

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2023/106860

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

11/10/2024
DATE


SIGNATURE

In the matter between:

James Jakov Grcic

Applicant

and

J & J Investments (Pty) Ltd

First Respondent

Jonathan Luke Mason N.O.

Second Respondent

Romy Mason N.O.

Third Respondent

Larissa Erna Kelbrick

Fourth Respondent

(the second to fourth respondents cited in their capacity as trustees of the J-Rap Family Trust, registration number: IT003140/2016)

Brian Kahn Inc.

Fifth Respondent

JUDGMENT

McCAFFERTY AJ

Introduction

1. On 24 February 2023¹, a written agreement (styled as the Share and Claims Purchase and Sale Agreement) (“the agreement”)² was concluded between the applicant (“Grcic”) and J&J Investments (Pty) Ltd (the first respondent) (“J&J”) and the J-Rap Family Trust (“the Trust”) represented in these proceedings by the second to fourth respondents as trustees of the Trust who are cited in their capacities as such.³
2. The agreement pertains to the sale by Grcic of all of his shares and claims in J&J, to the Trust⁴, for an amount of R40 000 000.00.
3. The agreement records that prior to its conclusion, the Trust had made payment to Grcic of R20 640 000⁵.
4. The agreement further records that the balance due to Grcic in respect of the shares and claims would be R19 360 000.00, payable in two equal tranches of R9 680 000.00. The first tranche of the balance has been paid.⁶
5. The second or remaining tranche is being held by the fifth respondent (“the Trust’s attorney”) in its trust account, as provided for in the agreement, pending payment to Grcic.
6. Grcic has delivered the shares and claims to the Trust⁷
7. The relief sought by Grcic in the notice of motion is the following:
 - 7.1 Implementing clause 11.8 of the agreement, which deals with severability.
 - 7.2 Severing clauses 2.6, 2.6.1, and 6.2.1.2.1 from the agreement, which, for convenience, are highlighted in bold and set out below:

“2.6 Clean Break Agreement shall mean a Written and signed agreement concluded between at least –

¹ FA para 11 at **02-7**

² FA Annex JJG1, **02-15-02-41**

³ FA paras 3-6. **02-6**

⁴ The agreement para 2.22 read with 5.1.1. **02-19** and **02-22**

⁵ The agreement para 5.1.3. **02-22**

⁶ FA para 14.2 **02-12**

⁷ FA para 13.5 **02-11**

2.6.1 GRCIC and companies controlled by him or his wife, as well as within his identified and agreed group of companies; and

2.6.2 MASON and companies controlled by him as well as within his identified and agreed group of companies.”

“6.2.1 The sum of R19 360 000.00 ... shall be paid to Grcic as follows –

6.2.1.1 ...

6.2.1.1 the balance of R9 680 000.00 ... (“the 2nd tranche”) on the earlier of –

6.2.1.2.1 the conclusion of the Clean Break Agreement, or

6.2.1.2.2 a court order dealing therewith.”

7.3 Directing the fifth respondent, in terms of clause 6.2.1.2.2 of the agreement to pay Grcic the amount of R9 680 000.00, together with interest, *a tempore mora*, which is currently held in its trust account; and

7.4 Costs of the application.⁸

8. The basis raised by Grcic for the first two forms of relief, preparatory to the order for payment, are that:

8.1 the provisions relating to the Clean Break Agreement (“the clean break agreement”) constitute an unenforceable *pactum de contrahendo*.

8.2 in the alternative, the provisions relating to the clean break agreement are so vague as to be unenforceable; and

8.3 finally, regardless of what the provisions relating to the clean break agreement might mean, the agreement cannot be interpreted to mean that the amount R9 680 000.00, constituting the second tranche will not become due and payable.⁹

9. The Trust opposes this application on two main grounds:

9.1 first, there is a fundamental dispute between the applicant and the Trust regarding what clause 6.2.1.2.2 means, particularly the nature and content of the “*court order*” referred to. The agreement contains an alternate dispute resolution (“ADR”)

⁸ Applicant’s Notice of Motion, p. 2 **02-2-02-3**

⁹ Applicant’s Heads of Argument, p.6, para 21. **09-7**

clause, that requires such a dispute to be resolved in the manner provided, culminating in resolution by arbitration. Once the court accepts that such a dispute exists between the parties, it is submitted that this dispute must be resolved under the ADR provisions, not by this court. The appropriate relief in this case is a stay of these proceedings pending the arbitration.¹⁰

- 9.2 second, in the event that the court finds that the dispute should not be referred to arbitration, on a proper interpretation of clause 6.2.1.2.2 the "court order" referred to is one resolving the disputes between the applicant (and related parties to the applicant) (the "Grcic group") and Jonathan Mason (and related parties to Mason) (the "Mason group") that would have been the subject of negotiations towards the conclusion of the "clean break agreement". The "court order" is not one in which the applicant merely requests the court to order payment of the second tranche. The appropriate relief in this event is a dismissal of the application.¹¹

10. Grcic asserts that there is no arbitral dispute or otherwise that precludes him from approaching the court for an order for payment.¹²

The relevant factual background

The Founding Affidavit

11. In summary, in his founding affidavit, Grcic annexed the agreement¹³, set out what he considered to be the material terms¹⁴ and averred that:

- 11.1 with regard to the second tranche, that the agreement envisaged payment in two circumstances¹⁵:

- 11.1.1 firstly, when a clean break agreement is concluded; and

- 11.1.2 secondly, and in the alternative, payment will become due if a court orders payment of the outstanding amount;

¹⁰ Respondents' Note for Argument page 2 para 5.1. **09-52**

¹¹ Respondents' Note for Argument page 2 para 5.2. **09-53**

¹² Respondents' HoA para 8 **09-3**

¹³ Annex JMG1. **02-15-02-41**

¹⁴ FA para 12. **02-8-02-11**

¹⁵ FA para 16.1. **02-12**

- 11.2 the agreement does not specify the content of the clean break agreement beyond setting out who the parties must be and stating that the clean break agreement must be in writing¹⁶;
- 11.3 the parties are at an impasse regarding the conclusion of the clean break agreement¹⁷;
- 11.4 the Trust, on the instructions of the second respondent, has sought to make the conclusion of the clean break agreement (and the consequent payment to him) conditional on the resolution of a dispute relating to the ownership of certain equipment (*"the disputed equipment"*)¹⁸;
- 11.5 the position adopted by the respondents is that unless they are allowed to remove the disputed equipment, claimed by CypherWave Business Solutions (Pty) Ltd ("Solutions"), from the premises of CypherWave Storage Solutions (Pty) Ltd ("Storage"), then no clean break agreement can be concluded, and no further amounts will be paid to him¹⁹;
- 11.6 the position is wholly unsustainable for at least the following reasons²⁰:
- 11.6.1 he is advised that the provisions relating to the clean break agreement are so vague as to be unenforceable;
- 11.6.2 he is advised that the said provisions amount to a *pactum de contrahendo*;
- 11.6.3 there is no provision in the agreement which makes the conclusion of the clean break agreement, or the payment of the second tranche, contingent on the resolution of a dispute between Solutions and Storage;
- 11.6.4 he is further advised that the court cannot be requested to intervene to make an agreement between the parties or to remedy/fix the contract which the parties have entered into, i.e., the agreement²¹;

¹⁶ FA para 16.4. **02-12**

¹⁷ FA para 17.1. **02-13**

¹⁸ FA para 17.2. **02-13**

¹⁹ FA para 17.2. **02-13**

²⁰ FA para 19. **02-13**

²¹ FA para 20. **02-13**

- 11.6.5 he is also advised that the provisions of clause 11.8 of the agreement, relating to severability, ought to be activated and clause 2.6, 2.6.1 and 6.2.1.2 ought to be severed from the agreement²²; and
- 11.6.6 he has made out a proper case for the implementation of the severance and for an order directing that payment of the second tranche be paid to him (from the trust account of the fifth respondent)²³.

The Answering Affidavit

12. In summary, in the second to fourth respondents' answering affidavit, deposed to by the second respondent ("Mason"), on behalf of the Trust, the averments are that:
- 12.1 Grcic did not give written notice of the dispute, call for negotiation, or seek mediation and then arbitration of the dispute;²⁴
- 12.2 before the Trust filed its answering affidavit, its attorney raised the dispute with Grcic's attorney in writing and advised that this dispute was to be subjected to the agreed ADR process under the agreement;²⁵
- 12.3 Grcic's attorney did not engage with the dispute or explain why it should not be referred to the agreed ADR process;²⁶
- 12.4 the Trust then filed its answering affidavit. The Trust reiterated the existence of the dispute, referred to the agreed ADR process and contended that the dispute should be determined under that process;²⁷
- 12.5 part of the background relating to the conclusion of the agreement²⁸, which Grcic avoids, is that:
- 12.5.1 Grcic and Mason were close friends for many years and had various joint business interests. At some point this relationship soured;²⁹
- 12.5.2 prior to the conclusion of the agreement, disputes had arisen, and claims had been made between Grcic and companies controlled by him and/or his

²² FA para 21. **02-14.**

²³ FA para 22. **02-14.**

²⁴ AA para 3. **02-44-48.**

²⁵ AA Annex JLM1, **02-72** at para 11 **02-75.**

²⁶ AA Annex JLM2 **02-76.**

²⁷ AA Annex **02-42-48** at para 3 (in particular 3.1 and 3.7) **02-51** at para 6.2 and **02-70** para 14.16-14.17.

²⁸ AA para 7 – 7.1 to 7.9 **02-52-57.**

²⁹ AA para 7.5.1 **02-53 – 02-54.**

wife (on the one hand) as well as legal entities controlled by Mason, including the Trust (on the other hand).³⁰

12.5.3 the “*main parties*”, Grcic and Mason, considered it to be appropriate that all the issues and disputes amongst the two groups namely the Grcic group and the Mason group (both as referred to in the agreement) should be finally resolved.³¹

12.5.4 they did not want lingering disputes and litigation but if these could not be avoided by agreement, it was their intention that the parties who then had claims would litigate or arbitrate those claims and have them finally determined so that when the second tranche was paid, that would be the “*final event*” of the resolution of absolutely all issues/disputes/litigation between them in respect of the multi-faceted relationships between the two groups and importantly Grcic and Mason.³²

12.5.5 subsequent to the conclusion of the agreement additional claims were raised by the Grcic group. The raising of new claims post-conclusion of the agreement was accepted as a natural consequence of the parties intended desire to bring about a particular outcome i.e., a clean break.³³

12.5.6 the disputes and the claims fell into two categories, namely:

12.5.6.1 those that existed as at the date of signature of the agreement; and

12.5.6.2 those that arose after the conclusion of the agreement.

12.5.7 in respect of those that arose in the first category, there were 8 claims which the Grcic group had against the Mason group.³⁴ One of these was the subject of an action brought by Solutions against Storage. Of the remaining seven disputes, three disputes had been resolved, and four disputes remained unresolved.

12.5.8 in respect of the second category, there were four claims that the Grcic group had against the Mason group.³⁵

³⁰ AA para 7.3 **02-52**

³¹ AA para 7.4.1 **02-52**

³² AA para 7.4.2 **02-52**

³³ AA para 11.3 **02-61**

³⁴ AA para 9 **02-58 – 02-59**

³⁵ AA para 11.4 **02-61 – 02-63**

- 12.6 the above notwithstanding, Grcic had “*contrived to create the illusion*” that no further disputes existed between the parties³⁶, when on 28 October 2023, Grcic’s attorney wrote to the Trust’s attorney³⁷ and stated that the Grcic group would (conditionally) not be pursuing any and all claims that the Grcic group have against the Mason group relating to the clean break disputes, identifying five of them. In that letter the Grcic group effectively informed the Mason group that it would (but conditionally) not be pursuing any and all claims against the Mason group relating to the clean break disputes which involved³⁸:
- 12.6.1 the dividend dispute between Grcic and Solutions.
 - 12.6.2 the electricity charges dispute between Storage and Solutions.
 - 12.6.3 the airplane hanger dispute between Grcic and Mason.
 - 12.6.4 the security dispute between CSSI and Solutions.
 - 12.6.5 the vending machine dispute between Grcic and Mason.
- 12.7 but the letter made no reference to the claims in which the Grcic group claimed against the Mason group, the following:
- 12.7.1 the money spent related to the reinstating of certain premises in terms of the lease and what was required to be done thereunder.
 - 12.7.2 a monetary claim being a final reconciliation of cyber security and monitoring services.
 - 12.7.3 the transferal of an internet domain name.
 - 12.7.4 reparation in respect of damages to certain cabling, air conditioning, security systems and other items.
 - 12.7.5 the action.³⁹
- 12.8 the Trust’s attorney responded on 27 October 2023⁴⁰ and pointed out that it seemed that the Grcic group were waiving and abandoning certain of its claims,

³⁶ AA para 12 **02-63**.

³⁷ JML6 **02-83-02-84**.

³⁸ AA para 13.2 **02-64**

³⁹ AA para 12.2 **02-64**

⁴⁰ JML7 **02-85-02-86**.

but conditionally, and if that condition exists, there is not much purpose in their letter.

- 12.9 what Grcic should have done is to take stock of the claims it contended for against the Mason group and instituted action in respect thereof because that would have brought about a final determination of those claims. In regard to any claims that the Mason group contended for, and which were not the subject matter of action instituted by the Mason group, it was open to the Grcic group to institute court proceedings for a declarator or other relief to which it will be entitled in respect of those claims which the Mason group asserted – but it did not pursue⁴¹;
- 12.10 in any event, what has been raised by Grcic in this matter constitutes a dispute as defined in clause 2.8 of the agreement⁴².

The Replying Affidavit

13. In summary, in his replying affidavit, Grcic averred that:

- 13.1 much of the debate will centre around an interpretation of the agreement and can be dealt with during argument;⁴³
- 13.2 he denied that the parties ever contemplated that any demand as contended for by the Trust would be required before instituting legal proceedings.
- 13.3 there is no “*dispute*”⁴⁴ which is required to proceed by way of arbitration:

“because the entitlement to payment can be secured by an order of Court as referred to in clause 6.2.1.2.2 of the agreement.”
- 13.4 the provisions of clause 10.3.1, 10.3.6, and 12.1.1. of the agreement must be considered.
- 13.5 the agreement is clear, payment of the amount claimed is triggered by either the conclusion of a clean break agreement (which he asserts is a *pactum de contrahendo*) or when a court orders payment to be made. When there is no clean break agreement, he is entitled to ask the court to direct the Trust to pay him the amount claimed. This is notwithstanding the fact that he maintains that the clean

⁴¹ AA para 14.15 **02-69-02-70**

⁴² AA para 14.16 **02-70**

⁴³ RA para 1.4 **02-89**

⁴⁴ RA para 2.2-2.3 **02-89, 02-90** para 3.1 – 3.2

break provisions amount to *pactum de contrahendo* and consequently are unenforceable.⁴⁵

13.6 with regard to the claims alleged to be in existence at the date of signature of the agreement:

13.6.1 these allegations are irrelevant to these proceedings⁴⁶;

13.6.2 the Trust's reference to the "*Grcic group*" and the "*Mason group*" are nebulous and do not indicate what is to be included in each entity and what is to be left out⁴⁷; and

13.6.3 because Solutions and Storage are not parties to the agreement, the allegations about them (which are disputed) should play no part in the determination of this application.⁴⁸ He concluded with a general denial.⁴⁹

13.7 with regard to the Grcic group claims raised against the Mason group subsequent to the conclusion of the agreement, the reference to these entities is nebulous and that the Trust seeks to extend the rights and obligations arising from the agreement to these entities notwithstanding that neither of them are parties to the agreement.⁵⁰

13.8 the Trust has overlooked the definition of the agreement in clause 2 – in other words, that the agreement is that between the parties as described therein and between no one else.⁵¹ He concluded with a general denial.⁵²

The issues

14. The issues are set out by the parties in their joint practice note.⁵³ There was some jousting between counsel regarding (as I understood them) a purported difference between the formulation of the interpretation issue in the practice note compared to the Trust's Note for Argument, being a supplement to its existing heads of argument and an aid to oral argument. It seems to me that the heads of argument prevail.

⁴⁵ RA paras 3.1 and 3.2, **02-90**

⁴⁶ RA para 4.1 **02-91**

⁴⁷ RA para 4.2 **02-91**

⁴⁸ RA para 4.3 **02-91**

⁴⁹ RA para 4.8 **02-91**

⁵⁰ RA para 5.1 **02-92**

⁵¹ RA para 5.3 **02-92**

⁵² RA para 5.5 **02-92**

⁵³ **06-6-06-11**

15. The focus during oral argument was whether there exists an arbitral dispute between the parties and whether, since the agreement contains an ADR clause, the dispute must be resolved in terms of that clause and whether the appropriate relief is a stay of these proceedings.

An Arbitral Dispute

Introduction

16. Grcic has delivered the shares and claims to the Trust which refuses to permit its attorneys to release the remaining tranche to Grcic.
17. Grcic claims payment of the remaining tranche of the sale price in this application.
18. The Trust avers that it has raised an arbitral dispute and alleges that Grcic was obliged to invoke the ADR provisions of the agreement.
19. Grcic asserts that there is no arbitral dispute or otherwise which prevents him from approaching this court for an order for payment.

Grcic's contentions

20. Grcic contends that the parties are unable to agree on a "*clean break agreement*"⁵⁴ but that this condition is unenforceable and void as it is an agreement-to-agree or is too vague to enforce.⁵⁵
21. Grcic seeks to "*implement*" clause 11.8 of the agreement and to sever from the agreement clauses 2.6, 2.6.1 and 6.2.1.2.1.⁵⁶
22. Grcic then seeks that this court directs the fifth respondent to pay it the second tranche of R9 680 000.00.⁵⁷
23. Effectively, Grcic contends that it is entitled to seek that this court provides the "*court order dealing therewith*" under clause 6.2.1.2.2 of the agreement so that the second tranche becomes payable to Grcic.
24. Grcic submits that the term "*a court order dealing therewith*" is not expressed or expanded on in the agreement. Its operation is not limited and there is nothing to say

⁵⁴ FA para 7 **02-13**

⁵⁵ FA para 19.1 and 19.2 **02-13**

⁵⁶ NOM **02-2** prayers 1-2

⁵⁷ NOM **02-2 - 02-3** prayer 3

such a court order can only be sought after the finalisation of the ADR process provided for in the agreement.⁵⁸

25. Further, that there is no basis for the Trust to allege that the parties ever anticipated that any demand as contended for by the Trust would be made before instituting the proceedings.⁵⁹
26. There is accordingly no dispute which requires Grcic to proceed by arbitration or to refer the matter to ADR as alleged by the Trust.⁶⁰
27. In support of this contention, reference is made to a point made by Didcott J in *Parekh v Shah Jehan Cinemas (Pty) Ltd*⁶¹ ("Parekh"):

"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 that 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."

28. Then, so the argument goes, one must also have regard to the following provisions of the agreement:

"10.3.1. No remedy conferred by any of the provisions of this agreement is intended to be exclusive of any other remedy available at law, in equity, by statute or otherwise and each and every other remedy given here under or now or hereafter existing at law, in equity, by statute or otherwise."

10.3.2 The election of any party to pursue one or more such remedy shall not constitute a waiver by such party of the right to pursue any other available remedy."

12.1.1 The inclusion in this agreement of the ADR processes provided for in this clause shall not preclude any party from applying to court for an interdict,

⁵⁸ Applicant's HOA para 59 **09-13**

⁵⁹ Applicant's HOA para 65 **09-14**

⁶⁰ Applicant's HOA para 67 **09-14**

⁶¹ **Parekh v Shah Jehan Cinemas (Pty) Ltd 1980** (1) SA 301 (D) at 304E-G

a mandamus or relief of any other similar nature, provided however that the launching of an application shall not suspend or interfere with any ADR processes referred to herein”

29. Accordingly, it is contended that any reliance by the Trust on the ADR provisions is misplaced.⁶²

The Trust’s contentions

30. The Trust contends:

- 30.1 that content can be given to the requirement of a “*clean break agreement*” and that it envisaged an agreement between the Grcic group and the Mason group in which all disputes between them were finally resolved.⁶³
- 30.2 that properly interpreted “*a court order dealing therewith*” refers to a court order resolving the disputes hoped to be resolved by the clean break agreement.⁶⁴
- 30.3 that clause 6.2.1.2.2 must be understood in its proper context as ultimately requiring the final resolution of the disputes between the parties – either by agreement or resolution by the court – before the Trust would be required to pay the second tranche, being the final payment.⁶⁵
- 30.4 that under the agreement, as properly interpreted, Grcic is not entitled through this application to fulfil clause 6.2.1.2.2 of the agreement and trigger payment of the second tranche.⁶⁶
- 30.5 the relevant deadlock–breaking mechanism is the resolution by a court of the disputes between the parties.⁶⁷
- 30.6 It was incumbent upon Grcic⁶⁸:
- 30.6.1 to engage with the ADR provisions; and
- 30.6.2 not to proceed with the application.

⁶² Applicant's HOA para 70 **09-50**

⁶³ AA para 14.6.3 **02-66 - 02-67**

⁶⁴ Respondents' Note for Argument para 12 **09-54**

⁶⁵ Respondents' Note for Argument para 13 **09-54**

⁶⁶ Respondents' Note for Argument para 14 **09-54**

⁶⁷ Respondents' Note for Argument para 15 **09-55**

⁶⁸ Respondents' HOA para 13 **09-25**

Oral Argument

Counsel for Grcic: A summary of certain relevant submissions

31. Counsel for Grcic emphasised that the proper approach to the interpretation the agreement and clause 6 is that captured by Unterhalter AJA (as he then was) in *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others*⁶⁹.
32. With those rules of interpretation in mind, he carefully deconstructed clause 6, submitting that clause 6.2.1 was an enabling clause relating to two separate (stand-alone) events, the earlier of which could “trigger” payment of the second tranche. On this basis, as I understood him, the court need not concern itself with the conclusion of the “clean break agreement” and could make an order dealing with payment.
33. He also argued that for an arbitral dispute to exist between the parties, there has to be a “real dispute” which I understood him to mean more than simply a notification by one party that there is a “dispute”.
34. Following upon his written submissions regarding the point made by Didcott J in *Parekh*, he referred me to *Ramsden*⁷⁰, at paragraph 5.9.3, where the following is stated:

“Existence of a dispute between the parties

There can only be a reference to arbitration where there is a dispute between the parties to refer to arbitration. Before granting a stay of proceedings and referring a matter to arbitration, a court is thus obliged to determine whether there is dispute and whether the dispute falls within the jurisdiction of the arbitration agreement, alternatively decide whether the whole cause or matter or only particular questions or issues of fact have to be tried before an arbitrator. A court should thus not grant a stay of court proceedings and refer a matter to arbitration without the benefit of an adequate delineation (crystallisation) of the issues in dispute.”

