THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 444/2023

In the matter between:

THE MINISTER OF INTERNATIONAL RELATIONS

AND CO-OPERATION NO **FIRST APPELLANT**

THE DEPARTMENT OF INTERNATIONAL

RELATIONS AND CO-OPERATION NO **SECOND APPELLANT**

and

NEO THANDO/ ELLIOT MOBILITY (PTY) LTD **FIRST RESPONDENT**

ADVOCATE MC ERASMUS SC NO **SECOND RESPONDENT**

Neutral citation: *The Minister of International Relations and Co-operation NO and Another v Neo Thando / Elliot Mobility (Pty) Ltd and Another* (444/2023) [2024] ZASCA 134 (04 October 2024)

Coram: ZONDI DJP and MOCUMIE and WEINER JJA and HENDRICKS and DIPPENAAR AJJA

Heard: 2 September 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 4 October 2024.

Summary: Contract law – jurisdiction – Arbitration Act 42 of 1965 – whether the Arbitrator had jurisdiction to entertain a claim – whether a dispute existed between the parties at the time of the arbitration referral – whether the dispute submitted for arbitration was consistent with the claim presented in arbitration.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mokose J, sitting as a court of first instance):

1 The appeal is upheld with costs.

2 The order of the high court is set aside and substituted with the following:

‘(a) It is declared that the second respondent did not have jurisdiction to arbitrate the alleged dispute between the applicant and the first respondent.

(b) The first respondent is ordered to pay to the second applicant:

(i) All the amounts paid by the State Attorney on behalf of the second applicant to the second respondent in respect of his fees for acting as arbitrator;

(ii) All the legal costs incurred by the first/and or second applicant in defending the reference to the arbitrator, where the arbitrator lacked jurisdiction.

(c) The second respondent’s interim award dated 23 October 2018 is declared invalid and is set aside

(d) The second respondent’s award dated 28 July 2020 is declared invalid and is set aside.’

3. The first respondent is ordered to pay the costs of the application for leave to appeal before the high court.

JUDGMENT

Mocumie JA (Zondi DJP and Weiner JA and Hendricks and Dippenaar AJJA concurring):

Introduction

[1] This is an appeal against the judgment of the Gauteng Division of the High Court, Pretoria (the high court). The central question in the appeal is two fold: whether the second respondent, the arbitrator, had jurisdiction to arbitrate a matter referred to him unilaterally by the first respondent, Neo Thando / Elliot Mobility Pty Ltd (Neo Thando), without the consent of the Department of International Relations and Co-operation (DIRCO), which according to DIRCO, was contrary to the terms of the arbitration clause. Second, whether there was an arbitrable dispute to be referred for arbitration. The appeal is with the leave of the high court.

[2] The first appellant is the Minister of International Relations and Co-operation (the Minister), having executive authority over DIRCO. The second appellant is DIRCO, a national government department established in terms of s 7(2) of the Public Service Act 103 of 1994 as amended. It has its principal place of business in Pretoria which falls under the first appellant. Both will be collectively referred to as DIRCO.

[3] Neo Thando, is a joint venture with its principal office in Centurion, Pretoria. The second respondent is Advocate M C Erasmus SC, cited in his capacity as the arbitrator appointed to arbitrate the alleged dispute between the appellants and the respondent.

Factual background

[4] The factual background, which is essentially common cause between the parties, as gleaned from the Statement of Agreed Facts, is as follows. On 11 August 2015, DIRCO invited tenders 'for the removal, packing, storage (in South Africa only) and insurance of household goods and vehicles of transferred officials, to and from missions abroad' under Tender No DIRCO 05-2015/2016.'

[5] After due process and on 3 November 2015, DIRCO informed Neo Thando that it was awarded the tender. The value of the contract would be 'according to the pricing schedule provided as per your bidding document for the amount of R130 112 398'.

Subsequently, on 20 and 26 January 2016 the parties signed a Service Level Agreement (SLA) which contained, inter alia, all the responsibilities of both parties. This included who bears the responsibility for the packing for storage or unpacking from storage of a transferred official's household goods and personal effects or departmental furniture and equipment (the goods) which had to be conducted in the presence of such official (clause 3.6). Importantly, that Neo Thando would be responsible for the packing according to the detailed specifications set out in the technical specifications of a transferred official's furniture and equipment (clause 3.1).

