



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

CASE NUMBERS: 2023-076450; 2023-079688

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
18/06/2025	[Redacted Signature]
DATE	SIGNATURE

In the application between:

**SAMSUNG SDS GLOBAL SCL SOUTH AFRICA
PROPRIETARY LIMITED**

Applicant

And

RHENUS LOGISTICS PROPRIETARY LIMITED

Respondent

In re:

**SAMSUNG SDS GLOBAL SCL SOUTH AFRICA
PROPRIETARY LIMITED**

Plaintiff

and

RHENUS LOGISTICS PROPRIETARY LIMITED

Defendant

In the counter-application between:

RHENUS LOGISTICS PROPRIETARY LIMITED

Applicant

and

**SAMSUNG ELECTRONICS SOUTH AFRICA
PROPRIETARY LIMITED**

First Respondent

**SAMSUNG SDS GLOBAL SCL SOUTH AFRICA
PROPRIETARY LIMITED**

Second Respondent

**RAPS K9 LAW ENFORCEMENT
PROPRIETARY LIMITED**

Third Respondent

**MENZIES AVIATION SOUTH AFRICA
PROPRIETARY LIMITED**

Fourth Respondent

**WORLDWIDE FLIGHT SERVICES
PROPRIETARY LIMITED**

Fifth Respondent

In re:

**SAMSUNG ELECTRONICS SOUTH AFRICA
PROPRIETARY LIMITED**

Plaintiff

and

RHENUS LOGISTICS PROPRIETARY LIMITED

First Defendant

**RAPS K9 LAW ENFORCEMENT
PROPRIETARY LIMITED**

Second Defendant

**MENZIES AVIATION SOUTH AFRICA
PROPRIETARY LIMITED**

Third Defendant

**WORLDWIDE FLIGHT SERVICES
PROPRIETARY LIMITED**

Fourth Defendant

And in re:

**SAMSUNG SDS GLOBAL SCL SOUTH AFRICA
PROPRIETARY LIMITED**

Plaintiff

And

RHENUS LOGISTICS PROPRIETARY LIMITED

Defendant

JUDGMENT

PEARSE AJ:

AN OVERVIEW

1. This matter concerns how appropriately and effectively to deal with a proliferation of action/arbitration and application proceedings arising out of a theft of a consignment of goods. There is a delictual action by a plaintiff against four defendants alleged to be liable for the loss. There are also a contractual arbitration and a contractual action by a related plaintiff against one of the defendants alleged to be liable for the loss. That defendant intends to join the other defendants as third

parties in each of the actions and also, in a further action, to seek an indemnification or contribution by those defendants in respect of any adverse award in the arbitration.

2. The plaintiff in the contractual proceedings applies to stay its action in favour of its arbitration. The defendant in both the delictual and the contractual proceedings counter-applies to halt the arbitration and consolidate the existing actions. The application and counter-application are considered and decided in this judgment.
3. As regards the application, I find that the primary legal basis on which it is founded is unavailable to the plaintiff but this court's inherent jurisdiction to protect and regulate its process (including the power to stay proceedings where doing so serves the interests of justice) is sufficiently discernible as an alternative legal basis to warrant an adjudication of the merits of the application. In the circumstances of this case, I do not regard the plaintiff as having breached (or remained in breach of) an arbitration agreement with the defendant, or as having waived or abandoned its right to arbitrate, when, at about the same time and out of caution, it referred an arbitration and initiated an action in respect of the same claim. Staying the action in favour of the arbitration gives effect both to the principle of party autonomy in the conclusion of arbitration agreements and to the constitutional right of access to courts. In addition, at this stage of the proceedings, before close of pleadings in the actions or the arbitration and before the existence of any *lis* between the defendant and any third party, it is unclear whether the defendant would be disproportionately inconvenienced by prioritising arbitration over action. If anything

may be predicted at this stage, it is that the third parties would probably be less inconvenienced by prioritising arbitration over action. On balance, I consider that the interests of justice would be served by staying the action. I therefore exercise my discretion in favour of granting the relief sought in the application.

4. As regards the counter-application, I am mindful of the defendant's submission that, should its application fail, three or even four proceedings could fall to be conducted and determined against the same factual backdrop and expose the parties and the court to risks of duplicated proceedings and conflicting findings. Similarly compelling is the submission that the interests of achieving convenience and averting substantial prejudice could be served by having all the parties' disputes resolved in a single set of judicial proceedings. But these concerns are ameliorated by a likelihood that the success of the application will bring about a single, expeditious and final arbitral determination of the central contractual dispute between plaintiff and defendant. Save for that observation, as noted in paragraphs 79 to 82 and 87 to 96 below, competing considerations of convenience and prejudice, including those of the court itself, require a multi-faceted and nuanced enquiry in this matter. For reasons of prematurity, given that pleadings are yet to close in the various proceedings and there is not yet a *lis* between the defendant and any third party, I am of the view that such an enquiry would not properly be undertaken at this time. And I am unpersuaded that the defendant shows good cause to end the arbitration. I therefore exercise my discretion in favour of refusing the relief sought in the counter-application.

THE PARTIES

5. Samsung Electronics South Africa Proprietary Limited (**Samsung ESA**) is the plaintiff in the first action (paragraph 18 below) and a respondent in the counter-application (paragraph 34 below).
6. Samsung SDS Global SCL South Africa Proprietary Limited (**Samsung SDS**) is the plaintiff in the arbitration (paragraph 20 below) and the second action (paragraph 21 below), the applicant in the application (paragraph 32 below) and a respondent in the counter-application.
7. These Samsung parties are members of a group of companies that manufactures and distributes electronic devices such as mobile telephones.
8. Rhenus Logistics Proprietary Limited (formerly World Net Logistics Proprietary Limited) (**Rhenus**), a provider of aviation logistics services, is a defendant in the first action, the arbitration and the second action, the respondent in the application and the applicant in the counter-application.
9. RAPS K9 Law Enforcement Proprietary Limited (**RAPS**), a provider of aviation security services, is a defendant in the first action and a respondent in the counter-application.

10. Menzies Aviation South Africa Proprietary Limited (**Menzies**), a provider of aviation logistics services, is a defendant in the first action and a respondent in the counter-application.
11. Worldwide Flight Services Proprietary Limited (**WFS** or **Worldwide**), a provider of aviation logistics services, is a defendant in the first action and a respondent in the counter-application.
12. The context sketched below is not disputed on the papers or appears from documents that are not challenged in these proceedings.

THE CONTEXT

13. Samsung SDS and Rhenus concluded a written logistics services agreement on 01 July 2015 (**the Rhenus agreement**). The joint practice note referred to in paragraph 41 below records an understanding that, in terms of that agreement, *“Rhenus would be liable to pay compensation to Samsung SDS for cargo lost in transit in defined circumstances;^[1] and disputes arising out of the agreement would be resolved by arbitration in accordance with the rules of AFSA.”²* The phrase

¹ Clause 9.6 provides that, “[n]otwithstanding 9.1, LSP [Rhenus] indemnifies the SDS in relation to:

- 9.6.1. any damage to the Product(s) which occurs whilst such Product(s) are under LSP’s custody due to gross negligence; and
- 9.6.2. any loss/damage/costs/expenses arising to the Product(s) from the dishonesty or willful negligence of any employee, contractor or agent of LSP”.

