

19/3/2009 not reportable

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA.)

CASE NO: 08/33274

In the matter between:

SHAZI DEVELOPMENTS (PTY) LTD

Applicant

and

ELKON CONSTRUCTION CC

First Respondent

VAN DER LINDE, WILLEM S.C.

Second Respondent

JUDGMENT

Delivered.....

R D CLAASSEN J:

1. In this application the Applicant seeks the following relief:

1.1 Declaring that the arbitrator's (the Second Respondent's) appointment as arbitrator is of no force and effect; (Clause 7)

1.2 That the referral to arbitration was not done in terms of the contract between the parties;

1.3 That the dispute between the parties is not subject to arbitration.

Alternatively,

1.4 Firstly, in terms of Section 3(2) of the Arbitration Act No. 42 of 1965 that the arbitration agreement contained in Clause 7.1 of the Building Contract shall cease to have effect with reference to the disputes referred to in the arbitration proceedings,

1.5 Secondly, that the Honourable Court should order that the arbitration should commence *de novo*.

2. At the start of these proceedings a supplementary notice of motion was filed amending prayer 5 of the original notice of motion so that a further alternative be included to the effect that, should the other prayers not be granted, that the Applicant should be entitled to cross-examine the First Respondent's witnesses that gave evidence at the arbitration and to produce any evidence or witnesses of its own. The supporting affidavit

then also requests authority from the Court to alter his stance regarding a dispute between the parties to the effect that whereas he formerly denied that the original building contract had been cancelled, that he now be allowed to contend and accept the fact that it had in actual fact been cancelled.

3. Second Respondent, for obvious reasons, did not take part in any of these proceedings and First Respondent did not wish to object to the admission of the supplementary notice of motion because it did not want to waste any further time and wanted the matter to be finalised.
4. The Applicant and First Respondent ("*Respondent*") concluded a written building contract on the 12th of December 2006 at Johannesburg. It contained an arbitration clause. During the construction period certain disputes and issues arose. A round table conference was held on the 16th of May 2007. The following terms were agreed upon (I refer to **Annexure "JHH1"** at page 145).

"Present: Julius Lecoana, Sharon Slaughter, Martin Oosthuisen, Sarel Stapelberg."

The following was decided and agreed:

1. *Messrs Elkon Konstruksie to complete units in progress and not start any newly allocated units.*
2. *Messrs Elkon Konstruksie to complete all units currently in progress, hand over keys as the units are completed, and complete all of the works by no later than 29 June 2007, including cleaning of all builder's rubble on site. Estimated progress as on 16 May 2007 is as follows:*
(Ten erven are then referred to, which are not relevant for present purposes.)
3. *A retention of R10,000.00 per unit will be held on all the above units, and paid into the trust account of Messrs Shazi's lawyers, and released as soon as the Owners signed off their 30-day defects list. All other monies, apart from the retention will be paid to Elkon Konstruksie prior to handing over of keys.*

4. *A retention for any civil services damaged by Elkon sub-contractors or suppliers to be determined and kept to cover repairs.*

5. *NHBRC certificates issued under Elkon Konstruksie and need to be cancelled:*

(21 Erven are referred to which are not relevant for present purposes.)

A separate letter, on Elkon's letterhead to be directed for each and every ERF Number to the NHBRC stating that Elkon will not be building the units, and requests that it be deregistered.

(Signed by: Julius Lecuoana, Sharon Slaughter, Martin Oosthuizen, Sarel Stapelberg)"

As indicated the document was signed by all four attendees on different dates. Although it is alleged by Applicant's deponent ("Lecoana"). That his signature is forged, the terms of the agreement were never disputed (more about the forgery later).

