



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

20/5/15
CASE NO: 22366/2014

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO. ☒ YES

(2) OF INTEREST TO OTHER JUDGES: YES / NO. ☒ YES

(3) REVISED.

18/5/2015

DATE

SIGNATURE

IN THE MATTER BETWEEN

BOTSWANA TEACHERS' UNION

APPLICANT

AND

INDUMISO OUTSOURCING (PTY) LTD

RESPONDENT

JUDGMENT

TOLMAY, J:

INTRODUCTION AND FACTUAL BACKGROUND

- [1] The applicant brought an application in terms of sec 3(2) of the Arbitration Act, 42 of 1965 (“the Act”) that an arbitration agreement concluded between the parties be set aside and that the arbitration between the parties be terminated.
- [2] During April 2012 the respondent served a statement of claim on the applicant claiming payment in the amount of R540 209-83, being damages which the respondent alleged it suffered as a result of the applicant’s breach of contract.
- [3] The aforesaid claim arises from a written agreement entered into on 21 November 2011, the relevant terms of which were *inter alia*:
- 3.1 A joint venture company, Benefits Enterprises (Pty) Ltd (“Benefits”), would be established in order to exploit certain business opportunities in the alternative housing market within the Republic of South Africa as well as neighbouring countries;
- 3.2 the applicant would provide all information required to implement the turnaround strategy; transform the manner of operation to follow strict business rules and corporate governance; dedicate resources to participate fully in Benefits and identify all business opportunities;

- 3.3 the respondent would provide the initial funding for Benefits;
implement process improvement programmes and provide advice on
the best investment instruments for Benefits;
 - 3.4 the parties agreed to resolve any dispute through mutual consultation
and if the dispute remained unresolved same will be referred to
arbitration.
- [4] Pursuant to the agreement the respondent advanced a loan to Benefits in an
amount of R540 209-83 as initial funding.
- [5] The respondent in its statement of case alleged that:
- 5.1 The applicant repudiated the agreement, which repudiation was
accepted by the respondent.
 - 5.2 As a direct and reasonably foreseeable result of the applicant's
breach, which breach amounted to a repudiation of the agreement
 - 5.2.1 Benefits was not able to conduct business or to generate
income;
 - 5.2.2 the amount contributed by the respondent to the funding of
Benefits was expended to no benefit to the respondent, or to the
applicant, or Benefits;

5.2.3 Benefits is not able to repay the amount of R540 209,83, or any amount, to the respondent.

5.3 Had the applicant not repudiated the agreement as set out above, the said amount contributed by the respondent would have resulted in a profit accruing to Benefits, alternatively Benefits would have earned a profit and/or possessed sufficient assets, enabling it to repay the aforesaid loan to the respondent.

5.4 In the premises:

5.4.1 the respondent suffered damages in an amount equivalent to the amount contributed by it to Benefits; and

5.4.2 the applicant is liable to the respondent in an amount of R540 209,83 in respect of such damages, which amount is due, owing and payable.

[6] The applicant filed a statement of defence and inter alia raised the special plea of non-joinder of Benefits.

[7] After considering written and oral submissions on the special plea the arbitrator issued a written award on 22 August 2013 and in this award the arbitrator ruled that the arbitration agreement was concluded between applicant and respondent only, that Benefits was not a party to the arbitration

agreement and that it could accordingly not be joined to the arbitration proceedings. The special plea of non-joinder was consequently dismissed.

- [8] Subsequently the arbitration proceedings have not yet proceeded any further and applicant launched this application.

THE APPLICABLE LEGAL PRINCIPLES

- [9] Section 3(2) of the Act provides as follows:

“(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.”*

- [10] Sec 3(2) provides the Court with a wide power to on good cause shown set aside an arbitration agreement¹. The *onus* to show good cause is not easily discharged. The following was said in this regard in **Lancaster v Wallace**²:

“The onus is not easily discharged. There are certain advantages, such as finality, privacy, a judex of one’s own choice, and avoiding delays through having to await one’s turn on the roll of trial cases, which a party to an

¹ IMATU V Northern Pretoria Metropolitan Substructure 1999(2) SA 234 on 237

² Lancaster v Wallace N O 1975(1) SA 833 (WLD) on 847 A - B, See also Metallurgical & Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd 1971(2) SA 388 (W) at 391, Sera V De Wet 1974(2) SA 645 (T) at 650

arbitration may wish to retain; and one who has contracted to allow his opponent those advantages will not readily be absolved from his undertaking. Rhodesia Railways v Macintosh, 1932 A.D. 359 at p 375; Schietekat & Naumov, 1936 (1) P.H. A36; Metallurgical & Commercial Consultants, case, supra”

- [11] A Court has a discretion to set aside an arbitration agreement but the Court should exercise such discretion judicially and only when a very strong case has been made out, as was stated in **Universiteit an Stellenbosch v J A Louw Bpk**³:

“ ... it is undesirable for any court to attempt to define with any degree of precision, what circumstances would constitute a “very strong case”. In Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd 1971(2) SA 338 (W) Colman J at 391H refers to English authorities which say: “there should be ‘compelling reasons’ for refusing to hold a party to his contract to have a dispute resolved by arbitration”.

- [12] As a result a Court must determine on an evaluation of the circumstances of each particular case whether the *onus* has indeed been discharged.

³ 1983(4) SA 321 A at 334 A, See also De Lange v Presiding Bishop, Methodist Church of S.A. 2015(1) SA 106 (SCA)

[13] Our Courts have found good cause is a phrase of wide import and it will require a Court to consider the merits of each case in order to achieve a just and equitable result⁴.

[14] The pertinent question that needs answering is what would constitute such good cause. This question was considered by our Courts and it was found that the Court can terminate an arbitration under the following circumstances:

- (a) where all the parties to the dispute are not parties to the arbitration agreement with the result that there may be a multiplicity of proceedings with the danger of conflicting decisions and increased costs⁵;
- (b) where a defendant's counterclaim affects third parties who are not subjected to the provisions of the arbitration agreement and in respect of which the arbitrator had no power of investigating⁶.

[15] This question was also considered in the matter of **Halifax Overseas Freighters Ltd v Rasno Export; Technopromimport and Polskie Linie Oceaniczne PPW**⁷, Justice McNair considered four factors before ruling whether the parties should not be held to the contract to arbitrate, namely:

⁴ South African Forestry Co Ltd V York Timbers Ltd 2003(1) SA 331 (SCA) at p 14, Universiteit van Stellenbosch, *supra*, De Lange, *supra*

⁵ Metallurgical & Commercial Consultants (Pty) Ltd V Metal Sales Co (Pty) Ltd *supra*, at p 393 – 394, See also Yorigami Maritime Construction v Nissho-Iwai 1997(4) SA 682 (CPD) 693 F – 694 B, Universiteit van Stellenbosch v J A Louw, *supra* on 335 G – 336 D, 342, 344 B-C

⁶ Ramsden, The Law of Arbitration, p 108, Welihockyi and Others v Advtech & Others 2003(6) 737 (WLD) on 756 A – D, see also Sera V De Wet *supra*, p 653 G - H

⁷ (The "Pine Hill") 1958 (2) Lloyd's List Law Reports 146 at p 151

15.1 *the substantial risk of quite inconsistent findings of fact by two different tribunals;*

15.2 *difficult questions of law may arise together with the high degree of probability that these same questions of law would come to the court on a special case;*

15.3 *some of the parties concerned were not subject to the arbitration clause; and*

15.4 *time, expense and costs that would be saved to a very substantial degree by insisting that the whole of these disputes between the parties be disposed of in one set of proceedings.*

[16] I do not understand the aforesaid to be a *numerus clausus* of circumstances and I am of the view that in each case the Court will have to consider the facts to determine whether the *onus* to show good cause has been discharged which would justify the Court to exercise its discretion and to terminate the arbitration.

APPLICATION OF THE LAW OF THE FACTS IN THIS CASE

[17] Benefits was initially cited as a second defendant in the statement of claim, but was later removed by respondent as respondent was of the view that Benefits had no direct or substantial interest to the proceedings and was furthermore not bound to the arbitration clause.

[18] In its statement of claim the respondent alleges that it advanced a loan to Benefits as initial funding. Respondent goes further and alleges that Benefits is unable to repay the amount of the loan or any amount to the respondent. Respondent alleges that Benefits would have earned a profit and/or possessed sufficient assets enabling it to repay the loan, had applicant not repudiated the agreement. From the aforesaid it is clear that Benefits played a pivotal role in the origin and development of the cause of action and it follows that evidence from Benefits and relevant to Benefits will be required to prove the claim.

