



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 21/23506

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES

In the matter between:

TIMBELA TRADING CLOSE CORPORATION

Plaintiff

and

ANGLO AMERICAN PLATINUM LIMITED

First Defendant

MODIKWA PLATINUM MINE

Second Defendant

Delivered: 9 September 2024 – This judgment is handed down electronically by circulation to the parties' representatives via email, uploading it to CaseLines and releasing it to SAFLII.

ORDER

1. The action is stayed pending the final determination of the disputes on the pleadings by an arbitrator in terms of clause 24 of the agreement dated 17 May 2021.
2. The plaintiff shall pay the costs of the special plea on the party and party scale, including the cost of counsel at scale B.

JUDGMENT

BESTER AJ:

[1] The plaintiff, Timbela Trading CC, sues the first defendant, Anglo American Platinum Limited, for damages and the return of equipment in terms of a written contract concluded in May 2021. The second defendant is an unincorporated joint venture between the first defendant and Arm Mining Consortium Limited, represented by the first defendant.

[2] The plaintiff initially brought its claim by way of application. On 14 February 2022, Wright J referred the matter to trial, with the notice of motion standing as simple summons.

[3] In the action, as in the application, the defendants raised a special plea that the disputes between the parties are subject to an arbitration agreement. Although there was no agreement between the parties to separate the special plea, they agreed at the hearing that it was necessary to hear the special plea first. I thus allowed the separation of the special plea and heard argument in respect thereof.

[4] The parties did not present any evidence. It is common cause on the pleadings that a written contract for the provision of services was entered between the plaintiff and the first defendant on 17 May 2021. It is also common cause that the contract includes an arbitration clause which in relevant parts provides as follows:

“Subject to the provisions of clause 24.8, any dispute arising out of or in connection with the Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration.”

[5] Clause 24.8 provides that a party is not precluded from seeking urgent relief from a court of competent jurisdiction pending an award by the arbitrator. The further provisions of clause 24 deal with procedural aspects of the arbitration. The parties agree that the disputes on the pleadings fall within the ambit of the arbitration clause.

[6] The defendant did not replicate to the special plea but relied on allegations contained in its declaration in opposing the special plea.

Challenges to arbitration agreements

[7] Section 3 of the Arbitration Act, 42 of 1965, provides as follows:

- “3 Binding effect of arbitration agreement and power of court in relation thereto
- (1) Unless the agreement otherwise provides, an arbitration agreement shall not be capable of being terminated except by consent of all the parties thereto.
 - (2) The court may at any time on the application of any party to an arbitration agreement, on good cause shown-
 - (a) set aside the arbitration agreement; or
 - (b) order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or
 - (c) order that the arbitration agreement shall cease to have effect with reference to any dispute referred.”

[8] Section 6 of the Act further provides that:

- “6 Stay of legal proceedings where there is an arbitration agreement
- (1) If any party to an arbitration agreement commences any legal proceedings in any court (including any inferior court) against any other party to the agreement in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time after entering appearance but before delivering any pleadings or taking any other steps in the proceedings, apply to that court for a stay of such proceedings.
 - (2) If on any such application the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement, the court may make an order staying such proceedings subject to such terms and conditions as it may consider just.”

[9] In *Crompton Street Motors*¹ the Constitutional Court explained the application of section 6(2) of the Arbitration Act in the following terms:

¹ *Crompton Street Motors CC t/a Wallers Garage Service Station v Bright Idea Projects 66 (Pty) Ltd t/a All Fuels* 2022 (1) SA 317 (CC) in para 41.

“[41] Section 6(2) of the Arbitration Act allows a court to stay proceedings 'if [upon application in terms of s 6(1)] the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement'. The language of s 6(2) directs a court acting under that section to stay proceedings where such an application is made unless sufficient countervailing reasons exist for the dispute not to be referred to arbitration. The words 'no *sufficient* reason why the dispute *should not* be referred to arbitration' denote that the standard position is that a stay should be granted upon request. The onus of satisfying the court that the matter *should not* be referred to arbitration and instead heard by the High Court is on the party who instituted the legal proceedings.² In *Universiteit van Stellenbosch*³ the then Appellate Division held that, when a court is faced with a stay application, the discretion to refuse arbitration in the circumstances should be exercised judicially, and only when a 'very strong case' has been made out.⁴ This high threshold for refusal is because the party who does not want the matter referred to arbitration 'is seeking to deprive the other party of the advantage of arbitration to which the latter is entitled'. ”⁵

[10] The Constitutional Court (in *Crompton*) endorsed the finding of the Supreme Court of Appeal in *PCL Consulting*⁶ that there are two ways in which a party may seek a stay of proceedings pending arbitration:

“[32] What then of the manner in which the applicant applied for the stay? As a matter of fact, the applicant did not apply for a stay *before* delivering its pleadings and, therefore, the High Court was correct to find that it did not comply with the provisions of s 6(1) of the Arbitration Act. The incorporation of the application for a stay in the applicant's conditional counter-application and answering affidavit was a step beyond entering an appearance, and therefore one of the prerequisites for a stay in terms of s 6(1) was absent. However, non-compliance with s 6(1) does not render the request for a stay invalid. There are two avenues to apply for a stay of proceedings: a substantive application in

² *Kathmer Investments (Pty) Ltd v Woolworths (Pty) Ltd* 1970 (2) SA 498 (A) at 504H; *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) at 391C – E.

