



IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

CASE NO: 4313/2024

REPORTABLE: YES	
OF INTEREST TO OTHER JUDGES: YES	
REVISED: NO	
5/03/25	[REDACTED]
DATE	SIGNATURE

In the matter between:

CSG SECURITY (PTY) LTD

Plaintiff/Applicant

and

THE ELAWINI LUXURY RESIDENTIAL ESTATE
HOMEOWNERS ASSOCIATION NPC

Defendant/Respondent

JUDGMENT

Managa AJ

Introduction

[1] This is an application for summary judgment in terms of which the plaintiff seeks a judgment in the amount of R2 357 580 plus interest at the rate of prime plus 2% per annum, calculated from 1 July 2023 to the date of payment and cost of the application on scale C.

[2] As a background, the plaintiff issued summons against the defendant for the breach of the Security Service Agreement ("the agreement"). The summons comprises two claims.

[3] The first claim relates to the supply and installation of the parameter surveillance system at the property owned by the defendant. The plaintiff rendered an invoice in the amount of R2 357 580. The defendant refused and/or failed to pay the invoice for reasons which will be addressed in the later paragraphs.

[4] The second claim relates to the defendant's decision to terminate the provision of the asset protection service component. The claim is in the amount of R494 813.15 being the loss of the nett profit that the plaintiff would have earned on a profit margin of 10% for the balance of the initial period of the agreement.

[5] The application for summary judgment is only in relation to claim 1. Claim 2 is deferred to trial. It was also repeated in argument by the applicant's counsel, Mr Fürstenburg. He correctly pointed out that claim 2 is a damages' claim and therefore requires leading of evidence.

[6] On 9 September 2024, the defendant filed a notice of intention to defend the action.

[7] On 18 October 2024, the defendant filed a plea to the plaintiff's particulars of claim. The plea set out the grounds upon which the plaintiff's action is defended. These grounds are also incorporated in the resisting affidavit filed on behalf of the defendant.

[8] For the purpose of this application, it is important to note that the defendant signed two agreements. The first one is the agreement referenced above and the second is the credit rental agreement with Sunlyn for the financing of the services

which were rendered by the plaintiff. The relationship between the two agreements is that the agreement is subject to the approval of the credit rental agreement.

The legal principles relating to Rule 32 of the Uniform Rules of the High Court

[9] Rule 32 of the Uniform Rules of Court affords the plaintiff a right to launch an application for summary judgment. Rule 32(1) provides that the application for summary judgment can only be brought under the following claims: claim based on liquid document, claim for liquidated amount of money, claim for delivery of specific movable property and/or ejectment.

[10] Rule 32(3)(b) provides that a defendant who wishes to oppose a summary judgment application on the merits, shall:

“satisfy the court by affidavit (which shall be delivered five days before the day on which the application is to be heard), or with the leave of the court by oral evidence of such defendant or of any other person who can swear positively to the fact that the defendant has a bona fide defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor.”

[11] In *Maharaj v Barclays National Bank Ltd*,¹ Corbett J held that there should be sufficient disclosure of facts by the defendant on the nature and grounds of the defence, and the defence disclosed must be *bona fide* and good in law.

“Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (a) whether the defendant has ‘fully’ disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters the

¹ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A).

Court must refuse summary judgment, either wholly or in part, as the case may be.”²
(My emphasis.)

[12] The court in *Gulf Steel (Pty) Ltd v Rack-Rite Bop (Pty) Ltd and another*³ made a finding with regard to the state of the plaintiff in an opposed summary judgment and held that:

“In view of the nature of the remedy *the Court must be satisfied that a plaintiff who seeks summary judgment has established its claim clearly on the papers and the defendants have failed to set up a bona fide defence as required in terms of the Rules of this Court. There are accordingly two basic requirements that the plaintiff must meet, namely a clear claim and pleadings which are technically correct before the Court.* If either of these requirements is not met, the Court is obliged to refuse summary judgment. In fact, before even considering whether the defendant has established a bona fide defence, it is necessary for the Court to be satisfied that the plaintiffs claim has been clearly established and its pleadings are technically in order.”⁴ (My emphasis.)

[13] The purpose of a summary judgment was laid down in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*⁵ and the court held that:

“*[T]he summary judgment procedure was not intended to ‘shut (a defendant) out from defending’, unless it was very clear indeed that he had no case in the action.* It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.”⁶ (My emphasis.)