[6] The officials of DIRCO were to be transferred for a period of four years to and from missions abroad during which time their goods had to be kept safe for the duration of the transfer period and for re-delivery thereof, upon their return to South Africa. Based on the SLA, on 11 November 2015, Neo Thando concluded a written lease agreement with a property company, Improvon where the goods were to be stored. The lease commenced on 1 June 2016 to terminate on 31 October 2019.

[7] In terms of the SLA, Neo Thando had to take possession of the goods at the premises at which they were to be stored. DIRCO had an existing SLA with AGS Frasers/Gin Holdings (AGS Frasers), which DIRCO contended would terminate when Neo Thando began operating under the SLA. In terms of the SLA, Neo Thando was to arrange with AGS Frasers to collect the goods already stored by the latter. When Neo Thando contacted AGS Frasers they refused to hand over the goods. Neo Thando sought the intervention of DIRCO.

[8] On 21 January 2016 and 24 March 2016 respectively, DIRCO wrote to AGS Frasers demanding that it hand over the stored goods to Neo Thando. On 16 March 2016, AGS Frasers wrote back to DIRCO – confirming its refusal to return the goods because according to them 'the original SLA contractually obliges the two parties, … AGS Frasers …and DIRCO to continue to provide the relevant storage services until the return of the officials from abroad …the original SLA contractually obliges DIRCO to pay the requisite storage fees for the consignment that will remain in storage until

the officials return from abroad'. It was common cause that the officials who had left the country for four years had not returned from abroad yet.

[9] Correspondence was exchanged between DIRCO, AGS Frasers and Neo Thando without any solution until the parties reached a deadlock. DIRCO wrote to AGS Frasers expressing their view of the matter as follows:

'9. In the circumstances we hereby afford you up to the end of business on Friday the 22nd of April 2016 to indicate as to when you are prepared to release the goods. You must bear in mind that DIRCO has an obligation to make the goods available to the newly appointed service provider which is suffering damages as a result of the mora of DIRCO.'

[10] On 12 September 2017, Neo Thando instructed their attorneys to issue a letter of demand on DIRCO in which they claimed:

'15. This letter comprises formal notice to you of our client's intention to institute legal proceedings against you, under and in terms of section 3(1) of the Institution of Legal Proceedings Against Certain Organs of State Act No 40 of 2002, as amended. To such end, *we are instructed to formally demand payment of the said R53 258 416,90, (plus interest thereon, at the rate of 10.25% per annum, calculated from today),* within 30 (thirty) days from today, as foreshadowed in section 5 (2) of the said Act, failing which summons will be issued for such amount, together with such additional damages as our client may suffer in the future.

16. To the extent that [clause] 13 of the service level agreement entered into between you and our client makes provision for arbitration, and we quote: "if the parties wish to arbitrate such difference or dispute", please be advised that our client would prefer to submit this case to arbitration, rather than to litigate through the courts. To this end, and if the claim above is not paid by you within 30 days from today, you are requested to advise within such time period whether or not you are prepared to submit the claim to arbitration in accordance with the service level agreement. If not, summons will be issued through the courts upon expiry of the thirty day time period…' (Emphasis added).

[11] On 2 November 2017, the attorneys for Neo Thando wrote a letter to the Chairperson of the Pretoria Bar Council in which they alleged that a dispute existed between the parties as detailed in the letter of 12 September 2017, a copy of which

was attached to the letter. Neo Thando did not hear anything from DIRCO until a month and a few days later, on 8 November 2017, when the State Attorney acting on behalf of DIRCO acknowledged receipt of the letter of 12 September 2017. On 9 November 2017 (seven days after Neo Thando had approached the Bar Council to appoint an arbitrator), the State Attorney responded by saying the letter of 12 September 2017 did not make it clear what the dispute was and that DIRCO did not believe there was any dispute to arbitrate and accordingly did not agree to arbitration. If necessary, the letter stated, DIRCO would appear before the appointed arbitrator only to challenge his or her jurisdiction to entertain the alleged dispute. By then the horse had already bolted, an arbitrator had already been appointed.

