Executive Council for the Department of Co-operative Governance, Human Settlements and Traditional Affairs of the Limpopo Province (“the Department”).
- [4] The applicant believes that if it is successful in that review application, the nature of the arbitration will change considerably as will the extent of the dispute between the parties. Furthermore, that a successful review of the decisions will abate the first respondent’s claim in the arbitration.
- [5] The applicant believes that should the arbitration proceed prior to the completion of the applicant’s review application, the applicant will suffer irreparable harm. On the other hand, according to the applicant, a continuation of the arbitration proceedings, absent a judgment on the review application, may render the arbitration moot and of academic value only.

Factual Background

- [6] The applicant is the registered owner of a property known as Portion 1 (remaining extent) of the Farm, Tweefontein 915 LS within the Limpopo Province (“the property”). During November 2006 the applicant and one Henk Gerhardus Van Aswegen (“Van Aswegen”) decided to become partners in a joint venture for the purposes of developing the property.
- [7] In order to achieve this object, it was necessary to successfully apply for a township establishment on the property to subdivide the property into residential or other stands and to sell these stands to members of the general public. From the income generated from the anticipated sale of stands, the parties would be compensated for their respective contributions to the joint venture, whereafter the profits would be shared equally between the parties.
- [8] Subsequent to the arrangement being formalised in a written agreement, Van Aswegen ceded his right, title and interest in and to the joint venture to the first respondent as his nominee.
- The first respondent conducts the business of a property developer.
- [9] Before the joint venture could come to fruition, a dispute arose between the parties. This dispute led to the arbitration proceedings pending before the second respondent. The arbitration has commenced during October 2014 but has not been finalised. The first respondent is still presenting its case.

The Arbitration

[10] On 9 October 2014 the part heard arbitration proceedings between the applicant and the first respondent were postponed by agreement to 9 February 2015.

[11] In the arbitration proceedings the first respondent claims that the applicant repudiated the agreement in denying that it was bound by it and in refusing to comply with the terms thereof. The first respondent alleges that as a result of the applicant's repudiation of the agreement it could not continue with the development, profits could not be realized and the first respondent suffered damages.

[12] In defence the applicant denies that the first respondent incurred the expenses claimed and the repudiation and in addition to that the applicant denies that the development was finalised and that any properties were sold or that the joint venture generated any income.

[13] The arbitration hearing commenced before the second respondent on 6 October 2014 until 9 October 2014 when it was by agreement postponed to recommence on 9 February 2015.

[14] The applicant alleges that during the first session of the arbitration proceedings the first respondent made a number of additional documents available to the applicant which had not been discovered prior to the commencement of the arbitration. These documents gave rise to the launching of the review application before this court on

11 December 2014 under case number 88292/2014, which application is currently pending.

- [15] On 9 February 2015 the applicant made application to the second respondent for the suspension of the arbitration proceedings pending the finalisation of the review application. On 10 February 2015 the second respondent (the Arbitrator) ruled that the arbitration proceedings will not be suspended but only postponed and should be set down within 45 days.
- [16] On 24 February 2015 the first respondent approached the second respondent to have the arbitration set down for hearing. On 27 February 2015 the first respondent served a notice of set down upon the applicant, informing that the arbitration will proceed on 20 April 2015.
- [17] On 3 March 2015 the applicant had this application to suspend the arbitration pending finalisation of the review application issued and served on the first respondent's attorneys.

The Review Application

- [18] In the review application the applicant seeks an order reviewing and setting aside the decisions of the department to extend the time period within which general plans for the development had to be filed with the Surveyor-General in terms of the Development Facilitation Act. According to the applicant, if it succeeds in the review, it will redirect its defence in the arbitration by avoiding the first respondent's damages claim in the arbitration and possibly also its claim based on expenditure.

- [19] The applicant avers that should the review be successful, it will have the opportunity to amend its plea in the arbitration and raise, as a defence to the respondent's claim, the fact that the development forming the subject of the dispute between the applicant and the first respondent, never came into being. Such a defence will hold that the first respondent had no opportunity of realising any profit and that the joint venture failed. Furthermore, that the applicant will be able to plead in the arbitration that any expenses incurred by the first respondent in the fruitless exercise of the joint venture development cannot be claim from it.
- [20] In short, it is the applicant's case that if it is able to succeed with the review, the first respondent should be left without a claim against it in the arbitration.

Issues raised in Defence

- [21] The first respondent raised the following issues:

21.1 That the matter is not urgent;

21.2 That the court does not have jurisdiction to entertain this application;

21.3 That the review will fail;

21.4 That the review application has no bearing on the arbitration;

21.5 That the first respondent will suffer greater prejudice if the relief is granted than what the applicant will suffer if the relief is refused; and

21.6 That the applicant does not satisfy requirements for an interdict as prayed for.

Urgency

[22] The main point taken by counsel for the first respondent in relation to urgency is that the applicant delayed impermissibly in launching the present application from 10 February 2015, when it received the arbitrator's ruling that the arbitration proceedings will not be suspended but only postponed and to be set down within 45 days, until 3 March 2015, when it actually launched this application.

[23] Uniform Rule 6(12)(b) requires the applicant to "set forth explicitly the circumstances which [it] avers render the matter urgent".

[24] In its own papers, in particular, the replying affidavit, the applicant states that the urgency in this matter was brought about by the refusal of the second respondent (the arbitrator) on 10 February 2015 to suspend the arbitration proceedings before him and the first respondent's subsequent setting down of the arbitration for hearing on 20 April 2015.

[25] In my view the applicant should have launched this application immediately after 10 February 2015 and not wait until after

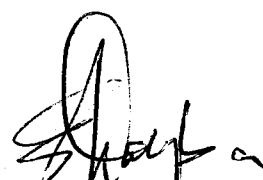
27 February 2015 when a notice of set down was served. The applicant knew all along as early as 10 February 2015 that the arbitration it now seeks to suspend would be proceeding on 20 April 2015.

It is trite that an application for an interdict *pendente lite* from its very nature requires the maximum expedition on the part of the applicant. See *Juta & Co Ltd v Legal and Financial Publishing Co (Pty) Ltd* 1969 (4) SA 443 at 445A-F.

Caledon Street Restaurant CC v D'Alviera [1998] JOL 1832 (SE) at p1832.

[26] Given the applicant's delay in launching this application, any "urgency" is entirely self-created. I accordingly make a finding that the applicant has failed to make out a case for urgency.

[27] The application is accordingly struck from the roll with costs.



E M MAKGOBA

JUDGE OF THE GAUTENG DIVISION, PRETORIA

Heard on:

24 March 2015

For the Applicant:

Adv A Liversage

Instructed by:

Van Huyssteens Attorneys

For the First Respondent:

Adv R F Van Rooyen SC & Adv P Rabie

Instructed by:

Van Aswegen Attorneys
c/o Eduard De Lange Attorneys
PRETORIA

Date of Judgment: