

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO
	NO

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case Nr: 293/2004

Case Heard: 20/03/2006

Date delivered: 28/04/2006

In the matter:

L SANDENBERGH

APPELLANT

versus

H A SANDENBERGH

RESPONDENT

Coram: Kgomo JP et Majiedt J et Molwantwa AJ

JUDGMENT ON APPEAL

KGOMO JP et MAJIEDT J:

THE BACKGROUND AND THE RELIEF SOUGHT

1. The appellant, Mr Leon Sandenbergh, is an attorney with a firm of attorneys in Durban Road, Bellville, Western Cape. The respondent, Mr Hercules Sandenbergh, is a farmer in the district of Prieska, Northern Cape. The parties are siblings who are involved in a titanic battle on a subject-matter which appears from the Notice of Motion below. It is this “*broedertwis*”, as the Trial Judge, **Lacock J**, characterized the dispute, which blinded the parties from settling the main and ancillary issues finally and keep them apart or, better still, reconcile them. The appellant approaches the court with the leave of the *court a quo*.
2. The appellant was the plaintiff in Case 1367/98 (Northern Cape) in which he claimed against the respondent (as defendant) his eviction from a portion of Portion 1 (Leeukop) of the farm Middelwater Nr 99, Prieska, Northern Cape, which he contended the respondent was occupying illegally. On the obverse the respondent denied the allegation in his plea. In his earlier affidavit resisting Summary Judgment he blamed the fluidity of the situation on the

lack of a defined or established boundary.

3. On the 20th October 1999 the case was settled out of Court and the terms of the Deed of Settlement were made an order of Court. The relevant clauses for purposes of adjudicating the current dispute are the following (translated):

“1. The defendant (the farmer) is ordered to make a contribution in the amount of R30 000,00 (Thirty thousand Rand) in respect of the legal costs incurred by the plaintiff (the attorney), which sum is payable before 31 October 1999 to attorneys Duncan & Rothman, Kimberley.

2. *As far as the boundary fence which demarcates the parties' respective farms is concerned, which fence has been erected by the farmer-defendant, the parties undertake, as soon as possible, to reach agreement in respect of the reasonable and necessary costs incurred in the erection of the fence (by the defendant):*

2.1 *The defendant shall present to the plaintiff's attorney a written account in which he details how the amount (of the costs incurred) is composed and computed.*

2.2 *The defendant shall simultaneously therewith furnish documentary proof of the costs incurred by him for purchasing material and/or for the employment of labour.*

2.3 *In the event of the parties failing to reach agreement within 14 (fourteen) days of the furnishing of the specified account and accompanying vouchers relating to the aforesaid costs, then Mr J W Wilmans (an attorney) will, in accordance with a procedure he has devised, as the arbitrator, make a final determination in this connection.*

2.4 *Half the amount so determined as the costs, either by agreement or by Mr Wilmans, will be paid by the plaintiff to the defendant's attorneys Messrs Joseph & van Rensburg, within 10 (ten) days of the boundary fence being fully completed.*

3. *The parties agree that the boundary demarcating the respective farms shall be relocated so that the boundary where the access road crosses over to the defendant be*

diverted in the following manner ... (details omitted).

4. In order to give effect to the foregoing re-demarcation:

4.1 The plaintiff shall transfer a portion of the existing Suiderkruis-camp (distinctively marked on the chart), to the defendant;

4.2 The defendant shall in turn transfer the existing Pan-camp (differently marked), to the defendant.

(Sub-paras 4.3 – 4.6 have to do with improvements and the land identified in paras 4.1 and 4.2 (above) of the Deed of Settlement).

5 – 7 (irrelevant)

.....

8.1 The parties note that their respective liabilities, if any, pertaining to the account of the landsurveyor, Mr Mitchell, in respect of his professional fees as regards the pegging of the boundary fence is in dispute;

8.2 The parties refer this dispute concomitantly to the arbitrator, Mr J W Wilmans, for final adjudication of what constitutes fair and reasonable compensation for the land surveyor's services and what the parties' respective liabilities against each other therefor are.

9 – 10 (irrelevant)

....."

4. Mr Wilmans withdrew as arbitrator because there was a dispute over his fees. This led the respondent-farmer to approach the *court a quo* for the following relief, after negotiations for a substitute arbitrator failed (also translated):

"1. That the order granted in Case No 1367/98 by this court, as set out in the Deed of Settlement marked Annexure "A" to the founding affidavit, be amended by the deletion of the name "Mr J W Wilmans" in paras 2.3 and 8.2 thereof and to substitute the name "M D J Steenkamp" therefor.

2. That it be declared that the parties are obliged:

2.1 To subject themselves to arbitration by the aforesaid M D J Steenkamp relating to the issues referred to in the aforementioned paras 2.3 and 8.2 (of the Deed of Settlement);

2.2 Each one is to pay half the fair and reasonable compensation of the arbitrator, to wit; the amount of R800,00 per hour (VAT excluded), as well as any necessary expenditure incurred by the arbitrator, pending

the award of any costs order by the arbitrator involving the arbitration.

3. *That the respondent-attorney be ordered to pay the costs of this application on the attorney and client scale.*
4. *Further and/or alternative relief."*

5. The siblings inherited a farm each – Middelwater and Leeukop – pursuant to the joint-will of their late parents. These farms lie adjacent to each other. The dispute was precipitated by the fact that their father, and his father before him, farmed these farms as a consolidated unit, apparently since about 1934. The demarcating boundary fence between the farms had been collapsed leaving only ill-defined beacons or pointers of what may have separated the farms. The sibling's father, who was predeceased by his wife, was the usufructuary on the properties.

THE APPELLANT'S CASE AND PRESCRIPTION

6. The appellant's attitude or objection to the appointment of Mr Wilmans as an arbitrator or a substitute to Mr Wilmans are the following:
 - 6.1. That the appellant's accounting has revealed that he is not indebted to the respondent, alternatively that the amount owed is so meagre that the appointment of an arbitrator is unnecessary and unjustified. The short answer to this postulate is that there is in existence a dispute between the parties and therefore a triable issue relating to who owes who and how much. This is precisely one of the components of the arbitrator's brief to determine. It is not for this court to now usurp the functions of an arbitrator;
 - 6.2. Appellant reckons that the fee of R800,00 to be paid to Judge Steenkamp, a retired judge president, is too exorbitant having regard to the elementary issues involved and the amount in dispute – estimated by the appellant-attorney to be in the region of less than R100 000,00 (One Hundred Thousand Rand). The appellant intimates that many local (Prieska) attorneys have indicated that they would do the arbitration for much less.

Whilst the appellant-attorney cannot exactly be typified as penny-pinching stingy, he certainly is exceedingly tight-fisted. R800,00 per hour at current going-rates whether it be for a very experienced and senior attorney like Mr Wilmans or the respected Judge President Steenkamp, the proposed rate is

eminently reasonable. To suggest that the rate is excessive is fallacious. Besides, the respondent's attorneys have directed several letters to appellant's attorneys before this application was launched requesting the appellant to suggest an alternative arbitrator but appellant remained indifferent and even lacked the courtesy of a response between 29 January 2001 and 26 September 2001. Even on the latter date no name was suggested by the appellant as requested. The appellant does not question the suitability of Judge Steenkamp to discharge his impending mandate;

6.3. The appellant-attorney averred in his Answering Affidavit that the respondent-farmer's claim has prescribed due to the effluxion of 3 (three) years in terms of the Prescription Act, 68 of 1969 (hereinafter referred to as "*the Act*") and that he has not applied for the extension of time in terms of section 23 of the Arbitration Act, No 42 of 1965.

7. There is considerable merit to point 6.3 made by the appellant. The record shows that:

7.1. The respondent-farmer, acting in terms of the Deed of Settlement, referred the matter to the arbitrator, Mr Wilmans, on the 29th June 2000 to adjudicate upon the issues in dispute. He also provided Mr Wilmans with a copy of "*die volledige hofrekord vir u inligting en agtegrond*". Mr Wilmans was in that letter also requested "*om die prosedure te bepaal hoe dat hierdie arbitrasie sal geskied...*".

7.2. On the 17th July 2000 Mr Wilmans obliged. The contents of his letter will go some way to resolving the question whether the dispute had already been "subjected to arbitration" by Mr Wilmans as contemplated in section 13 (1) (f) and (i) of the Prescription Act. The terms of this letter directed to respondent's attorneys read:

"L Sandenbergh v H A Sandenbergh Saakno 1367/98

Ons erken ontvangs van u brief van 29 Junie 2000 tesame met die aanhangsels daarby wat Mnr Wilmans deurgewerk het.

Die skrywer hiervan wil dit op rekord plaas dat hy bereid is om as arbiter op te tree, onderhewig aan die volgende voorwaardes en voorgestelde prosedure, naamlik:

1. Koste van arbiter:

1.1 *Die arbiter se koste word vasgestel op R800,00 (BTW uitgesluit) per uur,*

insluitende vir enige reistyd en inspeksies.

- 1.2 Die arbiter se koste sal in gelyke dele deur elkeen van die partye betaal word binne 14 dae vanaf die datum waarop die arbiter se beslissing m.b.t. paragrawe 2.3 en 8.2 van die skikkingsooreenkoms per faks aan die partye en/of hulle regsverteenwoordigers gestuur is.*

2. Prosedure:

- 2.1 Die verweerder sal die skriftelike uiteensetting en dokumentêre stawing vermeld in paragrawe 2.1 en 2.2 van die skikkingsooreenkoms onmiddellik aan die arbiter beskikbaar stel;*
- 2.2 Die eiser sal die besware wat hy teen enige van die items of bedrae daarvan of die dokumentêre stawing daarvan t.o.v. die uiteensetting en dokumentêre stawing vermeld in paragrawe 2.1 en 2.2 van die skikkingsooreenkoms onmiddellik aan die arbiter beskikbaar stel;*
- 2.3 Elkeen van die partye sal hulle skriftelike redes onmiddellik aan die arbiter beskikbaar stel t.o.v. die vraag of dit noodsaaklik was of redelik noodsaaklik was, al dan nie, dat van die dienste van die landmeter, Mitchell, gebruik gemaak moes gewees het waarna verwys word in paragraaf 8.1 van die skikkingsooreenkoms; en/of die landmeter se dienste of die resultaat daarvan enigsins en indien wel, tot watter mate bygedra het tot die bereiking van die skikkingsooreenkoms;*
- 2.4 Volledige besonderhede van die ure wat deur die landmeter se dienste in beslag geneem is, volledige besonderhede van al die werk wat hy gedoen het en*

volledige besonderhede van die tarief per uur, sowel as reiskoste en ander uitgawes waarvolgens sy rekening saamgestel is, moet ook verskaf word, tesame met elkeen van die partye se kommentaar of besware ten opsigte daarvan.

3. *'n Volledige lys van al die geskilpunte wat volgens elkeen van die partye se siening deur die arbiter in oorweging geneem moet word, vir doeleindes van sy beslissing;*
4. *Indien enige van die partye dit gerade of noodsaaklik ag dat 'n inspeksie ter plaatse gedoen moet word, moet sodanige party 'n volledige motivering daarvoor skriftelik aan die arbiter voorlê;*
5. *Op ontvangs van die voorgaande stukke sal die arbiter met die regsverteenwoordigers van die partye skakel om 'n geskikte datum, plek en tyd te bepaal waartydens die arbiter getuienis sal aanhoor wat enige van die partye aan hom wil voorlê. Sodanige sitting sal onderhewig wees aan dieselfde prosesregtelike reëls m.b.t. verteenwoordiging van die partye en kruisondervraging van getuies, toelaatbaarheid van getuies en inhandiging van dokumente as wat geld vir siviele hofsake in die Landdroshof;*
6. *Die partye moet vooraf besluit en ooreenkom of die beslissing van die arbiter finaal en bindend op die partye sal wees sonder enige reg van appél of nie;*
7. *Die vraag of enige van die partye deur die arbiter beveel moet word om enige gedeelte van die ander party se regskoste m.b.t. die arbitrasie-verrigtinge te betaal of nie, sal oorgelaat word aan die uitsluitlike diskressie van die arbiter.*

Sal u asseblief 'n afskrif van hierdie brief aan die eiser se prokureur stuur vir sy aandag."

7.3. On 26 July 2000 the respondent's attorney did what they were asked, by furnishing a copy of Mr Wilmans' letter, Annexure "J", to the appellant's attorneys. On 2nd October 2000 having not received any reaction, the respondent's attorneys notified the appellant once again that Mr Wilmans is prepared to act as arbitrator and enquired whether *"u kliënt akkoord gaan met die koste van die arbiter"*;

7.4. On the same latter date (02/10/2000) the appellant informed Mr Wilmans that his terms are acceptable and furnished the further requested information and documentation to Mr Wilmans. On the 11th October 2000 Mr Wilmans wrote to respondent to acknowledge receipt of the additional information and documentation aforesaid and intimated that he is still awaiting the appellant's reaction in order for him to deal further with the matter;

7.5. On the 11th December 2000 Mr Wilmans, in a last-ditch effort, wrote to appellant's attorneys and decried the fact that no response to his letters of the 11th October and 2nd November 2000 had been received. He then placed the respondent on terms that unless a reaction is received by the end of January 2001 he will conclude that appellant is satisfied with his terms and the determination of his procedures and cautioned appellant of the consequences of such nonchalance;

7.6. On the 15th January 2001 the appellant's attorneys spewed vitriol and for the first time queried the R800,00 per hour rate chargeable by Mr Wilmans and intimated that the non-acceptance of the tariff has the effect of rendering the procedures determined by Mr Wilmans nugatory;

7.7. On the 29th January 2001 Mr Wilmans informed the parties that he is not prepared to undertake the arbitration for a reduced tariff. He suggested that another person be appointed in his place so that he may hand over the file to such person. It must be stated that respondent had no qualms with Mr Wilmans' tariff;

7.8. The respondent entered into correspondence, between the 22nd February 2001 and the 24th May 2001, with appellant's attorneys on the one hand and Mr Wilmans on the other in an endeavour to persuade them that Mr Wilmans be retained as arbitrator, but all efforts came to naught;

7.9. On the 27th June 2001 and again on the 14th August 2001 the respondent tried valiantly to get the appellant to suggest a name or names as substitute(s) for Mr Wilmans, with no success. On the 26th September 2001 the appellant responded by telling the respondent that their ultimatum (of the 10th September 2001,

apparently to seek relief from the Court) had expired and that no useful purpose would have been served to have replied to their previous correspondence and that he will not do so in the future;

7.10. Further one-way correspondence was nevertheless dispatched to the appellant on 5th December 2001, the 5th March 2002, the 28th June 2002 and the 7th August 2002. The appellant's failure to reply should not have surprised the respondent because he was told in so many words on the 26th September 2001 (see para 7.9 (above)). However, such attitude from the appellant and his attorneys, all officers of this Court, though the appellant is also a litigant, is strongly deprecated because it is gravely unprofessional and borders on being unethical;

7.11. There followed a considerable lull, 18 months in fact, from the 7th August 2002 (See par 7.9 (above)) until the applicant launched this application on the 18th March 2004. It is mainly this unexplained delay that Adv D J van der Walt, for the appellant, latched upon both in the *court a quo* and before us to contend that the respondent has shown no good cause for what he labelled a wanton disregard for the time-related rules of Court.

8. The appellant-attorney makes the following averments in his Answering Affidavit in support of his contention that the applicant's claim has prescribed (the re-numbering is ours):

“Die uitwissing van die verpligting deur verjaring

1. *Die skikkingsooreenkoms is reeds op 20 Oktober 1999 onderteken. Meer as drie jaar het sedertdien verloop.*
2. *Die Applikant se vordering vir betaling ten opsigte van-*
 - 2.1 *landmeterkoste was opeisbaar toe die landmeter destyds sy rekening op 16 Mei 1999 aan die Applikant gelewer het;*
 - 2.2 *koste aangegaan in die oprigting van die gedeelte van die heining was reeds opeisbaar voor die sluiting van die skikkingsooreenkoms by voltooiing van die gedeelte van die heining gedurende September 1999 en laastens op 30*

September 1999.

3. *Die Applikant se vordering ten opsigte van die gedeelte van die heining is 'n vordering wat binne 3 jaar vanaf dit opeisbaar geword het kragtens die bepalinge van die Verjaringswet, No 68 van 1969, ("die Verjaringswet") verjaar. Die Applikant se vordering ten opsigte van landmeterkoste, wat ookal die regsaard daarvan mag wees, is insgelyks onderhewig aan 'n verjaringstermyn van 3 jaar.*
4. *Die vordering was derhalwe reeds onderskeidelik uitgewis op 15 Mei 2002 en 29 September 2002.*
5. *Indien dit bevind sou word dat die geskille, nadat dit op 29 Junie 2000 deur middel van aanhangsel "H" na Mnr Wilmans vir beslegting verwys was, van arbitrasie onderhewig was is verjaring voltooi. Ek vestig die Hof se aandag daarop dat:*
 - 5.1 *Die Applikant volgens aanhangsel "H" die tersaaklike geskille op 29 Junie 2000 na Mnr Wilmans as arbiter vir optrede en beregting verwys het;*
 - 5.2 *Die Applikant se prokureur (alhoewel op onreëlmatige wyse korrespondensie te skikking gewissel aan Mnr Wilmans geopenbaar het) Mnr Wilmans op 2 Oktober 2000 versoek het om die dispute tussen ons te bereg soos wat dit uit aanhangsel "M" blyk;*
 - 5.3 *Mnr Wilmans, as arbiter, op die dispuut begin ingaan het, soos wat dit uit die korrespondensie aangeheg by die funderende beëdigde verklaring blyk onder meer uit bylaes "J" en "O";*
 - 5.4 *Mnr Wilmans nie binne 4 maande soos vereis deur Artikel 23 van die Arbitrasiewet sy toekenning gemaak het nie;*
 - 5.5 *Daar geen verlenging van die gemelde tydperk van vier maande kragtens die bepalinge van Artikel 23 van die Arbitrasiewet geskied het nie;*
 - 5.6 *Die vordering gevolglik nadat die gemelde 4 maande verloop het nie meer aan arbitrasie onderhewig was nie; en*