² In relevant part, clause 19 provides that:

“19.2. Any dispute or difference of any nature whatsoever arising out of or in relation to this Agreement on any manner incidental thereto or any claim, cross-claim, counter-claim or

"[a]ny dispute or difference" is of wide amplitude and the word "shall" signifies that a referral to arbitration is peremptory.³

14. It appears that on 15 August 2020 part of a consignment of mobile telephones in transit from Vietnam via the United Arab Emirates was stolen at OR Tambo International Airport (**ORT**).
15. The record includes exchanges of correspondence between Samsung SDS, Rhenus and others in the period November 2020 to August 2023 relating to the theft and resultant loss. Since these communications are marked without prejudice, I disregard their contents for purposes of this judgment. The record also contains with-prejudice documents disclosing a dispute between Samsung SDS and Rhenus as regards whether certain trading terms and conditions were of application to their contractual relationship.
16. Besides the pleadings traversed in the paragraphs that follow, I am unaware of any other pleas and/or replications in the action and arbitration proceedings between

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- 19.3. *set off regarding any right, liability, act or omission of any of the Parties hereto shall be referred to arbitration, unless mutually settled in an amicable way.*
If the dispute cannot be settled through friendly consultation within twenty (20) days after written notice of the dispute is first given, all disputes, controversies, or differences arising out of or in relation to or in connection with this Agreement or for the breach thereof shall be finally settled by arbitration in Johannesburg, South Africa in accordance with the current Rules of Arbitration Foundation of Southern Africa. The award rendered by the arbitrator(s) shall be final and binding upon the Parties."

³ *Industrial Development Corp of SA Ltd and another v Kalagadi Manganese (Pty) Ltd (661/2024) [2025] ZASCA 70 (30 May 2025) [11]*

the parties. My understanding is that pleadings are yet to close in each of the proceedings.⁴

THE LITIGATION

The Action and Arbitration Proceedings

17. Samsung SDS' attorneys informed Rhenus' attorneys on 26 July 2023 of Samsung SDS' intention to refer its dispute with Rhenus for determination in arbitration proceedings.

18. First, however, Samsung ESA initiated an action against Rhenus, RAPS, Menzies and WFS, under case number 2023-076450, on 02 August 2023 (**the Samsung ESA action**). The cause of action is delictual in nature. The allegations pleaded in the particulars of claim include that:

18.1. *"On arrival at OR Tambo International Airport representatives of Rhenus, Raps and Menzies met the shipment in order to carry out and supervise the splitting and further transport of the goods contained therein" (para 12.2).*

⁴ This understanding was confirmed by senior counsel who appeared at the hearing for the Samsung parties, Rhenus and WFS.

- 18.2. *"While the splitting of the shipment was taking place, two employees of Raps, namely ... and ... stole two pieces containing 1 070 devices by moving them into the Menzies warehouse and then moving them to the land side using a roller bed" (para 12.5).*
- 18.3. *"The theft of the two pieces was carried out with the knowledge and co-operation of all of the employees of Rhenus, Raps and Menzies who attended the offloading, transport and breaking down of the consignment, and by the WFS employee who loaded the stolen pieces onto a Raps vehicle, all acting in collusion with each other to achieve the common purpose of carrying out the theft" (para 13).*
- 18.4. *"The plaintiff's loss has been caused by the intentional unlawful conduct of the first to fourth defendants' employees described herein" (para 15).*
- 18.5. *"The conduct of the relevant employees of the first to fourth defendants is objectively closely connected to the carrying out of their employment duties and the scope of their employment obligations" (para 19).*
- 18.6. *"The plaintiff has accordingly suffered a loss amounting to \$956 611.76 as a consequence of the unlawful and intentional conduct of the first to fourth defendants' employees, for which the first to fourth defendants are vicariously liable" (para 22).*

19. The combined summons in the Samsung ESA action was served on Menzies on 03 August 2023.

20. It seems that Samsung SDS referred its dispute against Rhenus for arbitration, under AFSA reference number S.383, on 10 August 2023 (**the Samsung SDS arbitration**).⁵ (The referral, including a statement of claim and certain related documents, appears to have been copied by Samsung SDS' attorneys to Rhenus' attorneys.) Although I have not had sight of the pleading, the cause of action is understood to be contractual in nature. And it may be gleaned from paragraph 28 of the affidavit referenced in paragraph 32 below that the allegations pleaded in the statement of claim include that:

20.1. On 05 August 2020, acting in terms of the Rhenus agreement, Samsung SDS engaged Rhenus to provide services for inbound transportation and perform import clearance in relation to nine Samsung SDS pieces documented on a pleaded air waybill.

20.2. Rhenus employed the services of RAPS to assist it in rendering the inbound transportation and custom clearance services.

⁵ I make no finding as regards when the Samsung SDS arbitration was referred.

- 20.3. On 15 August 2020 and at ORT two of the pieces, consisting of 1,070 mobile phones, were stolen during the course of unloading and unpacking the goods.
- 20.4. The theft was carried out with the knowledge and cooperation of employees of Rhenus, RAPS and Menzies acting in collusion with each other to achieve the common purpose of carrying out the theft.
- 20.5. The stolen devices, which have not been recovered and are permanently lost, have a landed value of \$956 611.76.
- 20.6. The loss of such devices is loss arising to “*Products*” from the dishonest and wilful conduct of an employee and of a contractor or agent of Rhenus as contemplated in clause 9.6.2 of the Rhenus agreement; hence Rhenus is liable to indemnify Samsung SDS in relation to the loss of the devices.
21. It seems that Samsung SDS initiated an action against Rhenus, under case number 2023-079688, on 11 August 2023 (**the Samsung SDS action**).⁶ Although I have not had sight of the pleading, the cause of action is understood to be contractual in nature. And it may be gleaned from paragraph 28 of the affidavit referenced in paragraph 32 below that the allegations pleaded in the particulars of claim include those set out in paragraph 20 above.

⁶ I make no finding as regards when the Samsung SDS action was initiated.

22. The combined summons in each of the Samsung ESA action and the Samsung SDS action (**the Samsung actions**) was served on Rhenus on 11 August 2023.
23. The statement of claim and certain related documents in the Samsung SDS arbitration were emailed by AFSA to Rhenus on 14 August 2023.
24. It is unclear whether Rhenus delivered notice of intention to defend the Samsung SDS arbitration.
25. On 15 August 2023 Samsung SDS' attorneys reiterated to Rhenus' attorneys Samsung SDS' intention to pursue the Samsung SDS arbitration against Rhenus, having initiated the Samsung SDS action as a precautionary means of interrupting prescription. In relevant part, the letter reads as follows:

"3 *We record that the dispute between Samsung SDS and Rhenus Logistics is arbitrable, and we consider that the referral thereof on 10 August 2023 interrupted the running of the statutory prescription period of three years. This notwithstanding, out of an abundance of caution, the High Court proceedings were commenced by Samsung SDS in order to ensure that the running of the statutory prescription period was interrupted.*

4 *Considering the above, our suggestion is that the parties abide by the AFSA dispute resolution process and avoid the incurrence of any further unnecessary costs associated with the High Court proceedings."*

26. On or about 16 August 2023 Rhenus delivered notices of intention to defend the Samsung ESA and Samsung SDS actions.
27. On 21, 28 and 30 August 2023 WFS, RAPS and Menzies delivered notices of intention to defend the Samsung ESA action.
28. By letter dated 06 September 2023 Rhenus' attorneys responded to Samsung SDS' attorneys' letter referred to in paragraph 25 above stating that *"our client will only agree to proceed with arbitration through AFSA on the condition that all relevant parties are joined to the proceedings."* In relevant part, the letter proceeds as follows:
- 28.1. *"2 pieces [of the consignment], being the devices in question, were not loaded onto our client's truck but were removed by employees of Menzies Aviation and redirected to Warehouse 19"* (para 4.8.5).
- 28.2. *"The devices were thereafter loaded by an employee(s) of Worldwide Flight Services ('WFS') into a RAPS Security Group ('RAPS') vehicle operated by 2 RAPS employees"* (para 4.8.7).
- 28.3. *"The RAPS employees then left the airport with the devices in their vehicle"* (para 4.8.8).