35. Further, he argued that the contention by the Trust that - clause 6.2.1.2.2 must be interpreted to require the resolution of the disputes between the Grcic group and the Mason group, before the Trust is obliged to pay - incorrectly conflates the notion of a

⁶⁹ **Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others**, (470/2020) [2021] ZASCA 99 (09 July 2021) at para 25

⁷⁰ Peter Ramsden “The Law of Arbitration: South African and International Arbitration” para 5.9.3 “Existence of a Dispute between the Parties”

dispute with the claims relied upon by the Trust. This approach, he contended, is entirely in conflict with the ordinary language of the clause.

36. He argued further that the "*interpretation*" dispute contended for by the Trust was inappropriate because the "*clean break*" disputes have effectively all been resolved.
37. In this regard, he drew attention to JLM6, being a letter from the attorneys for Grcic (and others⁷¹) addressed to the attorneys for Mason (and another⁷²) in which they advised that their clients "*will not be pursuing any and all claims they have against them relating to the 'clean break agreement' disputes*",(which involved five listed matters) and stated further that: "*(O)ur clients therefore consider the 'clean break agreement' items as closed and no longer in dispute*". The letter concludes as follows: "*Although our clients will not be pursuing their claims and monies owing to them by your clients, this does not render any claims they might have had invalid. To this end, we hereby reserve all their rights thereto including raising same as a counterclaim by way of off-set, against any claims that your clients may feel they are entitled to bring against them, which claims our clients deny.*"⁷³
38. Notwithstanding the stated reservation of rights, he argued that Grcic had abandoned his claims, and that the reservation of rights is a "*shield not a sword*".
39. He also argued, if I understood him correctly, that if one has regard to the following averment made by Mason in his answering affidavit, the Mason group has no further claims:

*"The point I make is that when the application was launched, both groups knew exactly what the other contended for and those claims have been the subject matter of attempted settlement – but without success. I can say at this time that the Mason group has no further claims against the Grcic group and I would be very surprised if the Grcic group has any further claims against the Mason group that it has not already identified and which have been the subject matter of settlement negotiations."*⁷⁴
40. He contended that all that was then left is the claim which is the subject of the action in the High Court between Solutions (plaintiff) and Storage (defendant). Even then, he highlighted the fact that, neither of these entities is party to this application.

⁷¹ Also, CSSI South Africa (Pty) Ltd, Cypherwave Storage Solutions Holdings (Pty) Ltd

⁷² Cypherwave Business Solutions (Pty) Ltd

⁷³ **02-83 - 02-84**

⁷⁴ AA **02-69**, para 14.14

41. He submitted that there are therefore no disputes between the parties to the agreement which are to be referred to arbitration.
42. In addition, he contended that a factor which also weighs against the validity of the interpretation of clause 6.2.1.2.2, contended for by the Trust, is that its practical effect might be that payment of the second tranche may never become due.
43. Further, that had the parties intended to make the “*order dealing therewith*” subject to the resolution of the claims by the court, they would have said so. He then contended that the proper interpretation of the words “*court order dealing therewith*” relate only to the payment of the second tranche and to nothing else. In addition, that the only parties concerned with this are Grcic, the Trust and J & J.
44. By contrast, he argued that implicit in the adoption of the Trust’s interpretation would mean that one would have to (improperly) “*read-into*” clause 6.2.1.2.2 the following:

“A court order dealing therewith” means ‘all and every other claim of persons who are not party to this agreement’”.
45. He submitted that the interpretation dispute might be considered simply as a mechanism used by the Trust to avoid the making of payment to Grcic.
46. With regard to clause .12.1.1 of the agreement, relied upon by Grcic⁷⁵, he tentatively argued, without authority, that since payment involved the taking of action by the fifth respondent (who has given notice of intention to abide⁷⁶), that might fall within the ambit of a *mandamus*, being an exception to the ADR provisions.

Counsel for the Trust – A summary of certain relevant submissions.

47. Counsel for the Trust did not disagree with the approach to interpretation captured by Unterhalter AJA (as he then was) in *Capitec Bank Holdings* but emphasised that it was an approach more sophisticated than that contended for by Counsel for Grcic.
48. He submitted that in deciding whether an arbitral dispute existed which could be subjected to the ADR provisions, one should have regard to the definition of a dispute in paragraph 2.8 of the agreement⁷⁷. He also took the view that, contrary to the

⁷⁵ RA para 2.4, **02-89-90**

⁷⁶ **03-12 - 03-14**

⁷⁷ **02-16**

submissions made by counsel for Grcic, *Ramsden* was in favour of the Trust and not Grcic.