³ *Universiteit van Stellenbosch v JA Louw (Edms) Bpk* 1983 (4) SA 321 (A).

⁴ *Id* at 327C – D.

⁵ *Body Corporate of Via Quinta v Van der Westhuizen NO and Another* [2017] ZAFSHC 215 in para 41.

⁶ *PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd* 2009 (4) SA 68 (SCA) in para 7.

terms of s 6 of the Arbitration Act may be made, or a special plea requesting a stay of the proceedings pending the determination of the dispute by arbitration.⁷ In *PCL Consulting* the Supreme Court of Appeal put it in the following terms:

'If a party institutes proceedings in a court despite an [arbitration] agreement, the other party has two options:

- (i) It may apply for a stay of the proceedings in terms of s 6 of the Arbitration Act 42 of 1965; or
- (ii) it may in a special plea (which is in the nature of dilatory plea) pray for a stay of the proceedings pending the final determination of the dispute by arbitration.¹⁸

[33] A special plea for arbitration is one of several dilatory pleas and can be included in pleadings.⁹ Generally, when a special plea is raised, all the defences on which the defendant intends to rely must be raised at the same time.¹⁰ This is so because, should the special plea fail, there would be no further opportunity to plead over on the merits.¹¹ There is no objection to pleading a special defence in the course of the plea, with or without a special heading.¹²

The plaintiff's opposition to the special plea

[11] The defendants were entitled to raise the special plea. It was for the plaintiff to provide sufficient countervailing reasons for the dispute not to be referred to arbitration.

[12] Mr Gededger relied on paragraphs 19 to 25 of the declaration in opposition to the special plea of jurisdiction. This encompasses the whole section under the heading "*BREACH OF THE AGREEMENT BY THE DEFENDANTS*", and reads as follows:

"19. On Thursday, 30th July 2020, the Mine Manager of the Second Defendant, Mr Francois Laubscher ("Laubscher") called officials of the Plaintiff (Messrs Tebogo Makgabane and Evander Maboko) to his office

⁷ Id. See also *Transasia 1 (Pty) Ltd v Arbitration Foundation of South Africa and Another* [2018] ZAGPJHC 548 in para 19.

⁸ *PCL Consulting* above in para 7.

⁹ *Foize Africa (Pty) Ltd v Foize Beheer BV and Others* 2013 (3) SA 91 (SCA) in para 30.

¹⁰ *Thyssen v Cape St Francis Township (Pty) Ltd* 1966 (2) SA 115 (E) at 116G.

¹¹ *David Beckett Construction (Pty) Ltd v Bristow* 1987 (3) SA 275 (W) at 280E.

¹² Harms & Hugo *Amler's Precedents of Pleadings* 9 ed (Butterworths 2018) at 5.

wherein he informed them that he no longer require the Services of the Plaintiff at the Mine and demanded keys to their office (which they did give to him) and he proceeded to order them (Messrs Tebogo Makgabane and Evander Maboko) to vacate the Mine premises with immediate effect.

20. After handing over the keys to Laubscher he instructed Mine Security Officials to escort officials and employees of the Plaintiff out of the mine Site and also ordered the Security to deactivate all the Electronic Access Cards issued to the Plaintiff and its personnel and thereby ensuring that they were barred from entering the Mine Site going forward.
21. At the time when the officials of the Plaintiff were ejected off the Mine Site they were not allowed to remove their equipment, machinery and office appliances and in the results all the belongings of the Plaintiff were left at the Mine Site.
22. Subsequent to the above mentioned ejectment of the Plaintiff and its personnel from the Mine Site on 3rd August 2020 the Plaintiff was served via an email from the First Respondent with a Notice of Suspension (Letter of Suspension) signed by Maartin Zimmermann and this despite the fact that the termination had already occurred on 30th July 2020 when the Plaintiff and its personnel were ejected from the Mine Site by Loubser. I annex hereto the Notice of Suspension marked Annexure "E".
23. Some 69 days later (after 3rd August 2020) the Plaintiff was served via an email from the First Respondent with a Notice of Termination (Letter of Termination) signed by Maartin Zimmermann. I annex hereto the Notice of Termination marked Annexure "F".
24. In the circumstances, the Second Defendant through its officials has breached the aforementioned Agreement when:
 - 24.1. Without just cause arbitrarily took away ((from the Plaintiff's officials) keys in respect of the office allocated to the Plaintiff and physically caused the Plaintiff to be arbitrarily ejected from the Mine Site;
 - 24.2. It arbitrarily caused the Electronic Access Cards issued to the Plaintiff's personnel to be deactivated by the Mine Security;
 - 24.3. Without cause arbitrarily and unlawfully barred the Plaintiff from removing its equipment, machinery, office appliances and Company documents;
 - 24.4. It caused the First Defendant to serve the Plaintiff with a Notice of Suspension dated 3rd August 2020, some three (3) days after its