- 5.7 *Die vordering derhalwe kragtens die bepalinge van die Verjaringwet verjaar het aangesien meer as drie jaar verloop het sedert die vordering opeisbaar geword het, alternatiewelik sedert 29 Junie 2000 verder alternatiewelik sedert 29 Oktober 2000 verloop het, selfs indien die voltooiing van verjaring uitgestel was gedurende die 4 maande waartydens die vordering aan arbitrasie onderworpe was.*
6. *Ek voer voorts en in ieder geval aan dat 'n arbiter, by gebrek aan verlening van die voormelde tydperk van 4 maande vasgestel kragtens die bepalinge van Artikel 23 van die Arbitrasiewet, nie geregtig is om die betrokke geskille te bereg nie en die Hof dus nie in die geldende omstandighede 'n arbiter ter vervanging van Mnr Wilmans behoort aan te stel nie.*
7. *Die Applikant se aansoek behoort derhalwe met koste geweier word."*
9. Realizing the prescription dilemma facing him, the respondent-farmer applied during the course of the hearing before **Lacock J** in October 2004 for and obtained an amendment to his Notice of Motion which incorporated the following addition:
- That the four months period within which an arbitration award had to be made by virtue of Annexure "A" (the Deed of Settlement) to the Founding Statement and as contemplated in section 23 of the Arbitration Act, No 42 of 1965, be extended to the 28th February 2005.
10. At the conclusion of the hearing the court *a quo* made the following order (portions not appealed against have been omitted):
- “(C) *Die arbiter vermeld in die bevel verleen deur hierdie Hof onder saakno 1367/98, en soos vervat in die skikkingsooreenkoms hierby aangeheg as bylae "A" synde Mnr Wilmans, word hierby vervang deur Regter M D J Steenkamp en word Regter M D J Steenkamp as arbiter aangestel in die plek van Mnr Wilmans;*
- (D) *Die voormelde skikkingsooreenkoms en hofbevel word dienooreenkomstig gewysig;*
- (E) *Die tydperk waarbinne 'n arbitrasie toekenning gemaak moet word uit hoofde van bylae "A" hiertoe (soos gewysig), en soos voorgeskryf kragtens art 23 van Wet 42 van 1965, word verleng tot 28 Februarie 2005;*
- (F) *Die respondent (now the appellant-attorney) word gelas om die koste van die aansoek te betaal."*

THE GROUNDS OF APPEAL

11. The kernel of the appellant's grounds of appeal could be summarised in these terms: That the *Court a quo* erred:
 - 11.1. In having granted the respondent-farmer the four months extension of time within which the arbitrator had to make his award in terms of section 23 (a) of the Arbitration Act and that the award period should not have been prolonged to the 28th February 2005;
 - 11.2. In having found that Mr Wilmans was prevented from making his award within the stipulated four months period primarily because the appellant-attorney was recalcitrant;
 - 11.3. In not having found that the respondent-farmer sought an indulgence from the Court and was accordingly obliged to place sufficient facts and reasons before the Court to enable the Court to exercise its discretion in the respondent-farmer's favour. That, consequently, the respondent-farmer gave inadequate or no explanation for his tardiness respecting to the long delays generally and between particular dates, viz from 14 August 2001, alternatively 26 September 2001, further alternatively 28 June 2002 to 18 March 2004 when this application was filed;
 - 11.4. In having substituted Judge Steenkamp for Mr Wilmans.

12. Mr van der Walt argued that Mr Wilmans' acceptance of his brief was conditional ("die skrywer is bereid om as arbiter op te tree onderhewig aan die volgende voorwaardes" - see letter quoted in para 7 of this judgment) and the act of thereafter declining to proceed with the arbitration has had the effect of the matter or the debt never having been "the object of a dispute subjected to arbitration". Apart from the legal interpretation that will follow at a later stage this argument is hollow for the following reasons:
 - 12.1. Mr Wilmans' condition is a non-sequitur and may even be read pro non scripto because he was not going to render his services free of charge and the parties expected to pay him a reasonable fee;
 - 12.2. The Deed of Settlement which was made an order of court by consent stipulated as a prerequisite (in clause 2.3 thereof) that in the event of the parties failing to reach an agreement within 14 (fourteen) days of the furnishing of the specified account and accompanying vouchers relating to the costs in question, then Mr Wilmans will, in accordance with a procedure he has devised as arbitrator ("*volgens 'n prosedure deur hom bepaal as*

arbiter") do certain things. In the letter quoted in full in para 7.2 of this judgment Mr Wilmans did no more than was required of him. The preamble in the letter "*onderhewig aan die volgende voorwaarde*" becomes immaterial;

12.3. The appellant-attorney, firstly, unjustifiably queried the R800,00 per hour tariff. Secondly, he feebly suggested that the referral to arbitration was premature because the account and invoices supplied to him were unsatisfactory. In raising the latter point he does not realise that he unwittingly underscores the fact that a dispute has indeed arisen between him and his brother – only soluble by the arbitrator;

12.4. The respondent-farmer therefore acted correctly and within the scope of the Deed of Settlement to refer the dispute to Mr Wilmans for arbitration and was not dependant upon the whims of the appellant-attorney to do so.