49. He further submitted that the approach contended for by Grcic's counsel amounted to an argument that the Trust's interpretation of clause 6 was "*so bad*" that it could be decided by this court without more. That is unjustified. He submitted that Grcic had not cited any authority for the proposition that the court can act as a sort of "filter" in this regard.
50. He contended that the mere raising of a dispute in a letter is sufficient for the purposes of bringing the ADR provisions into play.
51. He submitted that Grcic's attorney had not dealt with the real dispute raised by the attorney for the Trust before the application was served and most importantly, that Grcic had failed to put up any facts why this court should not, in the exercise of its discretion, order a stay of these proceedings.
52. With regard to the provisions of clause 12.1.1 of the agreement (which states that the inclusion of the ADR processes provided for, shall not preclude any party from applying to court to court for an interdict, a mandamus or relief of a similar nature), the relief contemplated is interim in nature and inapplicable in the instant case. Grcic has not made out a case for the granting of an interdict or mandamus. The relief which the Grcic seeks is for the payment of money.
53. On this basis, he submitted that the dispute concerning the interpretation of the agreement must be determined under the agreed ADR process. Further, that it is unnecessary (and would be inappropriate), for this court to determine the interpretation issue. In these circumstances, he submitted that the appropriate order is for a stay of the proceedings to allow the agreed ADR processes to occur.

The legal principles applicable to arbitration agreements

54. A litigant is at liberty to proceed by way of proceedings in court even if there is an arbitration agreement between it and the opposing litigant. If that happens, the proceedings will continue unless the opposing party objects to that occurring.⁷⁸

⁷⁸ *Parekh* at 305G

55. While an arbitration clause does not oust the court's jurisdiction and does not prevent an applicant from instituting these proceedings in court, a respondent is entitled to raise the arbitration agreement and, in doing so:

*"The onus of satisfying the Court that it should not, in the exercise of its discretion, refer the matter is on the party who instituted the legal proceedings."*⁷⁹

56. The court's discretion to refuse arbitration must be exercised judicially and only when a "very strong case" has been made.⁸⁰
57. There are various factors that a court may consider in exercising its discretion.⁸¹
58. The courts must respect a choice by the parties to refer a dispute to arbitration, and "courts should be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently".⁸²
59. The pre-conditions to arbitration – here comprising a dispute notice, negotiation and mediation – are all considered part of the arbitration agreement and are enforceable as such.⁸³
60. The Supreme Court of Appeal has on numerous occasions now, affirmed a strong pro-arbitration stance,⁸⁴ even in the face of disputes about the existence of the arbitration agreement itself.⁸⁵

Application of the law to the facts in respect of a stay of proceedings

⁷⁹ **Universiteit van Stellenbosch v J A Louw (Edms) Bpk** 1983 (4) SA 321 (A) at 333H.

Foize Africa (Pty) Ltd v Foize Beheer BV and Others 2013 (3) SA 91 (SCA) at para 30 approving the raising of an arbitration clause by way of a dilatory plea or in an answering affidavit in motion proceedings

⁸⁰ **Universiteit** at 334A

⁸¹ **Foize** note 13 at paras 27 and 28 in which various such factors are set out.

RA para 2.3. **02-89**

⁸² **Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another** 2009 (4) SA 529 (CC) at paras 219 and 235

⁸³ **Richtown Construction Co (Pty) Ltd v Witbank Town Council and Another** 1983 (2) SA 409 (T) at 414H-415A – "It is quite clear that subclauses (1) [decision by engineer] and (2) [mediation] are intimately interlinked with the whole procedure of settlement of disputes, the final step being subclause (3) [arbitration]" – and **Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality** 1984 (1) SA 571 (A) at 582D-F – "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 submitted to the engineer".

⁸⁴ **Zhongji Development Construction Engineering Co Ltd v Kamoto Copper Co Sarl** 2015 (1) SA 345 (SCA) at paras 29 and 30 – "South African courts not only have a legal but also a socio-economic and political duty to encourage the selection of South Africa as a venue for international arbitrations" – **Canton Trading 17 (Pty) Ltd t/a Cube Architects v Hattingh NO** 2022 (4) SA 420 (SCA) at para 36.

⁸⁵ **Canton** above at para 36.