The verifying affidavit

[14] The plaintiff’s Director, Ms Charlene Zeelie, deposed to a verifying affidavit and confirmed the content of the particulars of claim. She confirmed that she is the director of the plaintiff and has under her control all the plaintiff’s records, accounts and other documents relating to the agreement.

² *Ibid* para 126.

³ 1998 (1) SA 679 (O).

⁴ *Ibid* para 183.

⁵ *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* [2009] ZASCA 23; 2009 (5) SA 1 (SCA).

⁶ *Ibid* para 31-33.

[15] She confirmed that the defendant is indebted to the plaintiff in the amount of R2 357 580 plus interest and costs on scale C as set out in the particulars of claim.

[16] Finally, she confirmed that claim 1 is an easily ascertainable amount which falls within Rule 32 and that the defendant has no *bona fide* defence to the claim. I now turn to the defences raised by the defendant in opposition to the summary judgment application.

The defendant's submissions

[17] The defendant raised four grounds to resist the application for summary judgment. The first ground is that the plaintiff has failed to join Sunlyn to the action. The second ground is that the rental credit application was made without a special resolution by the board members of the defendant and therefore the agreement is invalid. The third ground is that the representative of the defendant, Ms Casey, did not have authority to make the rental credit application or conclude the agreement. The fourth ground is that the court lacks jurisdiction because there is an arbitration clause in the agreement.

[18] It is not necessary to deal with all the grounds raised by the defendant as the dispute can be decided on the question of jurisdiction.

The court lacks jurisdiction because there is an arbitration clause

[19] The arbitration clause reads as follows:

"14. DISPUTE RESOLUTION

14.1 The following procedures shall govern the resolution of any controversy, dispute, or claim between the parties arising out of or in interpretation, performance, breach or alleged breach of this Agreement.

14.1.1 Negotiations

The Parties shall promptly attempt to resolve any disputes by negotiation in the normal course of business. If after good faith efforts, the dispute is not resolve, either Party may request in writing that the dispute be resolve via Executive Consultation as set out in clause 14.1.2 below.

14.1.2 Executive Consultation

For disputes submitted to Executive Consultation, each party shall designate a senior company official with authority and responsibility for attempting to resolve the matter. The party initiating the claim shall provide, in addition to documents supporting the claim, a brief summary of the claim, its perception of the position of the Parties and any perceived barriers to settlement of the dispute. The summary may be submitted directly to the designated senior company official. Within 30 (thirty) days after delivery of the claim summary, the parties shall meet and attempt to resolve the dispute. If the dispute is not resolved within 45 (forty five) days from submission of the claim summary, or such other time as agreed between the parties, the claiming party may proceed as set out in clause 13.1.3. below.

14.1.3 Arbitration

Any dispute between the Parties arising out of or relating to the Agreement that has not been resolved by Executive Consultation shall be finally resolved in accordance with the rules of the Arbitration Foundation of Southern Africa ("AFSA"), by an arbitrator agreed to between the parties. Failing such agreement by an arbitrator appointed by AFSA, provided that there shall be an appeal to a panel of 3 (three) arbitrators appointed in the same manner as the arbitrator. The arbitration shall be held in Johannesburg, unless otherwise agreed between the parties. The decision of the initial arbitrator, in the event that no appeal is timeously lodged against such decision or the award by the appeal panel, shall be final and binding on the arbitration, thereafter will be litigated at the competent court of law having jurisdiction.

This clause shall not preclude any party from obtaining interim relief on a urgent basis from a court of competent jurisdiction." (My emphasis.)

[20] It is common cause between the parties that the agreement contains the arbitration clause. The only point of divergence is whether there is a dispute as envisaged in the agreement. Mr Fürstenburg referred me to two judgments. The first one is *Withinshaw Properties (Pty) Ltd v Dura Construction Co (SA) (Pty) Ltd*.⁷ He argues that without a dispute having been crystallised by way of evidence or factual basis, there is nothing to refer to arbitration. The relevant excerpt of the judgment reads as follows:⁸

⁷ *Withinshaw Properties (Pty) Ltd v Dura Construction Co (SA) (Pty) Ltd* 1989 (4) SA 1073 (A).

⁸ *Ibid* at 1079D-G.