13. **Lacock J** did not deal specifically with the respondent-farmer's delay of 18 months between his last communication on the 7th August 2002 and when this application was filed on the 18th March 2004. See para 7.11 above. However, the following observation by the Learned Judge at p 20 para 8.4 of his judgment is equally apposite to this situation:

"8.4 Die redes waarom die eerste arbiter, Mnr Wilmans, *nie binne 'n tydperk van vier maande soos deur die voormelde aangehaalde artikels vereis, 'n toekenning gemaak het nie, is primêr te wyte daaraan dat die respondent (the attorney) versuim het om enige medewerking te bied vir die beslegting van die geskille by wyse van arbitrasie. Die direkte gevolg van hierdie gebrek aan samewerking vanaf die kant van die respondent (attorney) was dat Mnr Wilmans nie die geskil kon bereg binne die neergelegde periode van vier maande nie, en later verplig was om as arbiter te onttrek*".

Indeed if the appellant-attorney did not employ his obstructionist stratagems this matter would in all probability have been laid to rest in 2000. Whilst the respondent-farmer and his attorneys could and should have acted with due promptitude and better diligence to bring this matter to court, the appellant-attorney should not be allowed to benefit from this invidious situation which he has precipitated.

THE LAW AND DECIDED CASES

14. Adv van Niekerk, SC, who appeared before us on behalf of the respondent-farmer, has correctly alluded to the fact that the present matter concerns the extension of a statutory time limit (i.e. as contained in sec. 23(b) of the Arbitration Act) and not the condonation of non-compliance of a Rule of Court. Sec 23(b) reads:
“Provided that the Court may, on good cause shown, from time to time extend the time for making any award, whether that time has expired or not”.

15. This is not a case where there is a default of sorts on the part of the respondent; on the contrary, the respondent has demonstrated fully on the papers the numerous efforts undertaken by himself (through his attorneys) and by attorney Wilmans to get the arbitration process going. To summarise: we are of the view that, on a conspectus of all the facts and circumstances pertaining to this aspect, the respondent has shown good cause for the extension sought. We cannot find any fault with the approach adopted by **Lacock J** in this regard, nor are there any grounds on which his findings can be interfered with on appeal in this regard.

16. The nub of the enquiry regarding prescription is to be found in the provisions contained in sec. 13(1)(f) and (i) of the Act. These sections read as follows:
“(1) If –
(a) (e)
(f) the debt is the object of a dispute subjected to arbitration; or
(g) (h)
(i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a), (b), (c), (d), (e), (f), (g) or (h) has ceased to exist, the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i).”

17. As indicated in para 12, *supra*, Mr Van der Walt has contended that Mr. Wilmans’ refusal to act as arbitrator (due to the lack of co-operation from the appellant and lack of consensus on his fees, according to Mr Wilmans), had the effect of the debt never having been “the object of a dispute subjected to arbitration”. Consequently, so he contended, sec. 13(1)(f) and (i) did not find application in this matter.

18. The essence of the question to be determined here is the meaning of “subjected to arbitration”. **Lacock J** sought to answer this question with reference to:

- 18.1. The ordinary grammatical dictionary meaning of the phrase;
- 18.2. The intention of the Legislature in the codification of provisions relating to terms of prescription, particularly in ascertaining the fundamental objective of the stipulations contained in sec. 13(1)(f), *supra*;
- 18.3. The relevant case law, in particular the decision in **Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality** 1984(1) SA 571 (A).

We propose dealing with these three aspects above, *seriatim*.

19. Mr van der Walt initially had no quarrel in his Heads of Argument with the approach of the learned Judge *a quo* regarding the ordinary dictionary meaning of the phrase. During argument, however, he has handed up a bundle of extracts from other dictionaries in an attempt to show that **Lacock J** had erred in his conclusion. If anything, the extracts in Mr Van der Walt’s bundle tend to support the conclusion reached by **Lacock J**.

We do not find it necessary to repeat the ample examples referred to by **Lacock J**. We have no doubt that the learned Judge was correct in his finding that “subjected to arbitration” in its ordinary, grammatical dictionary meaning entails the mere referral or submission of a dispute for arbitration.

20. Mr van der Walt has, neither in his Heads of Argument nor in his oral argument before us, made any submissions regarding the findings of **Lacock J** with regard to the Legislature’s intention. This is not surprising. Suffice it to state at this juncture that there can be little doubt that the Legislature has clearly intended that the term of prescription should be extended in instances where a claim process can be concluded finally through an alternate process, such as arbitration. The learned Judge correctly refers to the following *dictum* in the **Murray and Roberts** case, *supra*, at 580A-C as authority:

“An arbitration agreement is therefore in a sense an impediment to the recovery of a debt by means of legal proceedings, but it is one because it

provides an alternative means of resolving disputes which carries the approval of the law. This applies a fortiori where a dispute has actually been subjected to arbitration. The creditor is protected against the running of prescription because there exists an impediment to his approaching the ordinary courts, and the impediment exists because he is taking appropriate alternative steps to recover his debt. It is against this background that s 13 (1) (f) of the Act should in my view be interpreted and applied."

21. Similarly, we are in agreement with **Lacock J** that what the Legislature had undoubtedly envisaged in sec. 13(1)(f) is that the term of prescription is postponed through the mere act of initiating arbitration (i.e. referral/submission). Since the emphasis is on attaining finality and certainty in legal disputes, it is difficult to understand how it could be otherwise. To uphold the contention advanced by Mr van der Walt, namely that the dispute will only become subjected to arbitration once the arbitrator has accepted his appointment and has commenced the arbitration, would be untenable in law and may lead to absurdity. What if the arbitrator dies or becomes incapacitated after referral but prior to the appointment coming to his knowledge? To borrow from the example quoted by **Lacock J** in his judgment – what would the position be if an arbitrator is agreed upon subsequent to negotiations between the parties only some three months after the referral? Is the arbitrator in these circumstances expected to conclude his/her work within one month?

22. An interpretation which accords with the one propounded by Mr van der Walt would not only militate against the ordinary grammatical dictionary meaning of the phrase and be contrary to the clear intention of the Legislature, but would also be in direct conflict with authoritative case law, as we now proceed to show. In the **Murray and Roberts** case, *supra*, a construction contract contained a dispute resolution clause 69, in terms whereof a dispute was to be referred firstly to the engineer appointed in terms of the contract, thereafter to a mediator and finally to a single arbitrator. At 580 H the Court (per **Grosskopf AJA**, as he then was) held that:
"Clause 69 accordingly provides an extra-judicial means of resolving a dispute between the parties. Once the parties have entered upon the procedures which it lays down, they will achieve certainty about the debt (or alleged debt) which forms the subject-matter of their dispute. Such certainty will arise from the decision of the engineer, the opinion of the mediator or the award of

the arbitrator.”