The law

[12] As this Court held in *Radon Projects (Pty) Ltd v NV Properties (Pty) Ltd and Another*,[1] when the jurisdiction of an arbitrator is challenged, an arbitrator does not throw his hands in the air and accept that he does not have jurisdiction. The parties must appear before him or her to argue the point and he or she must decide whether he or she has jurisdiction. He cannot wait for a court to decide that. Recently, this Court in *Canton Trading 17 (Pty) Ltd t/a Cube Architects v Fanti Bekker Hattingh N O (Canton Trading)*,[2] grappled with the issue when the jurisdiction of an arbitrator is challenged. After referring to several cases it held:

'The question as to who decides whether a dispute goes to arbitration or remains in the courts is one of ever greater significance, given the enhanced role that arbitration enjoys in the resolution of disputes, both domestically and in transnational law. This question may arise at different stages. As the present matter illustrates, there may be litigation at the commencement of a dispute as to whether the courts should decide the dispute or whether it should be sent to arbitration. Sometimes, however, *the issue crystalizes for the first time before the arbitrators. They are asked to decide whether they enjoy jurisdiction to hear the dispute. The arbitrators may determine the issue.* Finally, a court may be called upon to decide

[1] *Radon Projects (Pty) Ltd v NV Properties (Pty) Ltd and Another* 2013 (6) SA 345 (SCA) at paragraph 28.
[2] *Canton Trading 17 (Pty) Ltd t/a Cube Architects v Fanti Bekker Hattingh N O* [2021] ZASCA 163; 2022 (4) SA 420 (SCA) para 32. See also *Zhongjing Development Construction Engineering Co Ltd v Kamato Copper Co Sarl* [2014] ZASCA 160; 2015 (1) SA 345 (SCA) at para 50; *Northeast Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76; 2013 (5) SA 1 (SCA).

whether the arbitrators correctly assumed jurisdiction over the dispute, if the arbitrators' award is taken on review or enforcement proceedings are brought.' (Emphasis added).

[13] In *Canton Trading*, at para [35], acknowledging the use of the approach of '*Kompetenz-kompetenz*',[3] also known as competence-competence in South Africa, it stated:

'…Arbitrators enjoy the competence to rule on their own jurisdiction and are not required to stay their proceedings to seek judicial guidance….'

The arbitrator adopted this approach correctly, which DIRCO does not take issue with. What it takes issue with is what happened afterwards which the high court appeared to lose sight of as this judgment will demonstrate.

[14] On 22 November 2017, the legal representatives of the parties held a pre-arbitration meeting with the arbitrator, Adv M C Erasmus SC. The pre-arbitration minute recorded that DIRCO indicated that it reserved its right to contend that the matter is not subject to arbitration because of the absence of an arbitral dispute between the parties and or the arbitrator having no jurisdiction to entertain any dispute between the parties, as DIRCO had not consented thereto.

[3] *Kompetenz -kompetenz* is a jurisprudential doctrine whereby a legal body, such as a court or arbitral tribunal, may have competence, or jurisdiction, to rule as to the extent of its own competence on an issue before it. Regarding its German origin, see P Landolt, 'The inconvenience or Principle: Separability and *Kompetenz-Kompetenz*' Journal of International Arbitration 30, no. 5 (2013): 511-530 at 513, footnote 4: 'This German name for the principle has established itself in English usage. In its original German usage, it designated not the general notion of the arbitral tribunal's powers to come to a determination on its own jurisdiction but a more specific notion, i.e., a variant of the general notion.' Furthermore, E Gaillard and J Savage (Fouchard, Gaillard and Goldman on International Commercial Arbitration, Kluwer Law International, The Hague, 1999 at 396-397) explain: 'German legal terminology lends a meaning to the expression which differs substantially from that which the expression is intended to convey when used in international arbitration. If one were to follow the traditional meaning of the expression in Germany, "kompetenz-kompetenz" would imply that the arbitrators are empowered to make a final ruling as to their jurisdiction, with no subsequent review of the decision by any Court. Understood in such a way, the concept is rejected in Germany, just as it is elsewhere. From a substantive viewpoint, the paradox is all the more marked for the fact that in Germany the question of whether the courts should refuse to examine the jurisdiction of an arbitral tribunal until such time as the arbitrators have been able to rule on the issue themselves (the negative effect of the 'competence competence' principle), has never been accepted [. . .].'