- 28.4. *“The conduct of Menzies Aviation, WFS and RAPS’ employees gave rise to the loss of the devices and damages, or losses suffered by your clients” (para 4.8.11).*
- 28.5. *“Neither Rhenus nor its employees were at fault for your client’s loss. Even if there was a claim (which is denied), it would be excluded or limited under the aforementioned STCs” (para 5).*
- 28.6. *“As such, we will not agree to stay the proceedings unless and until all the relevant parties are joined to the arbitration proceedings” (para 6).*
29. A related exchange of correspondence between the attorneys occurred between 12 September and 17 October 2023.
30. Meanwhile, Menzies’ plea in the Samsung ESA action had been delivered on or about 12 September 2023. It raises special and general defences to the claim that are irrelevant to these proceedings.

The Application Proceedings

31. In October and November 2023 an impasse was reached in exchanges between the attorneys – with Samsung SDS maintaining that its arbitration should proceed and its action should be stayed by agreement or order and Rhenus countering that *“[i]t is our intention to plead in the High Court actions and thereafter to regard those*

proceedings as the operative dispute resolution process unless your client should take steps to prevent that course of action."

32. On 29 February 2024 Samsung SDS launched an application against Rhenus, under case number 2023-079688, seeking to enforce the agreement underpinning the Samsung SDS arbitration (**the arbitration agreement**) and stay the Samsung SDS action pending the final determination of the Samsung SDS arbitration (**the Samsung SDS application**). Material contentions set out in the founding affidavit in that application include the following:

32.1. *"Samsung SDS instituted the action proceedings out of caution in order to make sure that it interrupted prescription. It communicated that fact to Rhenus, and always made clear that it considered that the dispute should be resolved in arbitration and that it intended to pursue arbitration proceedings" (para 11).*

32.2. *"Samsung SDS ... contends that Raps, Menzies and WFS are not necessary parties to the dispute between Samsung SDS and Rhenus. Samsung SDS' claim is purely contractual. Samsung SDS does not claim any relief or contribution from Raps, Menzies or WFS" (para 13).*

32.3. *"The main dispute between Samsung SDS and Rhenus is over the true terms of their agreement. Rhenus contends that certain standard terms and conditions limit its liability, while Samsung SDS contends the terms*

relied on by Rhenus are not part of the agreement. Raps, Menzies and WFS could make no contribution to the resolution of this dispute” (para 14).

32.4. *“The relief that Samsung SDS seeks should be granted because there is a valid arbitration agreement enforced between Samsung SDS and Rhenus and there is no sufficient reason [as contemplated in section 6(2) of the Arbitration Act 42 of 1965 (**the Arbitration Act**)⁷] why arbitration should not proceed” (para 18).*

32.5. *“Samsung SDS’ claim in this action is based purely on contractual provisions of an agreement between Samsung SDS and Rhenus. Samsung SDS cannot advance any such claim against any other parties and in any event does not wish to do so. ... The arbitration can competently be decided without the participation of Menzies, Raps and WFS as parties” (para 58(a)).*

32.6. *“Whether Rhenus is liable to Samsung SDS in contract does not need to be decided together with delictual issues and the contractual liability*

⁷ Section 6 provides that:

“(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.”*

question should logically be decided first. Samsung SDS is not a party to the delictual action” (para 58(b)).

32.7. *“Assuming Rhenus has in mind to institute some sort of third-party procedure to claim an indemnity from Menzies, Raps and WFS, it has not articulated what the basis for that would be. On the face of it any such claim would appear to have prescribed by now” (para 58(d)).*

32.8. *“In any event, a professed intention to pursue contributions or indemnities from third parties is not an appropriate basis to refuse to enforce a binding arbitration agreement. The parties elected to include an arbitration clause despite having agreed that liability could be imposed on Rhenus for wilful dishonest acts of contractors who are not subject to the arbitration agreement” (para 58(e)).*

33. Rhenus delivered notice of intention to oppose the Samsung SDS application on 18 March 2024.

34. On 12 April 2024 Rhenus launched an application against the Samsung parties, RAPS, Menzies and WFS, under case numbers 2023-076450 and 2023-079688, seeking to set aside or not enforce the arbitration agreement and consolidate the Samsung actions for purposes of trial (**the Rhenus counter-application**). Material contentions set out in the founding affidavit in that application, which serves also

as Rhénus' answering affidavit in the Samsung SDS application, include the following:

- 34.1. Rhénus infers that any loss was suffered by Samsung ESA and submits that *"Samsung SDS ... has suffered no loss for which it is entitled to claim an indemnification"* (paras 17-29).
- 34.2. According to Rhénus, *"it may reasonably be inferred that the action was issued on case lines (and then served) before the arbitration commenced by notification from AFSA to Rhénus"* (paras 30-41), an inference said to have a material bearing on the viability of the Samsung SDS application.
- 34.3. Indeed, it is submitted that, *"having instituted an action in breach of the arbitration clause (indeed a repudiatory breach of that clause), Samsung SDS is precluded from advancing an arbitration"*, especially where *"Rhénus accepts the repudiation by Samsung SDS and elects to proceed by way of action"* (paras 50-51).
- 34.4. Given that it is *"entirely clear that the factual background against which the two actions and the arbitration are to be determined is precisely the same"*, Rhénus submits that it is *"not convenient (and indeed untenable) that three different fora should be called upon to make the same factual determinations"*, bearing in mind *"a material risk that different fora might come to different conclusions"* (paras 42-46).

34.5. Rhenus discloses that the core of its defence in each instance is likely to be that:

34.5.1. *vis-à-vis* the Samsung ESE action, the claim is time-barred under the applicable terms and conditions and, in any event, “*Rhenus will undoubtedly seek to apportion liability with the other Defendants*” (paras 47.1, 48);

34.5.2. *vis-à-vis* the Samsung SDS action, the claim is time-barred under such terms and conditions, Samsung SDS has not suffered a loss and “*Rhenus will undoubtedly third-party RAPS, Menzies and Worldwide*” (paras 47.2, 48); and

34.5.3. *vis-à-vis* the Samsung SDS arbitration, “*Rhenus will adopt the same defences that it intends in the action but will be procedurally precluded from bringing the other parties before the Arbitrator*” (para 49).

34.6. Rhenus submits that it would be appropriate for this court to exercise its power under section 3(2)(b) of the Arbitration Act⁸ not to enforce the

⁸ Section 3(2) provides that “[t]he 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 the dispute referred.”

arbitration agreement or under section 6(1) thereof not to stay the Samsung SDS action (paras 52-54).

34.7. Should the court decline to exercise either power, *“Rhenus would have to institute a conditional action against RAPS, Menzies, and Worldwide in this Court for recovery of such amount as it may be obliged to pay Samsung SDS pursuant to the arbitration”*, meaning that *“this Court will inevitably be faced with two actions”*, being the Samsung SDS action and a Rhenus action (paras 58-59) in addition to the Samsung ESA action.

34.8. By contrast, should the court exercise either power, the Samsung actions would proceed before court, in which event it would be convenient for the actions to be consolidated such that a single court could determine all the disputed issues without the risks of duplicated proceedings and conflicting findings (paras 55-57, 60-62).

35. The Rhenus counter-application was served on the Samsung parties on 15 April 2024 and on Menzies and WFS on 18 April 2024.