23. The Court, in the aforesaid case, then embarks upon a consideration of the issue at hand, namely *“whether the submission of the dispute to the engineer for decision pursuant to clause 69 amounted to a subjection thereof to arbitration within the meaning of s 13(1)(f) of the Act”* (at 581 F). The Court thereafter concludes as follows (at 582 E-G):

“Having regard to the wording of s 13 (1) (f) of the Act as well as its scope and purpose, I consider that the procedure laid down by clause 69 taken as a whole must be considered one of arbitration, and that the dispute in the present case was subjected to such arbitration when it was submitted to the engineer. It follows that the completion of prescription was delayed until one year after the impediment ceases to exist (i.e. when the arbitration proceedings come to an end ...”

24. **Lacock J** found the **Murray and Roberts** case, *supra*, to be *in pari materia* and consequently relied on same as authority for the view that “subjected to arbitration” means a mere referral/submission to arbitration or conversely stated – a mere initiation of the arbitration process. Mr van der Walt has sought to distinguish the **Murray and Roberts** case, from the present case on the facts. He has contended that, given the factual distinction, that case is no authority for the findings of **Lacock J**. The facts there are contended by him to be distinguishable in the following respects:

24.1.The relevant agreement in the **Murray and Roberts** case, was a construction contract for the completion of a project against remuneration and therefore a species of the *locatio conductio operis faciendi*, whereas the settlement agreement between the parties in the present case was not;

24.2.Attorney Wilmans had not been an intermediary party to the settlement agreement (as the engineer in the **Murray and Roberts** case, was) and therefore not involved in the administration and execution thereof;

24.3.Attorney Wilmans was entitled to accept or decline his appointment as arbitrator (unlike the engineer in the construction contract who had no such choice);

24.4.Any further role that Mr. Wilmans was to play with regard to the settlement agreement was contingent upon him accepting the appointment as arbitrator; and,

24.5. In the present matter Mr. Wilmans had declined the appointment and had never acted as an arbitrator.

25. Mr van der Walt argued strenuously before us that in the **Murray and Roberts** case, the contracting parties had subjected themselves to the engineer's jurisdiction and the latter had been prepared and had in fact been bound to exercise such jurisdiction over the parties. In the present matter Mr Wilmans had acquired no such jurisdiction over the parties or over the dispute, so Mr van der Walt submitted.

26. While it is so that the agreement in the present matter differs from that in the **Murray and Roberts** case, we fail to see how these differences make the judgment in that case less apposite to the present matter. It would surely be fallacious to argue that only disputes in construction contracts could be subjected to arbitration. Furthermore, we do not understand the *ratio decidendi* in the **Murray and Roberts** case, to be to the effect that a dispute is only subjected to arbitration once it is referred to an arbitrator **who has assumed jurisdiction over the parties**. The primary thrust of appellant's counsel's argument in that case was to the effect that "arbitration" in sec. 13(1)(f) should be interpreted technically, i.e. that in the three-tiered dispute resolution mechanism contained in clause 69 of the contract, the dispute would be "subjected to arbitration" only during the third and final stage, viz. referral to the arbitrator. The Court pertinently rejected this argument in its finding at 582 E-G, quoted at para 23 above. The crux of the judgment, in our view, is that completion of prescription had been delayed once there had been a **referral** of the dispute to the engineer. The judgment most certainly does not constitute authority for the proposition advanced by Mr van der Walt, namely that delay of the period of prescription can only occur once the arbitrator has accepted his appointment or has assumed jurisdiction over the parties.

27. The **Murray and Roberts** case has been followed in: **SA Breweries v Grinaker Construction** 1986(1) SA 191 (D & CLD). It is of some importance to note that, in the Court *a quo* in the **Murray and Roberts** case, **Basson J** (whose judgment had been upheld on appeal) came to the following conclusion:
"Ek kom dus tot die slotsom dat die Wetgewer met die onderwerping van 'n

geskil aan arbitrasie bedoel het 'n verwysing van 'n geskil tussen die partye na 'n persoon om daardie geskil buite die hof te besleg".

See: **Murray and Roberts Construction (Cape)(Pty) Ltd v Upington Munisipaliteit** 1982(3) SA 385 (NC) at 401 D.

28. Mr van der Walt has relied on the following cases in support of his argument: **Bhoola v Bhoola** 1945 NPD 109 at 112-113. **Members of the Sugar Industry Central Board v Maritz and Another** 1984(4) SA 101 (T) at 107 A/B-E. In the **Bhoola** case, the parties (who were partners and joint venturers) had appointed four arbitrators who had accepted appointment, and had amongst themselves, then appointed a fifth arbitrator. It was common cause that the parties' intention had been to have five arbitrators, four to be appointed by themselves and the fifth to be appointed by the other four arbitrators. The fifth arbitrator named in this manner, refused to act. Thereafter, in the course of negotiations directed at settling the disputes between the parties, one of the four appointed arbitrators died. No agreement could be reached regarding his successor. As a result the Court was asked in an application under sec. 10 of Act 24 of 1898 to appoint a fourth arbitrator.

29. A point *in limine* was taken by the respondent that the original submission had lapsed, because the period of three months prescribed by para D of the schedule to the aforementioned Act had expired. The Court held that the period of three months only begins to run from the time that the arbitrators had entered upon the reference and it held further that a body of arbitrators can only enter upon the reference once all the individuals comprising that body have been nominated and have accepted their appointment. The preliminary point was dismissed. It bears consideration that the *gravamen* of the **Bhoola** judgment is to be found therein that: *".....the body of persons contemplated by the parties as the body to decide their disputes has not yet come into existence"* (at 112).