[15] The parties exchanged pleadings in Statements of Claim and Defence. In its Statement of Claim relevant to this appeal, Neo Thando alleged that, based on a proper construction of the SLA or as an implied or tacit term, DIRCO was required to procure from AGS Fraser the goods referred to in clause 8.8 of the Terms of Reference to the Bid Documents. These goods were to be transferred by AGS Fraser to Neo Thando upon the conclusion of the SLA or within a reasonable time thereafter. This defence was not the 'dispute' that was referred for arbitration.

[16] DIRCO challenged the jurisdiction of the arbitrator on the following bases: First, clause 13.3 of the SLA between it and Neo Thando outlined the circumstances under which a matter could be referred to arbitration. Both parties had not expressed a wish to refer a dispute to arbitration; Neo Thando had done so unilaterally. Nor had it alleged the existence of 'a difference or dispute' that it wished to be referred to arbitration. Second, in terms of clause 13 read with sub clause 13.3 and 13.4, a party requiring a 'difference or dispute' to be referred to arbitration was obliged to give a written notice identifying the 'difference or dispute' to be arbitrated. No such notice was given. The letter of demand of 12 September 2017 was a demand for damages. Third, arbitration agreements are governed by the provisions of the Arbitration Act 42 of 1965 (the Arbitration Act), which require that for a matter to be referred to arbitration, there must be a written agreement to refer 'a dispute' to arbitration. Neo Thando had not alleged that there was any dispute, and the matter was accordingly not arbitrable.

[17] DIRCO and Neo Thando agreed that the arbitrator didn't need to hear evidence. And thus, he proceeded on the papers. Having read the papers and considered relevant case law, he concluded that 'the arbitrator has jurisdiction to preside and determine the disputes in the arbitration proceedings'. He thereafter proceeded to deal with the merits.

[18] On 23 October 2018, the arbitrator issued what he termed an 'Interim Award'. In such an award, he concluded that:

‘98.1 The first, second and third special pleas filed by the respondent in its plea, dated 9 February 2018 [were] dismissed.

98.2 In respect of the third special plea it is recorded that the third special plea is dismissed on the basis as it is framed in the respondent’s plea.

98.3 It is therefore found that the arbitrator has jurisdiction to preside and determine the disputes in the arbitration proceedings.’

Subsequently, on 28 July 2020, the arbitrator rendered a ‘Final Award’, in which he determined that DIRCO has a contractual obligation to procure that all goods stored with AGS Fraser are to be transferred by AGS Fraser to Neo Thando.

In the high court

[19] Not satisfied with this outcome, DIRCO approached the high court for a review of the arbitrator’s awards. Neo Thando filed a counter application in which it sought confirmation of the arbitrator’s awards and to have them made an order of court. The high court granted the following order:

‘(i) the award of the second respondent dated 23 October 2019 is made an order of Court;

(ii) the award of the second respondent dated 28 July 2020 is made an order of Court;

(iii) the applicants are ordered to pay the costs including the costs of two counsel.’

Before this Court

[20] Initially, the attack and the debate focused on the two awards (as presented before the high court). However, through their interaction with the bench, the parties came to appreciate that, although the arbitrator addressed the merits when he commenced with the arbitration; he did so to consider the points *in limine* raised. One of these points concerned his jurisdiction – whether he had any. And although he referred to the first award as an ‘Interim Award’, it was clear that it related to the

jurisdiction point which the appellants had taken. Having said that, we need not say anything further on the first award.

[21] The central issue for determination before us is whether the arbitrator had jurisdiction to arbitrate the dispute referred to him by Neo Thando. Flowing from that is the question of whether the dispute that was referred is an '*arbitrable dispute'* as contemplated in the Arbitration Act.

[22] Clause 13 provides:

'13. DISPUTE RESOLUTION

Should any difference or dispute at any time arise which the parties are unable to resolve amicably, whether in regard to the meaning or effect of any terms of the Contract or this SLA, or the implementation of any party's obligations hereunder, or any other matter arising from or incidental to it, then in that event, if the parties wish to arbitrate such difference or dispute, such difference or dispute shall be submitted to arbitration in accordance with the following provisions:

13.1 Except as may be expressly otherwise provided for in this Agreement, arbitration proceedings shall be conducted in accordance with the Arbitration Laws of the Republic of South Africa.

13.2 The arbitration proceedings shall be held on an informal basis, it being the intention that a decision should be reached as expeditiously and as inexpensively as possible, subject only to the due observance of the principles of natural justice.