36. The Samsung parties delivered notice of intention to oppose the Rhenus counter-application on 29 April 2024.

37. Notice of intention to oppose the Rhenus counter-application was delivered by WFS on 02 May 2024.

38. On 20 May 2024 the Samsung parties delivered their replying affidavit in the Samsung SDS application and answering affidavit in the Rhenus counter-application. Material contentions set out in the affidavit include that:

38.1. *“Samsung ESA’s interests are aligned with Samsung SDS’ in respect of Samsung SDS’ proceedings against Rhenus. If Samsung SDS succeeds against Rhenus then Samsung ESA will withdraw the action for delictual damages against Rhenus, Raps, Menzies and Worldwide FS”* (para 34).

38.2. *“Samsung SDS is entitled to pursue Rhenus for payment of the agreed indemnity under the Logistics Services Agreement. It is logical and convenient for that claim to be decided first, before any delictual claim is considered”* (para 35).

38.3. According to the Samsung parties, *“[t]he main substance of the Samsung SDS-Rhenus dispute is about the contractual terms governing their relationship.”* RAPS, Menzies and WFS cannot contribute to the resolution of that dispute; nor are they necessary parties to contractual proceedings between Samsung SDS and Rhenus. Hence *“[c]onsolidation of the contractual and delictual actions would create an unwieldy, costly and misjoined single action out of two logically separate and distinct claims”* (paras 36-39).

- 38.4. A chronology of events is detailed in support of the submission that the SDS arbitration was referred before the SDS action was initiated (paras 59-61). There is thus no substance to the suggestion that Samsung SDS evinced an intention not to be bound by the arbitration agreement (paras 66-70).
- 38.5. Since Rhenus is on record as acknowledging that RAPS employees were involved in the theft, it fails *“to identify any risk of a grave conflict of facts that may arise if the Samsung SDS action and the Samsung ESA action are adjudicated in separate fora”* and *“there is no sufficient reason why the contract dispute between Rhenus and Samsung SDS should not be decided in arbitration as the parties agreed”* (paras 62-65).
- 38.6. If the Rhenus counter-application were to be granted, the Samsung parties would be prejudiced in that they would be compelled to incur unnecessary legal costs in respect of the evidence of parties not privy to the disputes advanced by them, Samsung SDS would be deprived of the agreed forum for dispute resolution *vis-à-vis* Rhenus and it could be held liable for legal costs incurred by Samsung ESA in a consolidated action.
39. On 31 May 2024 WFS delivered its answering affidavit (without annexures) in the Rhenus counter-application. The affidavit (with annexures) was deposed to and delivered again on 03 June 2024. Material contentions set out in the affidavit include that:

39.1. The application is premature for reasons including that:

39.1.1. no plea has been delivered in the Samsung SDS action or arbitration and only Menzies has delivered a plea in the Samsung ESA action. Hence it is not possible to determine what is in dispute between the parties and whether a consolidation of actions would be appropriate or convenient (para 9.1);

39.1.2. should Rhenus fail to set aside the arbitration agreement, the Samsung SDS arbitration would proceed and, in the absence of clarity on its outcome, it would be premature to consolidate the Samsung actions (para 9.2); and

39.1.3. if the Samsung SDS arbitration succeeds, Samsung ESA will withdraw its action and, as threatened but not yet acted on, Rhenus will or may seek recovery from RAPS, Menzies and/or WFS, these being possibilities too uncertain to provide a foundation for consolidation at this time (paras 9.3-9.4).

39.2. Rhenus fails to discharge its onus of demonstrating that a consolidation of the Samsung actions would be convenient for the court and the other parties. WFS and others would be required to attend a consolidated trial *“while the contractual claim between Samsung SDS and Rhenus is determined, as well as the issues which Rhenus has raised, such as*

whether Samsung SDS is the party which has sustained a loss”, which would “not only be inconvenient and time consuming for WFS, but will also result in unnecessary costs being incurred by WFS” (paras 10-12).

39.3. In the submission of WFS, *“[t]he Contractual Action and the Delictual Action have entirely different bases. Different considerations and different questions of fact and of law will arise in the two actions. As I have pointed out, WFS can add nothing to the dispute between Samsung SDS and Rhénus under the Contractual claim”* (paras 13-14).

39.4. As regards the submission paraphrased in paragraph 34.4 above, WFS disagrees that *“three different fora may be called upon to make the same factual determination and that there is a material risk that the different fora might come to different conclusions”* in that the Samsung SDS action and arbitration *“appear to be identical. The proceedings appear to be based entirely on the contractual relationship between the parties and questions such as the method by which the theft took place will not need to be determined in these proceedings”* (paras 23.2-23.3).

39.5. As regards the submission paraphrased in paragraph 34.7 above, WFS disagrees that *“the Court will inevitably be faced with two actions and that it will be convenient for the two actions to be consolidated”* in that *“[t]he necessity for a conditional action by Rhénus against WFS would only arise if Samsung SDS succeeds in the arbitration”* (paras 26-27).

40. On 26 August 2024 Rhenus delivered its replying affidavit in the Rhenus counter-application submitting that it remains convenient that the relief sought therein be granted by this court (para 7). Material contentions set out in the affidavit include that:

40.1. The Samsung parties are related entities, represented by the same attorneys, and *“it is highly unlikely that there will be any duplicated costs between those two parties if all the proceedings take place in one forum”* (paras 8-12).

40.2. Issues such as how the theft took place and what loss was suffered by which entity and for whose liability would require to be demonstrated in both actions and in the arbitration, indicating substantial commonality of disputed issues in the proceedings (paras 13-27).

40.3. Any withdrawal of the Samsung ESA action pursuant to the success of the Samsung SDS arbitration would not occasion judicial or commercial economy in that *“inevitably Rhenus will nonetheless proceed in Court against the other parties on the basis that it has suffered damages by reason of their conduct”*, meaning not only that *“the same issues will inevitably be ventilated before a Court irrespective of whether there is a withdrawal by Samsung of the delictual action”* but also that *“the action that would have to be instituted by Rhenus if the contractual proceeding were*

successful would simply commence much later” and “may well lead to a loss of evidence through unavailability of witnesses” (paras 28-39).

40.4. The prejudice contended for by the Samsung parties is overstated since they would be represented by the same legal team and the fact that Samsung SDS itself has initiated an action in court demonstrates that it is not averse to an action as opposed to an arbitration. By contrast, Rhenus would suffer *“a distinct prejudice because its costs (being the additional arbitration costs which are inevitably more expensive) will be elevated if it is forced to run two proceedings”* (paras 41-49).

40.5. The prejudice contended for by WFS is *“entirely speculative”* in that it appears to reason that Samsung SDS may be unsuccessful. However, *“that proposition ignores the existing delictual action between Samsung ESA and Worldwide Flight Services which would then proceed”* and in which *“Rhenus would seek an apportionment of damages. ... It follows that Worldwide Flight Services has no prospect whatsoever of avoiding a proceeding in court”* (paras 50-57).

41. A joint practice note on behalf of the Samsung parties, Rhenus and WFS was uploaded on CaseLines on 20 February 2025. The issues to be determined by this court are defined in the following terms:

“13.1. *Whether Samsung SDS’ claim against Rhenus should be decided in the arbitration, or whether the arbitration agreement should be set aside alternatively not be enforced, and the claim decided by the above Court.*

13.2. *Whether Samsung SDS’ claim against Rhenus should be decided in proceedings only between Samsung SDS and Rhenus or should that claim be consolidated with the aforesaid delictual action, which would involve other parties, being Samsung ESA, Raps, Menzies, and WFS, in circumstances where Samsung SDS has no claim against those parties but where Rhenus maintains it will be entitled to an indemnification by those parties.”*

42. A supplementary joint practice note on behalf of the Samsung parties and WFS was uploaded on CaseLines on 18 April 2025. (Counsel for Rhenus was discharging an acting judicial appointment at the time.) In elaboration on the issues quoted in paragraph 41 above, the supplementary practice note identifies a main issue and three sub-issues “*regarding forum for resolution of substantive dispute*” and a main issue and two sub-issues “*regarding consolidation of actions*”.