- Official (Laubscher) had already caused the Plaintiff and its personnel to be arbitrarily ejected from the Mine Site;
- 24.5. It caused the Plaintiff to be suspended for a period in excess of 30 days in direct contravention of clause 8(d) of the Agreement and this after the Second Defendant through its official (Laubscher) had already arbitrarily ejected the Plaintiff and its personnel from the Mine Site;
- 24.6. It caused the First Defendant to serve the Plaintiff with a Notice of Termination dated 13th October 2020, some sixty nine (69) days after its Official (Laubscher) had already caused the Plaintiff and its personnel to be arbitrarily ejected from the Mine Site;
- 24.7. In addition to the above the Second Defendant acted unlawfully when it caused a non-party (First Defendant) to arbitrarily suspend and terminate the Agreement it had with the Plaintiff;
- 24.8. It caused the First Defendant to unreasonably, unfairly, oppressively unlawfully and contrary to public policy to arbitrarily terminate the Agreement between itself and the Plaintiff in direct contravention of clause 24.1 of the Agreement;
25. The breaches listed above infringe the constitutional rights of the Plaintiff:
- 25.1 enshrined in Section 34 of the Constitution of the Republic of South Africa in that the ejection and subsequent suspension and termination of the Agreement between the Plaintiff and the Second Defendant is oppressive and contrary to public policy in that such ejection and subsequent suspension and termination were arbitrarily effected without the Plaintiff being given a hearing;
- 25.2 enshrined in Section 9 of the Constitution of the Republic of South Africa in that the ejection and subsequent suspension and termination of the Agreement between the Plaintiff and the Second Defendant is unreasonable, unfair, oppressive and contrary to public policy in that such ejection and subsequent suspension and termination were arbitrarily effected without the Plaintiff being afforded protection and benefits enshrined in Section 9(1) of the Constitution of the Republic of South Africa;
- 25.3 In that clause 8.2 (a) relied upon by the Defendants for the ejection and subsequent suspension of the Plaintiff is unreasonable, unfair,

- oppressive and contrary to public policy to the extent that it allowed the Defendants to arbitrarily suspend the Plaintiff without any cause;
- 25.4 In that such ejectment and subsequent suspension and termination infringes the rights of the Plaintiff enshrined in Section 25 of the Constitution of the Republic of South Africa in that such ejectment and subsequent suspension and termination is unreasonable, unfair, oppressive and contrary to public policy to the extent that it allowed the Defendants without a cause to arbitrarily deprive the Plaintiff of its ownership of equipment, machinery and office appliances;
- 25.5 In that such ejectment and subsequent suspension and termination infringes the rights of the Plaintiff enshrined in Section 12 of the Constitution of the Republic of South Africa in that such ejectment and subsequent suspension and termination is unreasonable, unfair, oppressive and contrary to public policy to the extent that it allowed the Defendants without just cause to arbitrarily eject and subsequently suspend and terminate the Agreement between the Plaintiff and the Second Defendant and thus depriving the Plaintiff of the freedom to use its properties (equipment, machinery, office appliances and Company documents) which to this date remains in possession of the Second Defendant;
- 25.6 In that the above mentioned retention and withholding of properties (equipment, machinery, office appliances and Company documents) of the Plaintiff without just cause infringes the rights of the Plaintiff enshrined in Section 13 of the Constitution of the Republic of South Africa in that it is unreasonable, unfair, oppressive and contrary to public policy to the extent that it subjects the Plaintiff to slavery in that the Second Defendant has and continue to deprive the Plaintiff the use of its properties and/or in that the Second Defendants or its employees continue to arbitrarily retain and deprive the Plaintiff use of its properties and/or in that the Second Defendants or its employees unreasonably, unfairly, oppressively and contrary to public policy continue to use the properties (equipment, machinery and office appliances) of the Plaintiff without just cause and without compensating the Plaintiff.
- 25.7 In that such ejectment, subsequent suspension and termination and retention of the Plaintiff's properties is unreasonable, unfair,

oppressive and contrary to public policy in that it is in breach of the principles of natural justice which dictates that *no one shall be a judge in his own case and no man should be condemned unheard.*"

(emphasis in the original)

[13] There are several reasons why the opposition to the special plea must fail. First, the plaintiff did not act in terms of section 3(2) of the Arbitration Act. Second, it did not plead to the special plea. In terms of Uniform Rule of Court 25 the plaintiff is taken to have denied all the allegations in the special plea. Although the plaintiff admitted all the allegations in argument, it persisted in its challenge to the relief.