13.3 Either party shall be entitled but not obliged, by giving written notice to the other, to require that a difference o[r] dispute be submitted to arbitration in terms of this Clause.

13.4 The arbitrator shall be, if the difference or dispute in issue is:

13.4.1 Primarily an accounting matter, an independent practicing accountant of not less than ten (10) years standing;

13.4.2 Primarily a legal matter, a practicing senior counsel or attorney of not less than ten (10) years' standing;

13.4.3 Any other matter, a suitably qualified independent person, agreed upon between the parties and failing agreement within three (3) days after the date on which the arbitration has been agreed to, shall be nominated by the chairperson of the Pretoria Bar Association (who may appoint one of their number) who may be instructed by either party to make the nomination at any time after the expiry of that three (3) day period.

13.5 The party referring the difference or dispute to arbitration shall, within ten (10) days of the selection or appointment of the arbitrator as provided for in sub-clause 13.4 above, furnish the arbitrator with an appropriate written notice of appointment, and shall ensure that the for his/her services. arbitrator notifies the parties forthwith of the remuneration which the arbitrator shall require for his/her services.

13.6 Within thirty (30) days after the delivery to the arbitrator of his/her written notice of appointment, each party shall be set out in all evidence, sworn statements, facts, submissions and expert opinion as such party may deem necessary to support its contentions in regard to the matter/s in dispute, and shall simultaneously serve a copy thereof on the other party.

13.7 Within fourteen (14) days of receipt of such copy of the other party's statement of case, either party may submit a further supplementary statement to the arbitrator and shall provide a copy thereof to the other party. The dispute shall be determined by the arbitrator on the evidence before him/her without legal representation by the parties.

13.8 If the arbitrator considers that the matters in dispute cannot be decided on the papers before him/her, the arbitrator may call for other evidence or for witnesses to testify at a place in Pretoria determined by him in the presence of the parties, who may also question such witnesses.

13.9 The arbitrator shall be entitled to make such award, including an award for specific performance, an interdict, damages or otherwise as the arbitrator in his/her discretion deem fit and appropriate

13.10 The arbitrator shall at all times have regard to the intention of the parties underlying the Agreement and shall resolve the dispute in a summary manner.

13.11 The award made by the arbitrator:

13.11.1 Shall be final and binding on the parties;

13.11.2 Shall be carried into effect by the parties;

13.11.3 May be made an Order of Court by a party if the other party fails to heed the terms of the award;

13.11.4 May Include an Order directing the unsuccessful party to pay the cost of the arbitrator and the expenses incurred by the successful party.

13.12 This Clause shall survive the termination or cancellation of Contract or this SLA.

13.13 If both parties decide that the difference or dispute should be submitted to arbitration, such decision shall constitute each party's irrevocable consent to any arbitration proceedings and neither party shall be entitled to withdraw from such proceedings or to claim that it is not bound by the provisions of this Clause.

13.14 If a party fails to take part in arbitration proceedings conducted in accordance with this Clause, such failure shall constitute consent to an award being made against such a party. (Emphasis added.)

[23] The words 'difference or dispute' are not defined in clause 13 or anywhere in the SLA. They are neither defined in the Arbitration Act nor in the preamble to the clause. Recently the Constitutional Court in *Amabhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa*,[4] reaffirmed what is now the trite approach to the interpretation of statutory provisions and likewise written contracts and or agreements as follows:

'. . .one must start with the words, affording them their ordinary meaning, bearing in mind that statutory provisions should always be interpreted purposively, be properly contextualised and must be construed consistently with the Constitution. This is a unitary exercise. The context may be determined by considering other subsections, sections or the chapter in which the keyword, provision or expression to be interpreted is located. Context may also be determined from the statutory instrument as a whole. A sensible interpretation should be preferred to one that is absurd or leads to an unbusinesslike outcome.'

[24] Following the above unitary approach, the point of departure is the language used in clause 13, in 'light of the ordinary rules of grammar and syntax'.[5] To this end, first, the word 'difference' in its ordinary grammatical meaning, means 'the way in

[4] *AmaBhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa* [2022] ZACC 31; 2023 (2) SA 1 (CC); 2023 (5) BCLR 499 (CC) para 36.
[5] *Natal Joint Municipality Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262; 2012 (4) SA 593 (SCA) para 18 and *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; [2014] 1 All SA 517; 2014 (2) SA 494 para 10.

which two or more things which you compare are not the same'.[6] Second, the word 'dispute', means a disagreement over something.