THE SAMSUNG SDS APPLICATION

43. As noted in paragraph 32 above, the Samsung SDS application seeks to enforce the arbitration agreement and stay the Samsung SDS action pending the final determination of the Samsung SDS arbitration.

44. Principles applicable to such an application are traversed in what follows.

45. The Samsung parties' heads of argument dated 04 September 2024 state that the Samsung actions were initiated out of caution to interrupt prescription (paras 14, 21). As noted in paragraph 32 above, the Samsung SDS application seeks to enforce the arbitration agreement and stay the Samsung SDS action pending the final determination of the Samsung SDS arbitration (paras 2, 23). It is submitted that, since Samsung SDS recorded its intention to arbitrate at the outset, it did not breach the agreement and, in any event, remedied any breach by launching the application (paras 44-50). And the Samsung parties rely on *BDE*⁹ for the proposition that the commencement of litigation does not constitute a waiver or abandonment of the right to arbitrate (paras 51-52). On the bases outlined in paragraph 89 below, the argument concludes that "*[c]ommon sense and practicality dictate that the arbitration should proceed without delay. This offers the cheapest and likely the quickest route to resolution of the whole case*" (para 9).
46. In heads of argument dated 20 September 2024 Rhenus submits that there should be a single judicial pronouncement on the facts underpinning three or even four proceedings between the parties (paras 1-3). It cites *Aveng*¹⁰ for the proposition that a stay is unavailable because the Samsung SDS action was initiated in breach – indeed repudiation – of the very arbitration agreement it now seeks to enforce (paras 26-29). And it argues that *BDE* is distinguishable inasmuch as, in that case, the innocent party had condoned the other party's breach of the arbitration

⁹ *BDE Construction v Basfour 3581 (Pty) Ltd* 2013 (5) SA 160 (KZD)

¹⁰ *Aveng (Africa) Ltd (formerly Grinaker-LTA Ltd) t/a Grinaker-LTA Building East v Midros Investments (Pty) Ltd* 2011 (3) SA 631 (KZD)

agreement such that it was common cause that the dispute should be determined by arbitration but in issue whether the action should be stayed or withdrawn (paras 30-32).¹¹

47. WFS does not oppose – hence its heads of argument dated 06 December 2024 do not address – the Samsung SDS application.
48. Before evaluating the submissions advanced on behalf of the Samsung parties and Rhenus, it may assist to traverse the competing authorities to which they refer.
49. In *Aveng* a contractor (Aveng) had initiated an action against an employer (Midros) claiming payment of the balance of the price alleged to be payable for certain contract works, to which Midros delivered a plea and counterclaim alleging defects disentitling payment and consequential damages (para 2). Efforts to resolve the litigation resulted in certain remedial works that generated disputes as to whether they were properly performed and whether the pleaded cause of action had been settled (paras 3-5). In the light of proliferating disputes and delays, Aveng invoked an arbitration clause in the contract (paras 6-7) and applied to stay the action to pursue an arbitration against Midros (para 1). It explained that it had initiated the action at a time when it did not understand there to be an arbitrable dispute, an explanation that was resisted by Midros, which argued that Aveng had elected to

¹¹ Rhenus elaborates on these arguments in paragraphs 16 to 21 of its supplementary submissions referred to in paragraphs 67 and 68 below.

litigate and thus waived its right to arbitrate and any claim based on a settlement agreement was not arbitrable under the contract (paras 8-10).

50. Observing that the application appeared to be novel (para 1), Wallis J (as he then was) found the parties' disputes to fall within the ambit of the arbitration clause (paras 11-15). Notably, in rejecting the submission that Aveng had abandoned its right to arbitrate against Midros or that Aveng's election to litigate was an 'offer' capable of 'acceptance' by Midros, Wallis J traversed a defendant's entitlement to seek a stay of an action, whether by application under section 6(1) of the Arbitration Act or by special plea, without pertinently considering or deciding whether a stay of litigation could be available to a claimant (paras 17-19). (The judgment appears to contemplate that the action would have to be withdrawn (paras 18, 20).) In Wallis J's view, the problem for Aveng was that it had initiated the action in breach of the agreement to arbitrate, notwithstanding that Midros had not taken the point, resulting in an untenable and impermissible approach to the proceedings:

"Aveng, whilst keeping in place the litigation commenced in breach of its obligations, seeks to enforce against Midros the very contractual provision of which it is in breach. It is hardly surprising that Midros objects to this. Whilst it has phrased that objection in the language of election its character remains that it objects to having the arbitration clause enforced against it for so long as Aveng remains in breach of its obligation to arbitrate. It is not in my view an answer for Aveng to say that it is now willing to arbitrate and comply with its obligations. It seeks to do so whilst maintaining the present litigation that was commenced and has been conducted in breach of the arbitration agreement. In other words it seeks to take advantage of its existing breach whilst trying to hold Midros to the

terms of the agreement. That is not something that a court will countenance"
(paras 20-21).

51. The decision in *Aveng* was considered and departed from by the same court in *BDE*. The applicant (BDE) sought an order (seemingly under section 6(1) of the Arbitration Act) staying an application for payment of a sum of money and reserving its costs for determination by an arbitrator. Relying on *Aveng*, the respondent (Basfour) argued that such an order was impermissible – that the applicant was obliged to withdraw the application and tender payment of the costs (paras 2-3). The parties were agreed – and the court accepted – that a party to an arbitration agreement that commences litigation instead of arbitration does not, merely by doing so, abandon its right to arbitrate (paras 4-5).

52. Swain J (as he then was) found that nothing turns on whether a stay is sought in respect of an action or an application (para 7). Where a party institutes proceedings in breach of an arbitration agreement, the other party faces an election whether to enforce the agreement (para 9). If it elects to do so, that party must:

52.1. apply for a stay of the proceedings under section 6(1) of the Arbitration Act before delivering a pleading or taking any further step in the proceedings;
or

52.2. deliver a special plea seeking a stay of the proceedings.

53. Basfour had not sought to – and had thus elected not to – enforce the arbitration agreement. It had condoned BDE’s breach of the agreement (paras 10-11). In the view of Swain J:

“I accordingly respectfully disagree with the conclusion of Wallis J that a breach of the arbitration agreement, caused by the failure of one party to refer a dispute to arbitration and institute legal proceedings, does not cease to be such, where the other party elects not to rely upon the breach and stay the proceedings. The consequence of having made an election not to rely upon the breach is to waive reliance upon it and thereby condone it. That the arbitration agreement imposes reciprocal obligations upon the parties, such that performance by the one party is conditional upon performance by the other, and the applicant may have ignored its contractual obligations under the arbitration agreement and proceeded with the present application, which the respondent has not challenged, does not alter the fact that the respondent in electing not to challenge the present proceedings, made an election not to enforce the arbitration agreement by which it is bound, which has as a consequence condonation of the applicant’s breach of the arbitration agreement” (para 12).

54. The court held that BDE was entitled to a stay of the proceedings and was not obliged to withdraw them before referring the dispute to arbitration (paras 13, 15).
55. Notably, neither *Aveng* nor *BDE* interpreted the wording of section 6(1) of the Arbitration Act or interrogated the source of the power to uphold a special plea of arbitration.