[14] Third, the paragraphs relied upon by the plaintiff set out its case regarding the defendants' alleged breach of the agreement, and nothing more. On no reasonable reading of these paragraphs, or the declaration as a whole, did the plaintiff plead a basis to avoid the consequences of the arbitration clause.

[15] Fourth, the allegations in the paragraphs relied upon are not common cause. Save for admitting the delivery of the notices of suspension and termination, the defendants denied these allegations. The plaintiff elected not to lead any evidence in support of its opposition to the special plea. The plaintiff did not establish any of the facts upon which it sought to rely in its opposition to the special plea.

[16] Fifth, the actual argument advanced by Mr Gededger cannot be found in any of the paragraphs quoted from the declaration. Moreover, it is not sound in law. His argument may be summarised as follows.

[17] On 3 August 2020, the first defendant served a notice of suspension on the plaintiff. On 13 October 2020, the first defendant delivered a notice of termination to the plaintiff, giving notice that it terminated the agreement with immediate effect. At least these facts are common cause on the pleadings.

[18] In terms of clause 8.2(d) of the contract, the suspension unilaterally imposed by the first defendant in terms of clause 8.2 shall never exceed 30 consecutive days at a time, unless otherwise agreed in writing between the parties. Because the

defendants' termination notice relies on the suspension, which had in fact already lapsed after 30 days, the termination is invalid.

[19] The defendants' termination is unlawful, arbitrary, an infringement of the plaintiff's right as enshrined in section 9 of the Constitution, and a breach of the contract. As a consequence, the plaintiff has forfeited its entitlement to invoke the arbitration clause.

[20] Mr Gededger, appearing for the plaintiff, relied on the Constitutional Court's judgment in *Beadica*¹³ to support this argument. He specifically relied on the following two paragraphs:

"[29] In *Brisley*,¹⁴ the Supreme Court of Appeal laid the foundation for its approach to the proper roles of good faith, fairness and reasonableness in the law of contract in the new constitutional era. It held that good faith does not form an independent or free-floating basis upon which a court can refuse to enforce a contractual provision and that the acceptance of good faith as a self-standing ground would create an unacceptable state of uncertainty in our law of contract. According to the Supreme Court of Appeal, good faith is a fundamental principle that underlies the law of contract and is reflected in its particular rules and doctrines. In this way, it informs the substantive law of contract, performing a creative, controlling and legitimating function. In a separate concurrence, Cameron JA emphasised that constitutional principles, particularly those encapsulated in the Bill of Rights, permeate all law, including contract. Where contracts infringe on the fundamental values embodied in the Constitution, they will be struck down as being offensive to public policy."

and

"[58] It must be categorically stated that, in *Botha*,¹⁵ this court did not revisit or revise the *Barkhuizen* test. *Barkhuizen* remains the leading authority in our law on the role of equity in contract, as part of public policy considerations."

¹³ *Beadica 231 CC and Others v Trustees, Oregon Trust and Others* 2020 (5) SA 247 (CC).

¹⁴ *Brisley v Drotsky* 2002 (4) SA 1 (SCA).

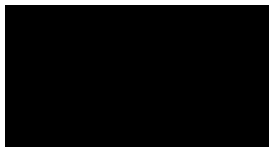
¹⁵ *Botha and Another v Rich NO and Others* 2014 (4) SA 124 (CC).

[21] The judgment does not support a single element of the argument advanced. The argument has no basis in law or reason. I do not deem it necessary to analyse the matter any further. The plaintiff has not established any reason for me to exercise my discretion to refuse arbitration.

Conclusion

[22] In the result, I order as follows:

- a) The action is stayed pending the final determination of the disputes on the pleadings by an arbitrator in terms of clause 24 of the agreement dated 17 May 2021.
- b) The plaintiff shall pay the costs of the special plea on the party and party scale, including the cost of counsel at scale B.



A Bester

**Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg**

Heard: 9 September 2024
Judgment Date: 9 September 2024

Appearance for the Plaintiff: Mr BF Gededger instructed by Mmala Attorneys

Appearance for the Defendants: Ms L Segeels-Ncube instructed by Webber Wentzel Attorneys