[25] Clause 13 states that the parties must have reached a disagreement over something. They must agree that they disagree in a way that there is no other solution to their problem than to go in a particular direction that they agree upon. It states: 'then in that event, if the parties wish to arbitrate such difference or dispute, such difference or dispute shall be submitted to arbitration in accordance with the following provisions…'. One of the provisions is clause 13.3 which sets out the route to follow: '*Either party shall be entitled but not obliged, by giving written notice to the other, to require that a difference o[r] dispute be submitted to arbitration in terms of this Clause. Importantly the party who so wants the issue to be referred to arbitration shall do so by doing one thing: 'giving written notice to the other.'*

[26] As with any clause in a composite agreement, one cannot read clause 13 in isolation. It must be read in conjunction with other clauses of the SLA. Amongst such clauses is clause 8.8. It expressly states that '…[*Neo Thando*] *must be willing to enter into a transitional arrangement with the existing service provider [AGS Fraser] with regard to the Household goods and vehicles currently in store with the existing service provider [AGS Fraser]'.*

[27] This arrangement necessitated that the packing and unpacking of the transferred official's goods occur in the presence of the official without any intervention by DIRCO. The intervention by DIRCO was merely to establish a relationship between the two service providers for the transitional arrangement to be concluded.

[28] The language and syntax of clause 13, starting from its preamble and taking into consideration clause 8.8, indicate that the parties must agree that they disagree over something. And they both 'wish' to have that difference or dispute arbitrated and

[6] Cambridge English Dictionary.

submit the dispute to arbitration. Clause 13.3 expressly states that the referral to arbitration must be at the instance of one of the parties where there is ‘a difference or dispute’. In addition, on the pleaded case, DIRCO did not consent to the referral. It raised both this issue and that there was no ‘arbitrable dispute to be referred for arbitration from the onset (‘the preliminary issues’). It did so before the arbitrator could commence with the arbitration and made its position clear in its Statement of Defence.

[29] If it is accepted that the purpose of the letter of 12 September 2017 was to declare a ‘dispute’ or spell out the ‘difference’, it however, fails to achieve that purpose to the extent that it makes no reference to any ‘difference’ or ‘dispute’. It demands payment of damages calculated at R53 million plus interest calculated from 30 days from the date of receipt of the letter of demand. The letter of 12 September 2017 stated that Neo Thando would prefer to arbitrate the matter than go to court. The letter was framed as a conditional proposition should a dispute arise. The clause stipulates that a dispute must arise before any arbitration can take place, indicating that the choice of language was deliberate, allowing for voluntary arbitration agreed to by both parties, rather than compulsory submission.

[30] It is trite that where there is a demand by one of the parties for performance or damages, the demand must have been rejected or there must be clear evidence that the other party, having received the demand, then ‘allowed an unreasonable time to lapse without dealing with it properly’, such that it can be inferred on a balance of probabilities that the other party ‘intended’ to reject the demand. In this matter, it is uncontroverted that Neo Thando did not allow DIRCO any time to deal with what it believed was ‘a difference or dispute’ between the parties. The delay of 17 September to 2 November 2017, a month and a few days can hardly qualify as an unreasonable time particularly when the letter of demand stated that if DIRCO did not respond within thirty days, Neo Thando would issue summons; not force DIRCO to arbitrate.

[31] Clause 13 provides for a two-fold mechanism, ie for the parties to agree to submit an existing dispute to arbitration, while also permitting a party to instead initiate

court proceedings against the other. In other words, if a party opts to pursue legal proceedings instead of seeking arbitration, it cannot later claim a right to submit the dispute to arbitration. DIRCO referenced clause 13.13, which states that 'if both parties agree to submit a dispute to arbitration', this decision constitutes irrevocable consent. Without mutual agreement to arbitrate an existing dispute, there is no basis for arbitration under the SLA.

[32] The requirement that there must exist a dispute first before the matter may be referred to arbitration was emphasised in *Parekh v Shah Jehan Cinemas*[7] in which the court stated the following:

'Arbitration is a method for resolving disputes. That alone is its object and its justification. A disputed claim is sent to arbitration so that the dispute which it involves may be determined. No purpose can be served on the other hand, by arbitration on an undisputed claim. There is then nothing for the arbitrator to decide. He is not needed, for instance, for a judgment by consent or default. All this is so obvious that it does not surprise one to find authority for the proposition that a dispute must exist before any question of arbitration can arise.'[8] In *Telecall (Pty) Ltd v Logan*,[9] this Court further stated that a '[dispute] is more than a mere disagreement; it is 'one in relation to which opposing contentions are or can be advanced'.