56. At the start of the hearing before this court on 02 May 2025, I asked counsel for the parties to address me on the unreported authority of *TJM*.¹²
57. In that case a plaintiff (TJM) had issued summons against a defendant (SANRAL) claiming damages based on an alleged breach of a contract between the parties (paras 2, 5, 19). On two occasions SANRAL excepted to the particulars of claim and objected to proposed amendments (paras 6-9). TJM abandoned its second proposed amendment and applied (under section 6(1) of the Arbitration Act) for a stay of the action pending a referral of a dispute to arbitration (paras 10, 12), albeit without adequately explaining its decision to switch to arbitration or ruling out the possibility of a return to litigation (paras 13-14, 34).
58. As a matter of interpretation, Van Niekerk AJ accepted the submission that section 6(1) of the Arbitration Act does not avail a plaintiff seeking a referral to arbitration of its own case. Only a defendant or third party – not a plaintiff – is capable of falling within the second “*any party*” in the provision, i.e. a party that may enter an appearance to defend and thereafter deliver a pleading or take another step in the proceedings. In context, that “*any party*” includes any defendant or third party but excludes a plaintiff. By contrast, a plaintiff is capable of falling within the first “*any party*” in the provision, i.e. a party that may commence proceedings in a court in

¹² *TJM Investment Trust t/a Engen Thoyoyandou Convenience v South African National Roads Agency SOC Ltd* (028653/2021) [2023] ZAGPPHC 1146 (6 September 2023)

respect of a matter agreed to be referred to arbitration (paras 24-26).¹³ Hence the application was dismissed (para 38).

59. On reflection, Mr Lamplough SC, who appeared with Mr Campbell for the Samsung parties, did not submit that I should find the decision in *TJM* to be clearly wrong; and Mr Wallis SC, who appeared for Rhenus, considered that there is good reason to regard the decision as being clearly right.
60. In my view, there is much to commend the interpretative reasoning outlined in paragraph 58 above, including in that it accords with the manner in which the provision appears to have been read by the former Appellate Division.¹⁴
61. On the strength of the decision in *TJM*, by which I am in any event bound, I consider that Samsung SDS is unable to invoke section 6(1) of the Arbitration Act in seeking to stay its action in favour of its arbitration.
62. Hence the primary basis on which the Samsung SDS application is brought is unsustainable.

¹³ Van Niekerk AJ sought to distinguish *TJM* from *Aveng* and *BDE* on the understanding that the earlier cases had not involved applications under section 6(1) of the Arbitration Act and SANRAL had not (yet) condoned or contested TJM's non-compliance with the arbitration agreement (paras 28-33). As noted in paragraphs 50 and 51 above, it is unclear to me whether the earlier cases involved applications under that provision.

¹⁴ *Universiteit van Stellenbosch v JA Louw (Edms) Bpk* 1983 (4) SA 321 (A) 333G-334C

63. Following the hearing, I issued a directive inviting the parties to deliver brief supplementary submissions on two queries:

63.1. If it is not open to a plaintiff to rely on section 6(1) of the Arbitration Act to stay its action pending the outcome of an arbitration, may it invoke any other power of the court to stay the action and, if so, what is the source/nature of that power?

63.2. What is the source/nature of the power exercised by a court when upholding a defendant's special plea of arbitration? May that power be invoked by a plaintiff and, if so, when and by what means?

64. I am grateful for the thoughtful supplementary submissions delivered by counsel on 14 May 2025 (for Samsung SDS) and 21 May 2025 (for Rhenus).¹⁵ My secretary was informed on 27 May 2025 that WFS did not intend to deliver supplementary submissions.

65. Samsung SDS submits that the power to stay created by section 6(1) of the Arbitration Act does not impliedly prohibit a stay by other means: “[t]he section is permissive and facilitative and does not restrict common law rights” (para 9). A court’s jurisdiction to decide a dispute is not excluded by an agreement to arbitrate;

¹⁵ The Rhenus submissions were not uploaded on CaseLines and came to my attention, via my secretary, on 28 May 2025.

the court retains a discretion either to halt an action in favour of arbitration or to decide the dispute itself (paras 16, 22-23).¹⁶

66. In addition, it is submitted by Samsung SDS that the power to stay proceedings, in the interests of justice, arises out of the court's inherent jurisdiction to protect and regulate its process recognised at common law and confirmed in section 173 of the Constitution¹⁷ (paras 24-29, 35-38).¹⁸
67. Save in one respect, Rhenus endorses Samsung SDS' submissions on a court's enduring discretion, rooted in section 173 of the Constitution, to stay proceedings, in the interests of justice, in the protection and regulation of its process. The point of difference is that Rhenus regards the submission that courts have historically stayed proceedings on a referral to arbitration as being overstated. It counters that stays in the protection or regulation of process are normally granted only in exceptional cases¹⁹ and the founding affidavit makes out no case on exceptionality (paras 10-14). In fact, the papers show acceptance by Rhenus of Samsung SDS' repudiation of the arbitration agreement (paras 16-21).

¹⁶ *Parekh v Shah Jehan Cinemas (Pty) Ltd and others* 1980 (1) SA 301 (D) 305E-306C; *Foize Africa (Pty) Ltd v Foize Beheer BV and others* 2013 (3) SA 91 (SCA) [19]-[22]

¹⁷ Section 173 provides that "[t]he Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

¹⁸ *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC and others* 2013 (6) SA 499 (SCA) [45]-[48]; *Mokone v Tassos Properties CC and another* 2017 (5) SA 456 (CC) [65]-[68]

¹⁹ *Abdulhay M Mayet Group (Pty) Ltd v Renasa Insurance Co Ltd and another* 1999 (4) SA 1039 (T) 1048H; *Ncube v Liberty Group Ltd* [2024] 2 All SA 861 (GJ) [25]-[27]

68. Rhenus also raises a preliminary point that the case made out in Samsung SDS' founding affidavit is not for the exercise of any common law power to order a stay of proceedings but for the exercise of the statutory power under section 6(1) of the Arbitration Act *alternatively* a common law power "*to enforce arbitration agreements*", i.e. "*to grant specific performance*". According to Rhenus, these common law powers are distinct in that the former (to stay an action) is *procedural* and the latter (to enforce an arbitration) is *substantive* in nature.²⁰ In addition, Rhenus submits that an exercise of the former power – which should serve the interests not of a party but of the court itself – requires an "*evidential enquiry [that] is not fully amplified in the papers*" and, in any event, would not offer convenience since the court is seized with "*a number of other related parallel proceedings*" and Samsung SDS remains in breach of the arbitration agreement (paras 2-9).
69. It is probable that many instances in which parties to arbitration agreements elect to initiate judicial proceedings will involve breaches and even repudiations of the agreements. (Some such infractions will be condoned; others will not.) In other instances an election to litigate may amount to a waiver or abandonment of the right to arbitrate.
70. Given the fact-dependent nature of the enquiry, however, an initiation of judicial proceedings will not necessarily entail a breach, let alone a repudiation, of an

²⁰ The Rhenus submissions cite no authority for this proposition.

arbitration agreement; nor, in my view, will it inevitably or even generally constitute a waiver or abandonment of arbitration.

71. Where – as in this matter – a party makes plain at the outset that it intends to give effect to an arbitration agreement but, out of caution, wishes also to place a toe in the door of a court,²¹ it acts not in defiance of or disregard for the agreement – or rejection of arbitration – but in recognition of an independent consideration that may be destructive of an otherwise viable claim. It seems to me that there is no closed list of such considerations. It may be unclear whether a claim is disputed and thus apt for determination by arbitration. There may be a concern that a referral to arbitration may not interrupt the running of prescription against the claim; or against other defendants who are not parties to the agreement. If the instrument housing the agreement is subject to suspensive conditions, their fulfilment may come to be contested. Whether the dispute falls within the ambit of the agreement may itself become a matter of contestation. In my view, guarding against such a risk need not be irreconcilable with an intention to enforce the arbitration agreement unless and until it proves unsuited to fulfilling its dispute resolution purpose.²²

²¹ See, for example, the letters referenced in paragraphs 17 and 25 above. That there was a referral to arbitration before or at about the time of initiating an action – as opposed to any disavowal of the arbitration agreement – appears to be a factor of relevance to the enquiry.