"It does not appear, however, that there *crystalised* 'a dispute of difference between the employer or the architect on his behalf, and the contractor' within the meaning of clause 26 [arbitration clause] ...

There was no evidence that the architects gave a 'decision' or that Withinshaw or Dura at any stage requested the architects to give a decision in writing in terms of clause 26.

The factual basis for the third submission was accordingly absent, and this defence fails like the others." (My emphasis.)

[21] The second judgment is *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd*,⁹ Mr Fürstenburg argues that it is only upon a *bona fide* dispute existing, being notified or declared and then referred to arbitration, are the parties bound to arbitrate as opposed to litigate in a court.

[22] He argued that the defendant only raised the defence for the first time in the resisting affidavit and therefore there was no crystallized dispute. The question is whether failure to pay the invoice by the defendant constitutes a bona fide dispute as envisaged in the agreement. The Supreme Court of Appeal in *The Minister of International Relations and Co-operation NO and Another v Neo Thando/Elliot Mobility (Pty) Ltd and Another* ("Neo Thando"),¹⁰ stated the following:

"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."¹¹ (My emphasis.)

⁹ *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd* 1994 (1) SA 162 (A) at 169F-G.

¹⁰ *The Minister of International Relations and Co-operation NO and Another v Neo Thando/Elliot Mobility (Pty) Ltd and Another* [2025] 1 All SA 31 (SCA).

[23] In this case, the plaintiff sent a letter of demand on 7 December 2023, affording the defendant an opportunity to make payment of R 2 357 580.00 within 7 (seven) days from the date of receipt of the letter. The defendant failed and/or refused to make payment of the invoice. The plaintiff issued summons on 23 August 2024, 9 (nine) months after the letter of demand was served on the defendant. Unlike in *Neo Thando*, the delay is unreasonable enough to infer that the defendant intended to reject the demand for payment of invoice. Therefore, the defendant's failure to pay the invoice constitutes a *bona fide* dispute which is arbitrable. The fact that the plaintiff is of the opinion that it has a prospect of success against the defendant is not a compelling reason for the court to bypass the arbitration clause in the agreement.

[24] The second question is whether the court can exercise its inherent powers to hear the application despite the arbitration clause? I deal with the legal principle in the subsequent paragraphs.

[25] The principle is set out in LAWSA,¹² which reads as follows:

"Extent of court's discretion not to enforce the arbitration agreement

The onus on the party wishing to avoid arbitration of showing good cause is not easily discharged. Moreover, the discretion of the court to bypass the arbitration clause must be judicially exercised and there should be compelling reasons for refusing to hold a party to its agreement to refer disputes to arbitration. In effect, this discretion is seldom exercised. Instances in which it has been exercised include allegations of fraud, where the arbitrator is not to be trusted or is incapable of giving a decision, and where there has been misconduct on the part of the arbitrator. If a party to an arbitration agreement agrees that a resident engineer employed by one of the parties is to act as arbitrator, then, even though that resident engineer is virtually a judge in his or her own cause, the court will give effect to the provision in the contract. Generally speaking, however, it is quite foreign to the concept of arbitration that one of the parties to a dispute should be the arbiter of the dispute. The court may also exercise its discretion against arbitration where all the parties to the dispute or with an interest in the dispute are not parties to the arbitration agreement, with the

¹¹ *Ibid* at 30.

¹² Butler "Arbitration" in LAWSA 3 ed (2015) Vol 2 para 95-96.

result that arbitration may lead to a multiplicity of proceedings with the danger of conflicting decisions and increased costs. A court may also exercise its discretion in refusing to refer a matter to arbitration where the issue between the parties is exclusively a question of law. However, the mere fact that an arbitrator would be required to decide a question of law and that the arbitrator would have no authority to grant an interdict is no reason for refusing to refer the matter to arbitration. Furthermore, where a party contends that impending arbitration proceedings will be invalid, it may be unrealistic and inconvenient to expect such a party to take part in the proceedings under protest, or otherwise to await the conclusion and then, if the result is against him or her, to oppose the award being made an order of court. Every consideration of convenience and justice points to the desirability of allowing such a party to seek an order preventing the allegedly futile proceedings before they are commenced.

The court may however be inclined to grant a stay in order to avoid adjudicating a doctrinal dispute between members of a religious denomination or becoming entangled in doctrinal issues.” (My emphasis.)