[19] The applicant's contention is that the arbitrator will be called upon to make factual findings against Benefits, without Benefits being a party before him and without Benefits having the opportunity to cross-examine witnesses of the respondent or to present any evidence to advance its own case.

[20] The applicant alleges that Benefits needs to be joined as it has a direct and substantial interest therein. The general principle was enunciated in the matter of **Amalgamated Engineering Union v Minister of Labour**.⁸

"Indeed it seems clear to me that the Court has consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit or, if the circumstances of the case admit such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect that party's interests."

⁸ 1949 (3) SA 637 (A)

- [21] In **Van der Walt v Saffy**,⁹ the following was said which may also be of some importance:

“Is die huurder van die aangrensende perseel dan `n person ‘directly and substantially interested’ in die uitreiking van `n verklarende bevel? Afgesien van die regtelike posisie blyk dit nodig te wees om die huurder van die teekamer saam te voeg as `n party tot die verrigtinge omdat dit uit die stukke voor die Hof blyk dat die teenswoordige partye angstig is om, sover doenlik, die regte van al die betrokke persone te bepaal om sodoende die moontlikheid van veelvuldige prosesse en gedinge uit te skakel of te vermy. As die Hof dus met enige diskresie bekleed is, sou ek dit as `n redelike uitoefening daarvan beskou dat die huurder van die teekamer ook as `n party voor die Hof moet verskyn, Volgens reg ook ag ek die huurder van die teekamer as `n person ‘directly and substantially interested’.”

- [22] In **Henri Viljoen (Pty) Ltd v Awerbuch Brothers**¹⁰ it was found that a sub-lessee had no legal interest in the contract between a lessor and a lessee. In my view the facts of this case is distinguishable from the aforementioned matter, as *in casu* Benefit’s alleged inability to pay resulted in the cause of action. There is consequently a direct nexus between Benefits and the cause of action, which was not the case in that matter.

⁹ 1950 (2) SA 578 (O) at 581

¹⁰ 1953 (2) SA 151 (O) at 165 – 171

- [23] It is also of importance to consider what was said in **Gordon v Department of Health, Kwazulu-Natal**¹¹:

"[9] ... The issue in our matter, as it is in any non-joinder dispute, is whether the party sought to be joined has a direct and substantial interest in the matter. The test is whether a party that is alleged to be a necessary party, has a legal interest in the subject-matter, which may be affected prejudicially by the judgment of the court in the proceedings concerned. In the Amalgamated Engineering Union case (supra) it was found that 'the question of joinder should . . . not depend on the nature of the subject-matter . . . but . . . on the manner in which, and the extent to which, the court's order may affect the interests of third parties'. The court formulated the approach as, first, to consider whether the third party would have locus standi to claim relief concerning the same subject-matter, and then 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. This has been found to mean that if the order or 'judgment sought cannot be sustained and carried into effect without necessarily prejudicing the interests' of a party or parties not joined in the proceedings, then that party or parties have a legal interest in the matter and must be joined".

- [24] In this matter Benefits was the recipient of the loan and is according to the respondent unable to pay it back. Only as a result of Benefit's failure did the claim against the applicant arose. It seems clear to me that factual and legal findings against Benefits are essential to the determination of the dispute between the parties. It is also interesting to note that the Court in the aforementioned matter, whilst determining a direct and substantial interest considered the possibility of multiplicity of actions to be a relevant factor to determine the issue at hand.

- [25] In my view Benefits has a legal interest in the subject matter, which may be affected prejudicially by the judgment on the proceedings. I say it because

¹¹ 2008(6) 522 (SCA)

the respondent's claim for damages against the applicant arises, only because Benefits became unable to pay the loan, allegedly because of applicant's breach of the agreement. As long as Benefits was able to repay the loan, the claim for damages against the applicant did not arise. The findings that (1) Benefits is liable towards the respondent and (2) is unable to pay, are accordingly a *sine qua non* for the applicant's liability towards the respondent.