5. On 31 July 2007 Respondent's attorney wrote a letter to the Applicant (for attention Lecoana and Slaughter). After relating

the recent past history of the matter and the salient terms of the agreement of 16.05.2007 it states that Applicant has “*once again failed to comply with your obligations.*” The last paragraph thereof, paragraph 7, reads as follows:

“Our instructions are accordingly to demand from you, as we hereby do, that payment in the amount of R942,746.04 be effected to our client by close of business on Wednesday, 1 August 2007, failing which our client will forthwith refer this matter to arbitration as envisaged in Clause 7 of the agreement of 12 December 2006.” (Annexure “B” at page 65)

- 6 It was received by the Applicant and its attorneys replied thereto on the same day, admitting receipt of the letter and stating that they will be consulting their client within the course of that week. On the 2nd of August 2007 Respondent’s attorney again writes to Applicant’s attorney and in the second paragraph thereof it is stated “*Ons kliënt het die aangeleentheid nou verwys vir arbitrasie. Die relevante kennisgewing in hierdie verband sal ook aan u versend word vandag.*”
7. Hereafter a long process ensued whereby a senior advocate from Johannesburg, Adv. W H G Van Der Linde, SC was appointed by

agreement between the parties by way of letters passed between the attorneys and obviously signed by them on behalf of their clients. More specifically Applicant's attorney writes to the Respondent's attorney on the 3rd October 2007. Paragraphs 5 and 6 of the letter reads as follows:

"5. Our client believes that in terms of the agreement it signed with Elkon Construction CC, the correct protocol in appointment of an arbitrator was not, strictly speaking, followed.

6. Be that as it may, the parties have agreed amongst themselves to appoint an advocate to preside as an arbitrator in this matter as the outstanding dispute is a legal matter".

8. Applicant's attorney then writes a letter to Respondent's attorneys naming five different possible counsel as arbitrators. Adv. Van Der Linde was then agreed upon and a pre-arbitration meeting was scheduled and held on 9th of November 2007 with Adv. Van Der Linde. At the meeting an arbitration agreement was drawn together with the schedule of directions by the arbitrator. This is sent firstly to Respondent's attorney who signed the agreement and the schedule

on behalf of the Respondent. It was then sent to Applicant's attorneys who eventually did not sign the document (**Annexure "Q"** at page 113 and further). However, on the 28th January 2008 Applicant's attorney writes to Respondent's attorney. Paragraphs 4 and 5 read as follows:

"4. With regards to the arbitration agreement, our client was reluctant to sign the agreement and agreed to time procedures, should he not be in a position to obtain and procure counsel to assist in this matter.

5. As we have informed you we have now procured the assistance of Advocate Bothma. Advocate Bothma however, is not available on the 11th of February 2008 but is available on the 8th, 9th and 10th February 2008."

9. Apart from all the other letters and documents this can only be seen as an unequivocal acceptance of the arbitration agreement. It may not by necessity incorporate the schedule of the procedures by the arbitrator but that is not part of the agreement as such.

10. Hereafter the parties exchanged pleadings. The Respondent was the claimant and Applicant the Respondent and the date for the

arbitration was eventually set as Friday, 8th February 2008. One date was then allocated. On the 5th February Applicant's attorney wrote to Respondent stating that they do not believe the matter can proceed *inter alia* because one day would not be enough and secondly, the question of forgery (referred to above) had to be aired in a public forum. In the result they withdrew their counsel's brief. They suggested that the matter should be removed to a High Court for hearing. This was not acceptable to the Respondent and he stated clearly that they are proceeding on the 8th of February. Certain events took place on the 8th February. The arbitrator gave an interim award, leaving further hearings / proceedings up to the parties.

11. On 19 March 2008 the arbitrator convened a pre-arbitration meeting at his chambers for the 10th April 2008. The purpose was to set further dates. Applicant's attorney wrote that his client is adamant that the matter must go to the High Court for a ruling.
12. On 15th April Applicant's attorney writes to the arbitrator and Respondent's attorney that his client contends that there was no binding arbitration agreement, certain other parties had to be joined and that the matter should be pursued in the High Court.

13. The arbitration eventually was scheduled to start on the 23rd June 2008. Applicant's attorney appeared as also Respondent's attorney and advocate. The Applicant's attitude was explained as follows by his attorney before the arbitrator (page 297, **Annexure "EK 8"**).

"Mnr Swart: Dankie Mnr die Arbiter. Soos ek vroeër gemeld het, is die doel van my teenwoordigheid vandag, wel ek sou sê dit is nie eers twee-ledig nie, dit is maar by eensydig. Die Respondent se houding is nog steeds (1) Dat hy nie voel hy gebonde is aan arbitrasie nie. In sover as wat daar 'n kontrak dan is wat op hierdie stadium deur hom ontken word, repudieer hy dit en hy voel dat die arbiter vandag hom nie kan verplig om aan die arbitrasie deel te neem nie. Dit is die eerste deel van die argument is, kan die Voorsittende beampte vandag 'n bevel maak om te sê hy moet of moes hier gewees het.

Die Respondent voel voorts dan dat hy die geleentheid gegun moet word om 'n verklarende bevel te kry om dan vas te stel of hy verplig is om te arbitreer al dan nie. Verder wil ons dan versoek dat die Respondent, sou die arbitrasie voortgaan vandag, die geleentheid gegun word om dan die getranskribeerde stukke op die verrigtinge van vandag sou hy

dit wil gebruik, gebruik om sy verklarende bevel dan of te ondersteun of nie en dit dink ek is die somtotaal van die submitisie. So as my teenwoordigheid verlang word sou die arbitrasie voortgaan, wil ek vra dat ek toegelaat word om as 'n, ek ken nou net aan die Engelse woord dink "observer" in te sit, maar ons gaan geen getuienis lei nie, ons wil ook nie inbreuk maak op enige van die verrigtinge nie. Ons sal dan bloot net teenwoordig wees, tensy daar natuurlik van die teenkant af enige besware teen dit is.

.....

Arbiter: Het u enige argumente om aan te voer oor waarom daar nie in 'n bindende arbitrasie ooreenkoms tot stand gekom het nie?

Mnr Swarts: Ja, maar die kliënt voel dat daar is wanvoeging en dan ook bedrog en hy sal graag dit eerder in 'n ope Hof wil laat aanhoor. Ek het ongelukkig geen gesag op hierdie stadium by my tot die punt nie.

Arbiter: Maar met betrekking tot die vraag oor of daar 'n geldige en afdwingbare arbitrasie-ooreenkoms tussen die Eiser en die Verweerder gesluit is, met betrekking tot daardie vraag, wat is die Verweerder se standpunt?

Mnr Swart: Die Verweerder se houding daar is daardie vraag kan nie vandag deur 'n arbiter voorgesit word nie. Die vraag moet in die ope Hof aanvaar word.

Arbiter: Waarom?

Mnr Swart: Dit is 'n interessante vraag. Die waarom is ek jammer is ek nie op hierdie stadium reg om u antwoord op te gee nie, maar my instruksie is dat óf die arbitrasie voortgaan vandag of nie, sal die Verweerder, dit sal nou eers oor twee weke gebeur want wanneer Advokaat Bothma terug in die land is, 'n verklarende bevel by die Hooggeregshof aanvra om te hoor is hy verplig om te arbitreer, ja of nee.” (sic)

14. Further in the discussion between the arbitrator and Mr Swart, Mr Swart confirms that his client was ready to proceed on the 7th December with the arbitration and that they also had an advocate on brief. In February 2008 however, his attitude changed and he did not want to proceed anymore.
15. The arbitration then proceeded, with the concurrence of Mr Swart, to examine the witnesses of the Respondent that were present, without deciding the question of enforceability of the arbitration agreement. As stated the record of proceedings would, however, be put at the disposal of the Applicant for further proceedings if he so wished.

16. After these events the Applicant launched the present application. It was initially set down for the 8th December 2008 but on that date the Applicant's attorney informed the Court that they did not have an advocate and asked that the matter be postponed. It was granted but Applicant had to pay the wasted costs on attorney and client scale. I shall refer to this matter later on when dealing with the costs.
17. In the meantime the Applicant had obtained the services of Advocate E Berg from Cape Town. In a supplementary notice of motion supported by an affidavit, the Applicant intimated that it had obtained certain advices from Advocate Berg and therefore changed his stance regarding the effect and standing of the original building contract which obviously included the arbitration clause.
18. Regarding the Applicant's altered attitude regarding the proceedings, the question now turned on the effect of the agreement concluded on the 16th of May 2007. At least until the previous hearing, the Applicant's attitude was that main building contract was not cancelled or terminated. On the advice of Advocate Berg he now maintains that that agreement of 16th May indeed terminated the original building contract including the arbitration clause with the result that the whole arbitration clause also fell by the wayside. It is

trite law that, should the building contract be terminated, “*as if it never existed*”, the arbitration clause would obviously also fall away and would be of no further binding effect. The first question then to resolve is what the effect was of the agreement of 16 May 2007.

19. Mr Berg’s point of departure was the manner in which the Respondent (by way of Mr M Oosthuizen) referred to this agreement. Reference is made to various passages in the deponent’s affidavit where the deponent explicitly states that the “*termination agreement cancels the building contract*”. He refers *inter alia* to the following phrases in the affidavit:

19.1 “*It was common cause that the parties agreed to terminate their relationship on certain terms....*”

“*The nature of the [termination] agreement was [that] the parties agreed to terminate their contractual relationship on certain terms.*” (par 30.5 of the answering affidavit, page 221).

19.2 “*I respectfully submit that the parties agree on what terms they will dissolve their agreement or*

terminate their contractual relationship. That is what occurred at the meeting of 16 May 2007. It was common cause that the parties agreed to terminate the relationship on certain terms..... Whether or not the minute was signed is immaterial. The content of the minute (insofar as it goes) were agreed to.” (para 30.8, p 222)

19.3 *“In the premises on or about 16 May 2007 and at or near Johannesburg, the parties, represented as aforesaid, met with a view to terminating the contractual relationship and to determine how to go about same and/or on what terms.” (para 8, pa 408 – Statement of Claim)*

19.4 *“Save to the extent that it was obvious and for pragmatic reasons that certain of the terms of the agreement would still have efficacy and apply to unfinished obligations, the agreement between the parties was cancelled.”(Par 9.1, page 404 – Statement of Claim)”*

Mr Berg thus concludes that it is “*common cause*” that the building contract was cancelled by **mutual consent**.

20. I cannot agree with this approach. Mr Berg never referred to the terms of the agreement itself. It was clear that this was a written agreement, signed by at least 3 of the four parties present. (The terms thereof are not contested. In interpreting the meaning and effect of it full conisance must obviously be taken of the content of the agreement.

a. It is nowhere stated in the said agreement that the building contract was cancelled or terminated.

b. Secondly it refers in paragraph 1 and 2 thereof, to completion of the works currently in progress.

c. Thirdly, Mr Oosthuizen says, as quoted by Mr Berg in par. 3 of the abovementioned quotes that the agreement was to be cancelled on certain terms.

d. Lastly, it is also trite that the words used by the parties outside and around the agreement cannot by themselves be taken at face value for interpreting the agreement. They must

be seen against the terms of the contract itself and their actual conduct, it seems to me, conveniently ignored.

When all these references are taken together, it is very clear that the clear intent of the agreement of 16 May 2009 was an agreement to complete the contract, albeit on amended terms. It can never be said that it was intended to cancel the agreement, as if it never existed. It only amended certain terms and what specifically was to be built and what not and how payment would be effected. Mr Oosthuizen specifically mentioned as quoted in the fourth quote above, that the agreement would still have efficacy and applied to unfinished obligations. For these reasons it can never be said that the building contract was cancelled. That disposes of a great of Mr Berg's arguments.

21. The next issue was the jurisdictions of the arbitrator, i.e. on the basis that there was no arbitration agreement. On this aspect he raised several issues as to why the arbitration could not proceed I will deal with these individually.

22.1 *There was no written agreement to arbitrate and one cannot rely on an oral agreement:*

It is true that the Arbitration Act requires a written agreement, however the signing thereof by the parties is not required. The law is clear that an oral agreement is also binding. The only difference then is that the Act will not apply. However, an award can still be made an order of Court.

See: LAWSA (1) (400 p 400, para 544.

In this respect Mr Swart clearly told the arbitrator that December 2007 his client was ready to arbitrate and had even appointed counsel. That at least shows an oral agreement but it goes further. Through his attorney, he agreed to an arbitrator being appointed differently to what it was described in the building contract. They filed pleadings for the arbitration and they agreed to meetings with the arbitrator, although Applicant did not sign the arbitrator's agreement, as already pointed out. His attorney, however adopted the arbitration but not necessarily the schedule of directions. All of the above was confirmed and/or agreed to in writing by and/or on behalf of the parties. There can just be no doubt that the arbitration agreement was in fact in writing.

22.2 The arbitration was not called for within the time frame as specified in Clause 7.1 of the building contract:

This point also has no merit. This point is also dealt with in paragraphs 5 - 7 above.

22.3 The correct procedure was not followed in appointing an arbitrator:

This point also has no merit. On Applicant's own argument that the building contract was cancelled, an oral agreement regarding Advocate Van Der Linde was reached and confirmed in writing as already indicated. This also clearly circumvents the non-variation clause of the building contract.

23.3 Lecoana's signature was forged:

If it is accepted that his signature was indeed forged, the fact is still that the terms of the agreement were never contested or attacked. The alleged forgery thereof is thus of no consequence. Furthermore, the signature of Ms Slaughter, who is obviously also a representative of the Applicant, was never attacked.

22.5 If fraud is alleged, it must be vented in open Court:

It is so that the Courts have often accepted this as a good reason for staying arbitration proceedings and referring the matter to an open Court, it being accepted as "*good cause*". However, the fact is it is for the

“*accused*” (the one who allegedly perpetrated the fraud) to ask that the matter be referred to open Court. If he/she does not require it, it is not for the accuser to ask for it. *In casu*, the “*accused*” wants to go to arbitration. From the cases quoted below, a party wishing to be relinquished from his contract (to arbitrate) has to show very good reasons and in a case like the present the weight of the authority is against the Applicant. I refer to the following cases:

Metallurgical and Commercial Consultants (Pty) Ltd
v Metal Sales Company (Pty) Ltd 1971 (2) SA 288
(W);

Rawstorne & Another v Hodgen & Another 2002 (3)
SA 433 (W)

This point therefore also fails.

22.6 *Applicant refused to sign the “Submission to arbitration” and a schedule of directions thereto:*

I have already indicated that whether he signed the specific documents or not, the terms of the agreement (not necessarily the schedule of directions) were accepted and signed on his behalf.

This point therefore also fails.

22.7 Applicant's attorney objected to the arbitration at the time:

Mr Berg quotes the following passage from the transcript of the proceedings: (**Annexure "EK8", page 297**):

"Die Respondent se houding is nog steeds dat hy nie voel hy gebonde is aan die arbitrasie nie. In sover as wat daar 'n kontrak dan is wat op hierdie stadium deur hom ontken word repudieer hy dit en hy voel dat die arbiter hom vandag nie kan verplig om aan die arbitrasie deel te neem nie."

This can only be a unilateral repudiation of the agreement to arbitrate. Whatever was intended by what the attorney said there, it cannot bind the Respondent. This point fails.

22.8 Applicant did not waive his rights in terms of the cancelled arbitration agreement (i.e. in the building contract):

He refers to various authorities for the trite proposition that the person waiving a right must do so with full knowledge, appreciation and consent. In this respect he argues that when Swart consented to arbitration (at whatever stage, I presume) he did so without the knowledge, appreciation and consent that the building contract as such was actually cancelled (as

Mr Berg has tried to argue). Therefore the Applicant cannot be held to the alleged waiver perpetrated on his behalf. This argument is totally flawed. Firstly, the building contract was not cancelled as already set out earlier. Further, full pleadings were exchanged between the parties and this argument was not raised. Only now on Mr Berg's advice is it latched onto. Apart from the foregoing Applicant and his attorney also throughout the proceedings, until Mr Berg appeared on the scene considered the building contract not to have been cancelled. That means firstly, no rights were waived and secondly, to the extent that it might have been, it was done with full knowledge, appreciation and consent of all the relevant facts.

22.9 The construction of the Guard House was not part of the building contract therefore not subject to arbitration:

It is conceded by the Respondent that a large portion of the evidence in the arbitration dealt with the construction of the Guard House which was not part of the initial contract. However, the arbitration agreement of the arbitrator states as follows in paragraph 1.1 and 1.2 (**Annexure "Q"**, page 113).

"1.1 The parties agree to submitting to arbitration certain disputes which have arisen between them. The nature of the disputes, from the claimant's perspective, is monies due

for services rendered, and from Respondent's perspective, contractual penalties.

1.2 *The issues in dispute between the parties will be further refined in pleadings, any subsequent amendments to those pleadings and any additional pleadings to be filed in the arbitration as may be allowed by the arbitrator."*

The issue of the Guard House is raised as a first claim in paragraph 13 of the statement of claim (page 416) and pleaded thereto by the Applicant, on the basis that the Applicant was not the contracting party thereto (page 432). Since the parties agreed to arbitrate and agreed to the issues to be arbitrated this argument cannot be sustained.

22.10 *Certain parties need to be joined to the proceedings:*

This issue was raised as a reason not to proceed with the arbitration before the arbitrator in June 2007. However, this point was not even touched on in argument.

23 This in essence deals with all the arguments on behalf of the Applicant. They all failed. However, Mr Berg's argument further was that in that case

his prayers in the *alternative* for prayers 2 of the notice of motion and the additional amended prayer 5 should be considered. It is convenient now to state all the prayers that are now sought:

1. Declaring that:
 - 1.1 The appointment of the Second Respondent in the arbitration proceedings pending between the Applicant and the First Respondent pursuant to the provisions of Clause 7.1 of the building contract concluded between the Applicant and the First Respondent on 12 December 2006 (the building contract) is of no force or effect;
 - 1.2 There has not been a timeous and/or proper referral to arbitration by the First Respondent of a dispute between the Applicant and the First Respondent in the terms regulated by Clause 7.1 of the building contract;
 - 1.3 Any dispute between the Applicant and the First Respondent arising out of the terms of the building contract is not subject to arbitration

provisions contained in Clause 7.1 of that building contract.

2. *Alternatively* and in the event of the above Honourable Court not granting the relief sought in paragraph 1 above, an order declaring that, in terms of the provisions of Section 32 of the Arbitration Act, No. 42 of 1965, the arbitration agreement contained in Clause 7.1 of the building contract shall cease to have effect with reference to the disputes referred to in the pleadings exchanged in the pending arbitration between the Applicant and the First Respondent.
3. *Alternatively* to prayers 1 and 2 *supra*: (the amended prayer 5)

First and Second Respondents be and are hereby directed to allow Applicant and/or its legal representatives, prior to the date of the publication of Second Respondent's award in terms of Section 25 of the Arbitration Act, Act 42 of 1965 (the Arbitration Act):

3.1 To cross-examine First Respondent's witnesses and/or expert witnesses who testified in the arbitration proceedings pending before Second Respondent;

3.2 To produce evidence (if any) of witnesses and/or expert witnesses in support of its statement of defence and its statement of counterclaim in the arbitration proceedings pending before the Second Respondent.

24 It is trite that the Court has a discretion to release a party from an arbitration agreement on good cause shown. There was huge a dispute as to who bears the onus in this regard, i.e. whether the Applicant must show that the arbitration must be stayed, set aside or deferred or the Respondent to show cause why it should proceed.

25 Whatever the answer may be, to my mind Respondent has shown very clearly that Applicant has not shown any good reason not to proceed. Of course, even if all the points raised were bad but the Court still feels it would be in the interest of justice to stay the proceedings, it ought to do so. However, this is not such a case. From all the evidence it is abundantly clear that Applicant has done

everything possible to erase the inevitable and has used every excuse possible (or not) to achieve that end. Therefore any prejudice that the Applicant might suffer because of these arbitration proceedings was caused solely by it and/or its attorney. They have tried everything to stall the proceedings before the arbitrator.

26 Mr Berg also submitted that should the Court be willing to grant only the amended prayer 5, it should order the arbitrator allow such procedures. Regardless of the outcome of this application, I am not prepared to be prescriptive to the arbitrator on an issue that is particularly within his jurisdiction.

27 For the above reasons the application must fail.

28 **Costs:**

Respondent asked for costs on the basis of an attorney and client as against Applicant and his attorney jointly and severally. The basis for this can be summarised as follows:

- 1 Applicant has tried every trick in the book to delay and frustrate the proceedings.
2. Its attorney assisted therein by giving false reasons to the court for requesting a postponement on 10 December 08.

The first point has already been alluded to in the body of the judgment. The second point needs more elucidation. At the previous date for hearing (on the opposed motion court roll for 8 to 12 December 2008) the matter was placed before me by the Senior Motion Court Judge. At the request of the parties the matter was to be heard on Wednesday, 10th December 2008. That morning Applicant's attorney made an affidavit stating that he had problems with obtaining counsel. After several counsel were unavailable (one of which being not to his client's liking) Adv. J Lambrecht was obtained. He was available for only the one day, being the 10th December. He was briefed with the papers. Mr Swart stated in the affidavit that Lambrecht was no longer available "*for personal reasons*". The Court had no choice but to grant postponement but ordered the Applicant to pay the wasted costs on an attorney and client scale. I also called on Adv. Lambrecht to give reasons to the Court on the next hearing as to why he should not be ordered to pay the costs jointly and severally with the Applicant.

- 29 Adv. Lambrecht made an affidavit. He sets out that the attorney called him on Sunday, 7th December to ask about his availability. He was willing and able to argue the matter on the Wednesday, 10th December. That was then accordingly arranged with me. On the Monday he studied the papers. On Tuesday he discussed the matter with his attorney and gave his views regarding the matter. Due to professional privilege he is not able to divulge

what the advices were. However, the brief was immediately taken away and his mandate terminated.

30 Adv Lambrecht filed his affidavit. Respondent's attorney requested Applicant's attorney to indicate whether they intended to reply to Lambrecht's affidavit or not. Eventually (after a second request) they declined to do so. When the matter again came before me in the week of 23 to 27 February 2009 I was informed by counsel, in Adv. Lambrecht's presence, that they do not seek any cost order against him and he was excused.

31 There is obviously a huge difference between the two versions of Lambrecht and Swart. In their letter to Respondent's attorney, Swart, in declining to submit an answer to Adv Lambrecht, states as follows in paragraph 2 of his letter to Respondent's attorneys:

"The only issued raised seems to be the difference in the choice of wording utilised in writer's affidavit i.e. that Adv. Lambrecht was unavailable due to personal reasons and Adv. Lambrecht's affidavit setting out the reasons are of a privileged nature."

32 In argument Adv. Van Der Westhuizen submitted that Mr Swart was blatantly lying to the Court on the 10th December 2008. But he goes further. He submits that Applicant, with consent and approval of his attorney, had all along been attempting to delay and frustrate the arbitration process. His whole attitude at the arbitration proceedings and his subsequent actions show his deliberate attempts to delay the inevitable. The attorney had at least since 26 November 2008 time to obtain counsel for the week of 8 to 12 December. He submits that this shows a wilful neglect, firstly to obtain counsel and then offers a lie to the Court as to the reason why his counsel "*dropped*" him.

33 To me the most serious part of this whole saga is Mr Swart's blatant lie to Court. Apart from being untruthful it is also contemptuous. What could be easier than to tell a Court that he and counsel did not see eye to eye on the matter and therefore could not proceed? For that reason alone I think the attorney should also be held responsible for the costs of the postponement together with his client.

I therefore make the following order:

1. The application, including the supplementary application, is dismissed with costs.

2. Applicant's attorney is ordered to pay the wasted costs occasioned by the previous postponement jointly and severally with the Applicant.

R D CLAASSEN
Judge of the High Court