61. Grcic launched these proceedings without any attempt to engage in the ADR process. He did not give written notice of the dispute, call for negotiation of the dispute, or seek mediation and then arbitration of the dispute.⁸⁶
62. Before the Trust filed its answering affidavit, its attorney raised the dispute with Grcic's attorney in writing and advised that this dispute was to be subjected to the agreed ADR process under the agreement.⁸⁷
63. Grcic did not engage with the dispute or explain why it should not be referred to the agreed ADR process.⁸⁸
64. The Trust then filed its answering affidavit and reiterated the existence of the dispute, referred to the agreed ADR process and contended that the dispute determined under that process.⁸⁹
65. In his replying affidavit, Grcic does not deny the agreement to arbitrate or set out any facts why the court should exercise its discretion against a referral to arbitration.
66. Instead, Grcic simply denies that there is any "*dispute*".⁹⁰

Findings

67. Having considered the relevant facts and the application of the law to those facts I make the findings set out below.
68. There does exist an arbitral dispute that has been properly delineated concerning the meaning, nature and content (interpretation) of the "*court order dealing therewith*" under clause 6.2.1.2.2 of the agreement and Grcic's entitlement to payment at this stage.
69. This dispute falls within the jurisdiction of the agreement, under clause 2.8, which therein defines a dispute as a "*dispute, argument or quarrel of any nature whatsoever between the PARTIES in relation to, or in connection with, their right and obligations in terms of this AGREEMENT, ... or the interpretation of any provision contained in this AGREEMENT...*"

⁸⁶ AA para 3 **02-44-48**

⁸⁷ AA JLM1 **02-72** at para 11 **02-75**

⁸⁸ AA JLM2 **02-76**

⁸⁹ AA **02-44-02-48** para 3 (in particular paras 3.1 and 3.7), **02-51** para 6.2 and **02-70** para 14.16 – 14.17

⁹⁰ RA **02-89** para 2.2-2.3, **02-90** para 3.1-3.2

70. With regard to any reliance by the applicant on clause 12.1.1 of the agreement, the relief sought in this application is not of this kind.⁹¹ A prohibitory interdict seeks that a respondent refrains from doing something while a mandatory interdict seeks that a respondent does something.⁹² Neither interdict is a mere monetary claim. The relief intended in clause 12.1.1 is in any event interim in nature which does "not suspend or interfere with any ADR processes referred to" in the agreement. The applicant does not seek interim relief or address any of the requirements for an interdict. Instead, it advances a monetary claim.
71. It is clear to me that the dispute is one which has been reserved by the parties for determination by the agreed ADR process under the agreement, not by this court.
72. The applicant has not made out any proper case which would give me cause, in the exercise of my discretion, to refuse arbitration.
73. It bears repeating that the applicant who bears the onus, does not deny the agreement to arbitrate or set out any facts why the court should exercise its discretion against a referral to arbitration. Grcic simply denies that there is any "dispute".
74. The pre-conditions to arbitration – here comprising a dispute notice, negotiation and mediation – are all considered part of the arbitration agreement and are enforceable as such.
75. I consider that it is appropriate that the initiation of the ADR processes should occur within a reasonable time and that a date should be set by me.
76. If the parties cannot resolve this dispute by negotiation or mediation, an arbitrator must finally determine it.⁹³

Costs

77. The ordinary rule is that costs follow the result.

⁹¹ Agreement Clause 12.1.1 **02-28**

⁹² Harms "Civil Procedure in the Superior Court" April 2024 S174 at A5.1

⁹³ Clause 12.2.1 **02-28** requires negotiation, clause 12.3.1 **02-29** requires mediation and clause 12.4.1 **02-31** requires arbitration
See also: **Makate v Vodacom Ltd 2016 (4) SA 121 (CC)** at paras 96-97. Para 97- "*The position in our common law is that an agreement to negotiate in good faith is enforceable if it provides for a deadlock-breaking mechanism in the event of the negotiating parties not reaching consensus*"

78. Whilst counsel for the Trust did not press for it, the Trust seeks an order for costs on an attorney and client scale.
79. I regard this as a form of unjustified punishment. I do not find that there has been bad faith, vexatious conduct or conduct that amounts to the abuse of the process of the court.
80. In the result, I make the following orders:
- 80.1 The Application is stayed to allow for the occurrence of the agreed alternate dispute resolution processes set out in clause 12 of the Share and Claims Purchase and Sale Agreement, concluded on 24 February 2023 ("the ADR processes") A copy of the said agreement is annex "JG1" to the founding affidavit of the applicant in these proceedings.
- 80.2 The ADR processes are to be initiated before 30 November 2024.
- 80.3 Failing the initiation of the ADR processes within the time provided, the Applicant shall be entitled to approach the court for appropriate relief on the same papers.
- 80.4 The Applicant is to pay the costs of the First to Fourth Respondents, including the costs of two counsel, on scale B.



S McCafferty AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

JOHANNESBURG

APPEARANCES

For the Applicant:

P Strathern SC

Instructed by:

Clarke Attorneys Inc.

For the Respondents

J Blou SC

Instructed by: Brian Kahn Inc.

Date of Hearing; 7 June 2024

Date of Judgment 11 October 2024