[26] In *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd*, Colman J explained that the onus to show good cause is not easily discharged. He stated that:¹³

“There are certain advantages, such as finality, which a claimant in an arbitration enjoys over one who has to pursue his rights in the Courts; and one who has contracted to allow his opponent those advantages will not readily be absolved from his undertaking. In *Rhodesian Railways v Mackintosh*, 1932 AD 359, WESSELS, A.C.J. (as he then was), *held that the discretion of the Court to refuse arbitration under a submission was to be exercised judicially, and only when a ‘very strong case’ for its exercise had been made out* (see p. 375). The Court was there acting under a different statute from the one before me. But the observation of WESSELS, A.C.J., is none the less apposite here, because it was based upon general principles. Similarly, in *Halifax Overseas Freighters, Ltd. v Rasno Export; Technoprominport and Polskie Linie Oceaniczne PPW. (“The Pine Hill”)*, 1958 (2) Lloyds List Law Reports 146, McNAIR, J., *held that there should be ‘compelling reasons’ for refusing to hold a party to his contract to have a dispute resolved by arbitration.* JESSEL, M.R., in

¹³ *Metallurgical and Commercial Consultants (Pty) Ltd V Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) at 391E-H.

Russel v Russel, (1880) 14 Ch. D. 411, said that the cases in which the discretion against arbitration should be exercised were 'few and exceptional'." (My emphasis.)

[27] In *Rawstorne and Another v Hodgen and Another*,¹⁴ the court held that the discretion to order that "any particular dispute referred to in the arbitration agreement shall not be referred to arbitration" is limited. An applicant seeking to avoid an agreement to resolve a dispute by arbitration should show compelling reasons for the matter to be heard in court. In *Transvaal Alloys (Pty) Ltd v Polysius (Pty) Ltd*,¹⁵ the court held that an applicant must make out a "very strong case" for the granting of an order in terms of section 3(2)(b) of the Arbitration Act 42 of 1965.

[28] The constitutional court in *Crompton Street Motors CC v Bright Idea Projects 66 (Pty) Ltd*¹⁶ explained the application of section 6(2) of the Arbitration Act in the following terms:

"[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. In *Universiteit van Stellenbosch* 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. 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'." (My emphasis.)

[29] Mr Fürstenburg argued that a claim for payment for the services rendered does not amount to a dispute and therefore the matter should be heard by the court.

¹⁴ *Rawstorne and Another v Hodgen and Another* 2002 (3) SA 433 (W) para 13-14.

¹⁵ *Transvaal Alloys (Pty) Ltd v Polysius (Pty) Ltd* 1983 (2) SA 630 (T) at 656D-E.

¹⁶ *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.

I do not agree with the legal proposition because failure to pay for services rendered (either by express or implied rejection) constitutes a breach of the agreement which is arbitrable. The fact that the plaintiff has a prospect of success in the arbitrable dispute is not the basis for the court to suspend the arbitration clause. There must be a *very strong case* for the court to suspend the arbitration clause and hear the matter. The *very strong case* does not relate to the prospect of success in the merits. It relates to reasons such as the ones referenced in paragraph 25 above.

[30] The threshold for the court to exercise the discretion to suspend the arbitration clause is very high and it is seldom exercised. There must be compelling reasons lest it undermines the integrity of the entire contractual regime which is important to both the private and public sector. The onus is on the party. Apart from the lack of *bona fide* defence, there are no other valid reasons advanced for the court to bypass the arbitration clause.

[31] Lastly, the plaintiff's argument that there was no dispute between the parties because it was not referred to arbitration is not correct. Clause 14 of the agreement refers to the claiming party. In other words, the innocent party who seeks to enforce its contractual obligation. The claiming party is the plaintiff and should have therefore referred the dispute to arbitration. The fact that the plaintiff or defendant did not refer the dispute to arbitration does not mean that there is no *bona fide* dispute between the parties.

[32] In conclusion, I find that the plaintiff should have referred the dispute to arbitration.

[33] I therefore make the following orders:

1. The action proceedings against the plaintiff is stayed;
2. The plaintiff is ordered to refer the dispute to arbitration as provided in Clause 14 of the agreement; and
3. The plaintiff is ordered to pay the costs of the defendant on scale C



P MANAGA

ACTING JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION, MBOMBELA

Appearances

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