[26] It therefore follows that Benefits is a necessary party to the proceedings between the applicant and the respondent. In my view the arbitration cannot practically proceed without Benefits being joined as a party thereto, but as Benefits can't be joined in the arbitration proceedings that option is out of the question. The logical conclusion then is that for the matter to effectively proceed Benefits needs to be joined and the matter will have to proceed in a Court of law.

[27] Applicant's further contention is that if the arbitrator finds in favour of the respondent on the basis that Benefits is liable to repay its loan towards respondent, but is unable to do so and that applicant is therefore liable to repay the loan, applicant will have a counter-claim against Benefits.

[28] Due to the fact that Benefits is not a party to the arbitration any claim that needs to be instituted will have to be instituted in a court of law, applicant contends that this will lead to a duplication of proceedings.

- [29] The respondent contends that since the purported cancellation of the agreement, the applicant has been in *de facto* control of Benefits. The respondent further contends that in practise no litigation will ensue between the applicant and Benefits if Benefits were to become liable towards the applicant. This is based on the allegation that the applicant is in a position to ensure that Benefits pay any amount owing to it since the applicant is in control of Benefits.
- [30] Applicant on the other hand contends that a distinction must be drawn between administrative control and the joinder of a party to proceedings where a judgment is *res judicata* against such a party. Although the applicant might be in control of Benefits, from an administrative perspective, Benefits has not filed any notice to abide in the proceedings. Any judgment will accordingly not be *res judicata* against Benefits merely because the applicant is in *de facto* control of Benefits.
- [31] Benefits remain a separate legal entity with all the legal consequences and rights that flow from that. In my view this can't be merely ignored by the Court at this point in time. Irrespective of who is in administrative control of Benefits it remains a distinct and separate legal entity. It will be legally unsound to disregard this fact and to pay undue consideration to who is in control of Benefits.
- [32] Respondent also raised the point that Benefits is a company registered in Botswana, consequently Benefits is a foreign company and South African

Courts will not have jurisdiction over Benefits and no effective order can be granted against Benefits by a South African Court¹².

[33] It must be noted that the parties in the agreement consented irrevocably to the jurisdictions of the South Gauteng High Court and Botswana. I am of the view that any question pertaining to a potential lack of jurisdiction over Benefits is equally speculative and premature and should not be determinative of the success of the application. One should keep in mind that applicant is also a foreign company, who consented to a South African court's jurisdiction. Benefits could still submit to the jurisdiction of this Court. In light of all the circumstances the Court can't on this basis dismiss the application.

CONCLUSION

[34] The applicant did show good cause for the arbitration agreement to be set aside due to the fact that:

- (a) all parties to the dispute are not parties to the arbitration agreement;
- (b) there exists a very real possibility of multiplicity of proceedings with the danger of conflicting decisions and increased costs;
- (c) the applicant's potential counter-claim affects a third party that is not party to the arbitration agreement; and

¹² Gallo Africa v Sting Music (Pty) Ltd 2010(6) SA 329 (SCA) par 10

(d) the arbitration cannot proceed effectively without Benefits being either a party to it or being obliged to present witnesses if so required.

[35] I am of the view that in the light of all the facts and in the exercise of my discretion that the applicant has discharged the onus that good cause has been shown for this Court to intervene and set aside the arbitration agreement.

[36] Consequently I make the flowing order:

36.1 The arbitration agreement concluded between the parties is set aside;

36.2 The arbitration agreement concluded between the parties shall cease to have effect with reference to the dispute referred to arbitration;

36.3 The arbitration between the parties shall terminate; and

36.4 The respondent is ordered to pay the costs of this application.



R G TOLMAY

JUDGE OF THE HIGH COURT

PARTIES: BOTSWANE TEACHERS' ASSOCIATION vs
INDUMISO OUTSOURCING (PTY) LTD

CASE NO: 22366/2014

DATE OF HEARING: 11 MAY 2015

DATE OF JUDGEMENT: 20 MAY 2015

JUDGE: TOLMAY

ATTORNEY FOR APPLICANT: GROSSKOPF ATTORNEYS

ADVOCATE FOR APPELLANT: ADV J L BASSON

ATTORNEY FOR RESPONDENT: LOCKETTS ATTORNEYS

ADVOCATE FOR RESPONDENT: ADV BEYTEL