²² With reference to two subsidiary points raised on behalf of Rhenus, it seems to me that the precise sequence in which action and arbitration proceedings are commenced or whether a defendant ‘accepts’ the initiation of an action before the referral of an arbitration is unlikely to be determinative of the prospects of success of a stay application, although they may be factors of relevance to the merits of the application.

72. Even if I am wrong in this regard, there is force to the submission that any breach of the arbitration agreement was remedied by the launch of the Samsung SDS application when it became clear that Rhenus was not amenable to a consensual stay of the Samsung SDS action. I was not referred to, and am unaware of, any authority to the effect that only a withdrawal – not a stay – of an action may serve to purge an infraction of an agreement to arbitrate.
73. In the circumstances of this case, I conclude that the initiation of the Samsung SDS action despite the existence of the arbitration agreement does not preclude Samsung SDS from seeking to stay its action in favour of its arbitration. The question is whether a case is made out on the papers for the relief sought in the Samsung SDS application.
74. I am satisfied that, as was recognised at common law and is confirmed in section 173 of the Constitution, this court's inherent jurisdiction to protect and regulate its process includes the power to stay proceedings where doing so serves the interests of justice. This general power exists independently of the specific power conferred by section 6(2) of the Arbitration Act.
75. I consider that this conclusion gives effect both to the principle of party autonomy in the conclusion of arbitration agreements²³ and to the constitutional right of

²³ *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) [4]; *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and another* 2009 (4) SA 529 (CC) [219]-[220]; *IDC v Kalagadi supra* [16]

access to courts.²⁴ A contrary finding – that a claimant may not act out of caution in circumstances such as those contemplated in paragraphs 71 and 72 above – would curtail dispute resolution options and could heighten prescription or similar risks.

76. What requires determination, therefore, is whether it is in the interests of justice to grant or refuse the relief sought in the Samsung SDS application.
77. Rhenus argues that the interests of justice would not be served by the grant of such relief since the alternative common law basis contended for in the founding affidavit is a power not to stay an action but to enforce an arbitration and thus that the parties' affidavits are inadequately directed at enquiring into whether prioritising the Samsung SDS arbitration over the Samsung SDS action would offer convenience or prejudice to the court and the parties. The thrust of the argument appears to be that Rhenus and perhaps WFS would have had more to say had the founding papers revealed the real basis on which Samsung SDS asks this court to exercise a common law power.
78. I am not persuaded of the distinction between procedural and substantive powers for which Rhenus contends. In any event, read in context of prayer 1 of the notice

²⁴ Section 34 provides that "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

of motion,²⁵ paragraph 16 of the founding affidavit in the Samsung SDS application²⁶ invokes the inherent jurisdiction of the court in respect of which there is consensus in the supplementary submissions. In addition, competing considerations of convenience and prejudice, including those of the court itself, are extensively traversed in the parties' affidavits and heads of argument. So too were they fully ventilated at the hearing by senior counsel for the Samsung parties, Rhenus and WFS. I do not regard Rhenus as having been taken by surprise or disadvantaged in the presentation of its views in relation to each of the two applications. I conclude that Rhenus' preliminary point is without force and the Samsung SDS application should be considered and decided on its merits.

79. It is not disputed that the arbitration agreement forming part of the Rhenus agreement is of force and effect and of application to the contractual dispute between Samsung SDS and Rhenus. When parties agree to resolve their disputes by arbitration as opposed to litigation, they may well have in mind features of the former mode of dispute resolution such as negotiation and, failing settlement, expedition and finality of arbitration. Even full-blown arbitrations are apt to avoid logjammed court rolls and, as is the case in this matter, parties may also forego rights of appeal that tend to prolong judicial proceedings. The principle of party

²⁵ In relevant part, prayer 1 provides that "[t]he action proceedings ... instituted by the applicant in the above Court are hereby stayed pending the final determination of the arbitration proceedings commenced by the applicant against the respondent" (emphasis added).

²⁶ In relevant part, paragraph 16 provides that "[t]his is an application ... based on the Court's common law power to enforce arbitration agreements, for a stay of the action, pending the final determination of the disputes referred to arbitration" (emphasis added).

autonomy is therefore a firm pointer in the direction of prioritising Samsung SDS' arbitration over its action.

80. It is also so that, as a matter of interpretation of clauses 9 and 19 of the Rhenus agreement, Rhenus may be understood to have reconciled itself to the possibility of defending an arbitration referred by Samsung SDS without an ability to draw third parties such as RAPS, Menzies and WFS into the fray in that forum. This understanding goes some way towards meeting the argument that delays and duplications would be disproportionately prejudicial to Rhenus. In any event, RAPS, Menzies and WFS need not be cited as parties to the Samsung SDS arbitration, which seems destined to be primarily a dispute in relation to contractual rights and obligations, since findings in respect of their conduct would not be binding on them in any subsequent arbitration or litigation. It is unlikely that RAPS, Menzies and WFS would have anything or much to contribute to that dispute and would probably be content to avoid it.
81. From the perspective of Rhenus, if the Samsung SDS arbitration were to succeed, the Samsung actions would presumably not proceed but Rhenus would likely seek an indemnification or contribution by third parties, whether in (other) arbitration or judicial proceedings. If the Samsung SDS arbitration were to fail, the Samsung ESA action would probably be revived. In either event, Rhenus would face arbitration and litigation on contractual and delictual disputes. But essentially the same would be the case if I were to dismiss the Samsung SDS application and grant the Rhenus counter-application, save that, in that event, the disputes would

be adjudicated on a consolidated, rather than a parallel or sequential, basis. And the burden of a parallel or sequential process is a function of Rhenus' choice to arbitrate any dispute with Samsung SDS.

82. From the perspective of RAPS, Menzies and WFS, by contrast, if the Samsung SDS arbitration were to succeed, the Samsung actions would presumably not proceed but Rhenus would likely seek an indemnification or contribution by such third parties, whether in (other) arbitration or judicial proceedings. If the Samsung SDS arbitration were to fail, the Samsung ESA action would probably be revived. In either event, RAPS, Menzies and WFS would face arbitration or litigation on a delictual dispute. But events between now and then could see them avoid such proceedings. (They have been signalled but not yet instituted.) However, if I were to dismiss the Samsung SDS application and grant the Rhenus counter-application, RAPS, Menzies and WFS would have no prospect of avoiding participating in the consolidated Samsung SDS actions, i.e. in both contractual and delictual disputes.

83. I am mindful of the attraction of having all the disputes between all the parties decided simultaneously in the same forum. If such a process appeals to the various parties that may otherwise be exposed to risks of duplicated proceedings and conflicting findings, it may be possible for them to reach an agreement to have all such disputes determined in the Samsung SDS arbitration. Time will tell. For now, there appears to me a sound basis, rooted in the interests of justice, on which to

exercise my discretion in favour of validating the arbitration agreement by staying the Samsung SDS action in favour of the Samsung SDS arbitration.

84. In the result, I consider that the Samsung SDS application should succeed.

THE RHENUS COUNTER-APPLICATION

85. As noted in paragraph 34 above, the Rhenus counter-application seeks to set aside or not enforce the arbitration agreement and consolidate the Samsung actions for purposes of trial.