30. Mr van der Walt appears to be relying on the following passages from the judgment as authority for his submissions:
 - 30.1. "It seems obvious that an arbitrator cannot enter upon a reference until he has been nominated and has accepted appointment" (at 112; own underlining).
 - 30.2. "This machinery has been put into operation, but it has not yet performed its

purpose, for Rana, the appointee, has refused to accept the appointment”.

31. The obvious mistake in Mr Van der Walt’s line of reasoning is that the **Bhoola** case concerned, not so much the question of when a dispute is “subjected to arbitration”, but rather **whether a body of arbitrators can enter upon a reference while all the individuals comprising such body have not been nominated and/or have not accepted appointment**. We have deliberately emphasized the words “enter upon a reference” in para 24.4(a), *supra*. The **Bhoola** judgment has to be understood in the context that the three month period laid down in par (D) of the schedule to Act 24 of 1898 “*begins to run from the time the arbitrators enter upon the reference*”, (at 112 of the judgment; own underlining).

Consequently, the enquiry in that case was completely different, namely: **When does an arbitrator enter upon the reference?** In the present matter the enquiry is: **When is a dispute subjected to arbitration?** At 113 of the reported judgment, **Broome J** extensively examines case law to determine what “enter upon the reference” means. After doing so, he concludes that it means enquiring into or hearing the case.

32. It is of considerable significance to note that the words “**entered on the reference**” is to be found in the provisions contained in sec. 23(a) of the Arbitration Act, 42 of 1965. That section deals with the time for making an arbitration award. It stipulates, importantly, that such award is to be made within 4 months of the date on which the arbitrator/s entered on the reference, “*...or the date on which such arbitrator was ... called on to act by notice in writing from any party to the reference*”. It is not without significance that the Legislature draws this distinction between “entering on the reference” and being “called on to act (by any party to the reference)”. This distinction accords with the one drawn by us herein. In the premises therefore, it is abundantly clear that **Bhoola v Bhoola**, *supra*, does not support Mr van der Walt’s contentions at all.
33. In the **Sugar Industry** case *supra*, a dispute had arisen between the first respondent (a sugar grower) and the second respondent (a miller), concerning payment for sugar cane tendered for delivery by the first respondent, which had been rejected by the second respondent. Clause 13

of the Sugar Industries Agreement made provision for the submission of any dispute to the applicant for arbitration. First respondent submitted the matter for arbitration and second respondent filed a special plea of prescription. First respondent, relying on sec. 13(1)(f) of the Act, contended that prescription had been delayed due to the fact that the dispute had been subjected to arbitration from the time that the dispute had come into existence by virtue of clause 13 of the agreement.

34. The matter was then heard by **Philips AJ** as a stated case concerning the question of law as to whether the mere agreement to submit a dispute to arbitration constitutes the subjecting to arbitration of such dispute, thus delaying prescription. **Philips AJ** held that a mere agreement which requires the referring of a dispute to arbitration was not an “impediment” as provided for in sec. 13(1)(i) of the Act. Mr van der Walt has placed specific reliance on the passages at 107A/B-E of the **Sugar Industry** case. At 107A Philips AJ held that:

“For s13(1)(f) to operate the debt must be ‘the object of a dispute subjected to arbitration’”. At 107B-E, the learned Judge states as follows:

“If the words “subjected to” are to have any meaning, in contradistinction to “subject to” or “submitted to”, then they must mean, not that an agreement to refer disputes to arbitration is in existence, but that there must be a reference to arbitration actually proceeding. It is clear from the definition of “arbitration agreement” in s 1 of the Arbitration Act 42 of 1965, that it is something which provides “for the reference to arbitration” of disputes. The actual reference, therefore, takes place after the written agreement. The *reference means the process of actually deciding the dispute. (Bhoola v Bhoola 1945 NPD 109 at 113.) The provisions of clause 13 of the Agreement do not produce the situation that the dispute is “subjected to” arbitration. They merely set up the tribunal to which the dispute can, in due course, be referred. It would not, for instance, be an apt use of language to say that a dispute is “subjected to action” merely because there is a court which has jurisdiction over the debtor. I therefore disagree, with respect, with the remarks by MCEWAN J obiter. I consequently conclude that prescription ran against the first respondent from the dates when the dispute arose in 1974, 1975 and 1976, and it was not delayed by the provisions of clause 13 of the Agreement.*”

35. Two observations need to be made regarding the above quoted passages:
- 35.1. The central enquiry in that case concerned the question whether an agreement to refer a dispute to arbitration *per se*, constituted subjection of the dispute to arbitration. The enquiry is clearly different in the present case
- 35.2. **Philips AJ**’s dictum that “the reference means the process of actually deciding the dispute” and his reliance on **Bhoola v Bhoola**, *supra*, must be understood in the context of the **facts** of the **Sugar Industry**- and **Bhoola** cases. In the present matter not only had the

parties identified the (sole) arbitrator in the settlement agreement, but the respondent had set in motion the process by referring the dispute to Mr. Wilmans for arbitration – thus proceeding beyond the mere agreement to arbitrate.

36. Not only is the **Sugar Industry** case (like the **Bhoola** case) therefore distinguishable as we have shown, but the further *dictae* of **Philips AJ** tend to support not the appellant's contentions, but rather those of the respondent, which had been upheld *a quo* by **Lacock J**:

36.1. Firstly the learned Judge finds support for his views in the **Murray and Roberts** (appeal) case (at 107 F-I);

36.2. In the second place, **Philips AJ** finds that: *"However the whole tenor of **Grosskopf AJA's** remarks (in the **Murray and Roberts** case), seems to me to show his wholehearted acceptance of the idea that the impediment comes into existence only when the creditor takes appropriate steps to recover his debt. Such steps in this case would be the initiation of arbitration proceedings to bring about a decision of the dispute"* (own underlining).

37. The **Sugar Industry** case therefore, as **Lacock J** correctly found *a quo*, lends no support to Mr van der Walt's contentions.