[33] There was no dispute, as defined by the Arbitration Act, that existed at the time Neo Thando referred the matter to arbitration. Section 1 of the Arbitration Act defines an arbitration agreement to mean 'a written agreement providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement, whether an arbitrator is named or designated therein or not'. As DIRCO correctly contended, as a minimum, there must be an 'expression by parties, opposing each other in controversy, of conflicting views, claims or contentions'.

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[7] *Parekh v Shah Jehan Cinemas (Pty) Ltd and Others* 1980 (1) SA 301 (D).

[8] Ibid at 304E-G.

[9] *Telecall (Pty) Ltd v Logan* 2000 (2) SA 782 (SCA) at 786B-787A.

[34] DIRCO submitted that a dispute must occur before there can be a referral to arbitration and in support of this proposition it relied on *Durban City Council v Minister of Labour and Another*, in which the following was stated:

'…to attempt a comprehensive definition of the word "dispute" …it seems to me that it must, as a minimum so to speak, postulate the notion of the expression by parties, opposing each other in controversy, of conflicting views, claims or contentions.'[10]

[35] In conclusion, the language of clause 13 is clear. A 'difference' or 'dispute' must have existed when the matter was referred for arbitration to be 'arbitrable' in terms of the Arbitration Act. On these facts and if regard is had to the letter of demand of 12 September 2017, it is clear that there was no 'difference' or 'dispute' identified. If there was any 'difference' between the parties, it was at most a difference of opinion about the extent to which DIRCO should have intervened in persuading AGS Fraser to release the goods of the officials it held in its possession to Neo Thando. Neo Thando was aware that in terms of the agreement that obligation did not fall on DIRCO. Contrary to the clear terms of clause 13.3 and in stark contradiction to the clear language used by the parties, Neo Thando unilaterally referred the matter for arbitration without DIRCO's consent. Arbitration by its very nature and as understood in the business world is voluntary. To read the arbitration clause as allowing the one party to the agreement to force the other party to submit to arbitration would be 'unbusinesslike'.

[36] For the reasons set out above, on this plain meaning, DIRCO's interpretation must be correct. The SLA required both parties to consent to arbitration. The words 'if the parties wish' makes this clear. Second, the letter of demand was for payment of damages. There was no existing dispute identified as to how the transitional arrangement was to be implemented and/or who was responsible therefor. It follows that the high court misdirected itself in holding otherwise.

[10] *Durban City Council v Minister of Labour and Another* 1953 (3) SA 708 (N) at 712A-E.

The issue of costs

[37] The issues were straightforward. They were not complex, and the matter did not justify the engagement of two counsel, either before the high court or the arbitrator, particularly senior counsel. Other than that, there is no reason why the general rule should not apply, ie costs must follow the result.

[38] In the result, the following order issues.

1 The appeal is upheld with costs.

2 The order of the high court is set aside and substituted with the following:

‘(a) It is declared that the second respondent did not have jurisdiction to arbitrate the alleged dispute between the applicant and the first respondent.

(b) The first respondent is ordered to pay to the second applicant:

(i) All the amounts paid by the State Attorney on behalf of the second applicant to the second respondent in respect of his fees for acting as arbitrator;

(ii) All the legal costs incurred by the first/and or second applicant in defending the reference to the arbitrator, where the arbitrator lacked jurisdiction.

(c) The second respondent’s interim award dated 23 October 2018 is declared invalid and is set aside

(d) The second respondent’s award dated 28 July 2020 is declared invalid and is set aside.’

3 The first respondent is ordered to pay the costs of the application for leave to appeal before the high court.

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B C MOCUMIE

JUDGE OF APPEAL

Appearances

For Appellants:	G I Hulley SC and L C Segeels-Ncube
Instructed by:	State Attorney, Pretoria
For first respondent:	A Subel SC and M Nowitz
Instructed by:	Nochumsohn & Teper Inc, Johannesburg
	Phatshoane Henney Attorneys, Bloemfontein.