To conclude this aspect regarding prescription: We are *ad idem* with **Lacock J** that the **Murray and Roberts** case is authority for the view that "subjected to arbitration" means referral or submission to arbitration. That view also accords with the ordinary grammatical dictionary meaning of the phrase as well as with the clear, unequivocal intention of the Legislature. Moreover, as **Lacock J** correctly pointed out, such a conclusion does not operate unfairly at all against the appellant. If the appellant had taken the view that there had been an unreasonable delay on the part of the appellant in finalising arbitration, or that arbitration had become redundant, he could have approached a Court for relief in terms of sec. 3(2) of the Arbitration Act, 42 of 1965. This he did not do. As **Lacock J** correctly found, it had in fact been the appellant who had been the delaying party.

THE SECURITY FOR COSTS ISSUE

38. Before we deal with the costs aspect, it is necessary to furnish reasons for

the order which was issued *ex tempore* on the preliminary issue regarding security for costs raised by the respondent: The respondent, as he is entitled to do in terms of the provisions contained in Rule 49(13), demanded security for his costs of appeal. The appellant provided security in the form of a suretyship by one of the partners in his law firm, Mr Daniël Nel. In terms thereof, Mr. Nel bound himself in his personal capacity, as surety and co-principal debtor together with the appellant, for the respondent's costs of appeal. The respondent found the **form** of security unacceptable and launched an application in which he sought a declarator that the appellant had failed to comply with the provisions of Rule 49(13) in that the security tendered is not in an acceptable form. The respondent also sought an order that the appeal be struck from the roll, alternatively that the appeal be postponed *sine die* and that the appellant be ordered to furnish proper security in the form of an irrevocable and unconditional guarantee by a recognized financial institution within 10 days, failing which the appellant would have the right to approach the court for the striking off of the appeal.

39. There is no issue between the parties regarding the amount of security – the respondent demanded R45 000.00 and Nel's personal suretyship is in that amount. In the course of filing his answering affidavit, the appellant paid an amount of R45 000.00 into his Kimberley attorneys' trust account as **conditional** security. At the hearing, Mr van Niekerk for the respondent, objected to the conditionality of the payment. He indicated that the security provided would be acceptable once the conditionality attached thereto had been removed. He also asked for costs of the preliminary application.

After hearing argument, an order was issued *ex tempore* that the security tendered is in order and that the appeal should proceed. We reserved our reasons on the costs aspect.

40. Rule 49(13) does not prescribe the **form** which security for costs in an appeal should take; it merely provides that an appellant should, prior to lodging copies of the appeal record with the registrar, "*.....enter into good and sufficient security for the respondent's costs of appeal*". The Afrikaans text refers to "*voldoende sekuriteit*".
41. Mr van Niekerk's argument before us was to the effect that "good" security

means “financially secure, sound or safe” and that “sufficient” related not only to the amount, but also the **nature** of the security. In this regard he referred us to **Majunga Food Processes SARL v SA Dried Fruit Co-operative Ltd** 2000(2) SA 94 (C) at 96 G-H whereat it was held that:

“To comply with the objective of giving security in my view, it ought to be tangible and durable. It ought to possess value and be negotiable”.

42. Mr van Niekerk further submitted that a personal suretyship can never be sufficient security, since it has no inherent value and is not negotiable. It is quite correct, as Mr van der Walt has submitted, that the Rule does not require security to be to the subjective satisfaction of a respondent on appeal. The rationale behind the furnishing of security for costs on appeal is to obviate the risk of non-payment in an unsuccessful appeal – consequently what needs to be determined is whether the security furnished is sufficient having regard to the **objective** risk of non-payment.
43. The following facts stand uncontroverted on the papers:
 - 43.1.the appellant is an attorney, an officer of this Court and a partner in a medium-sized law firm in Bellville;
 - 43.2.the appellant is a fairly wealthy man with unencumbered assets conservatively valued at R5 million – an aspect which is known to the respondent, his brother;
 - 43.3.the surety, Nel, is an attorney, an officer of this Court and a partner in the appellant’s law firm aforementioned; and
 - 43.4.the amount of security is, by today’s standards, not very large, namely R45 000.00.
44. While it is somewhat unusual for an attorney to stand surety in his **personal** capacity, as opposed to his firm standing surety, we do not view this as insufficient security *per se*. The totality of the surrounding facts and circumstances need to be taken into account on a case by case basis. Nel, as a senior attorney and officer of this Court, would hardly be expected to dishonour his written undertakings as surety and co-principal debtor. Compare: **Ridon v Van der Spuy and partners (Wes-Kaap) Inc** 2002(2) SA 121 (C) at 140 D-H. Furthermore, the respondent is well aware that his brother, the

appellant, is a man of considerable financial means. Moreover, as an attorney and an officer of the court, one would expect the appellant to pay his debts or face the consequences.

45. The practice of an attorney standing surety in his personal capacity in these circumstances, as Nel has done *in casu*, is one which is to be discouraged. We are satisfied, however, that such suretyship constituted good and sufficient security **in the circumstances of this case.**

THE COSTS

46. All that remains is the question of costs. The appellant has been unsuccessful in the appeal and should pay those costs. We see no good reason why in the exercise of our discretion, the reserved costs of the preliminary application relating to the security for costs should not be part of the costs in the appeal, to be paid by the appellant. The respondent most certainly did not act unreasonably in bringing the application under Rule 49(13), given the unusual form of security furnished.

WE ORDER AS FOLLOWS:

THE APPEAL IS DISMISSED WITH COSTS, SUCH COSTS TO INCLUDE THE COSTS OF THE APPLICATION UNDER RULE 49(13).

F D KGOMO
JUDGE PRESIDENT
NORTHERN CAPE DIVISION

SA MAJIEDT
JUDGE
NORTHERN CAPE DIVISION

I CONCUR:

B C MOLWANTWA
ACTING JUDGE
NORTHERN CAPE DIVISION

For the Appellant: **Adv J G van Niekerk, SC**
Instructed by: **Haarhoffs Inc, KIMBERLEY**

For the Respondent: **Adv van der Walt**
Instructed by: **Duncan & Rothman Inc, KIMBERLEY**