86. Principles applicable to such an application may be summarised as follows:

86.1. Section 3 of the Arbitration Act permits a court to overlook an arbitration agreement, “*on good cause shown*”, but this phrase is to be restrictively interpreted. A court’s discretion to set aside the agreement should be exercised “*only where a persuasive case has been made out*” and thus, “[a]bsent infringement of constitutional norms, courts will hesitate to set aside an arbitration agreement untainted by misconduct or irregularity unless a truly compelling reason exists.”²⁷

86.2. Rule 11 provides for the consolidation of actions in the interests of achieving convenience and averting substantial prejudice, to the court

²⁷ *De Lange v Methodist Church and another* 2016 (2) SA 1 (CC) [36]-[37]; *IDC v Kalagadi* supra [17]

and/or to the parties, including by avoiding duplicated proceedings and conflicting findings.²⁸ The rule concerns consolidating actions for purposes of a single trial as opposed to compelling different plaintiffs with different causes of action to join as plaintiffs in a single action.²⁹ The two actions are heard together but they do not become one action.

87. In its heads of argument Rhenus explains that it will join RAPS, Menzies and WFS as third parties in each of the Samsung actions and also initiate an action against them – a fourth proceeding – in the event of an adverse outcome to the Samsung SDS arbitration (paras 8-15). It understands the Samsung parties' intention to be that, in addition to a formal stay of the Samsung SDS action, there would be an informal 'stay' of the Samsung ESA action inasmuch as it would proceed only in the event of the failure of the Samsung SDS arbitration and/or action (paras 4, 16-19). It is argued that inevitable delays and duplications would be disproportionately prejudicial to Rhenus (paras 20-24). To ameliorate the burdens of multiple proceedings (implicating third parties) and the risks of conflicting findings,³⁰ Rhenus asks this court to exercise its discretion in favour of:

²⁸ *New Zealand Insurance Co Ltd v Stone and others* 1963 (3) SA 63 (C) 68F-71H; *Nel v Silicon Smelters (Edms) Bpk en 'n ander* 1981 (4) SA 792 (A) 801A-H

²⁹ *Licences and General Insurance Co Ltd v Van Zyl and others* 1961 (3) SA 105 (D) 108A-111E; *NZ Insurance v Stone* supra (C) 68F-69B

³⁰ *Stellenbosch v Louw* supra 335G-336E, 342B-H

87.1. directing (in terms of section 3(2)(b) of the Arbitration Act) that the Samsung SDS dispute shall not be referred to arbitration (paras 6, 33-38); and

87.2. consolidating (in terms of Rule 11) the Samsung actions on grounds that doing so would not be premature and would be convenient given that the same factual issues and procedural steps would arise in both actions (paras 6, 39-44).

88. At the hearing Mr Wallis SC submitted that, if this court were to refuse the stay sought by Samsung SDS, the relief sought by Rhenus would follow as a natural consequence or at least a matter of convenience. He referred the court to authority for the proposition that, where there are several claims only certain of which are subject to arbitration, convenience will generally dictate that they be resolved in a single set of proceedings, which, by necessity, will be by way of litigation.³¹ The Samsung parties are related entities, represented by the same attorneys, and thus unlikely to be prejudiced by consolidation. In response to a question whether the Rules provide for consolidation before close of pleadings, Mr Wallis SC submitted that the Rules do not preclude pre-close consolidation, in a suitable case, but did not strenuously resist the prematurity argument advanced on behalf of Samsung SDS and WFS.

³¹ *Id*; *Welihockyj and others v Advtech Ltd and others* [2003] JOL 11187 (W) [35]-[37]; *Aveng supra* [10]

89. The Samsung parties address both parts of the Rhenus counter-application in their heads of argument. In their submission:

89.1. As regards non-enforcement per paragraph 87.1 above: In accordance with the principle of party autonomy, a court should give effect to an agreement to resolve a dispute by arbitration (paras 83-84, 88) unless the dispute also implicates persons that are not parties to the agreement such that there are likely to be significant burdens of multiple proceedings and risks of conflicting findings on “grave” issues (paras 53-55).

89.2. According to the Samsung parties, conflicting findings on grave issues are unlikely to arise in this matter because, in the Samsung SDS arbitration, the contractual disputes concern only Samsung SDS and Rhenus and there is no real factual dispute between these parties that RAPS employees were involved in the theft (paras 33-38, 60-81). The contractual issues in the arbitration would be distinct from and irrelevant to the delictual issues in the Samsung ESA action (para 82).

89.3. In addition, Mr Lamplough SC submitted that, when clauses 9 and 19 of the Rhenus agreement are read together, its parties must be understood to have accepted that a dispute relating to the conduct of third parties could be the subject matter of an arbitration between (only) Samsung SDS and Rhenus.

- 89.4. In reply, he added that, if this court is not minded to consolidate the Samsung actions at this time, there is no prospect of all the claims or disputes being resolved in a single set of (litigation) proceedings and thus no sufficient reason why the Samsung SDS action should not be stayed in favour of the Samsung SDS arbitration.
- 89.5. As regards consolidation per paragraph 87.2 above: Samsung SDS submits that the convenience for which Rhenus contends is essentially its own; all other parties and the court would be inconvenienced by a consolidation of the Samsung actions (paras 5, 39-53).
- 89.6. The Rhenus counter-application is premature before close of pleadings in the Samsung actions in that Rule 11 *"does not allow for forced consolidation of actions before pleadings have closed against the will of distinct plaintiffs"* (paras 8.1, 28-31, 85), is non-compliant with Rule 10(1) in that the actions do not turn on substantially the same question of law or fact (paras 8.2, 26-27, 86) and would be inconvenient relative to what is proposed in the Samsung SDS application (paras 8.3-8.4, 32-38, 87).
90. In its heads of argument WFS opposes the Rhenus counter-application on grounds that jurisdictional requirements for consolidation are not met and consolidation would not be convenient (para 1). It cites authority for the principles that an applicant for consolidation must show that conjoining proceedings is favoured by the balance of convenience and would not cause any party substantial prejudice

(paras 15-16).³² WFS submits that the Samsung actions have different bases in law and even in fact (para 3) and observes that pleadings are yet to close in either of the actions or in the arbitration, rendering the application premature (paras 4-6).

91. WFS relies on further authority for the propositions that a consolidation application is adjudicated with reference not to the merits of the actions but to their pleadings, which must disclose a substantial overlap in issues of fact and law,³³ and which only crystallise on close of pleadings in the actions (paras 7-14). It concludes that WFS should not be dragged into a costly and lengthy contractual fight between Samsung SDS and Rhenus (paras 17-20).
92. At the hearing Mr van Vuuren SC elaborated on these submissions, pressing the prematurity point as a bar to the Rhenus counter-application³⁴ and suggesting that the parties could revisit a possible consolidation on close of pleadings. In his submission, it would be imprudent for this court to attempt to predict the paths that the various proceedings may follow or to discount the possibility of prejudice to a party or parties required to become embroiled in a fight primarily between others.
93. There is force to Rhenus' submission that, should its application fail, three or even four proceedings could fall to be conducted and determined against the same

³² *NZ Insurance v Stone* supra (C) 68F-69B

³³ *C v R* (A5002/2022) [2022] ZAGPJHC 1015 (15 December 2022) [36]; *Siyakhula Sonke Empowerment Corp (Pty) Ltd and another v Redpath Mining (South Africa) (Pty) Ltd and another* [2024] JDR 3104 (GJ) [26]-[27]

³⁴ *Siyakhula v Redpath* supra [34]

factual backdrop and expose the parties and the court to risks of duplicated proceedings and conflicting findings. Similarly compelling is the submission that the interests of achieving convenience and averting substantial prejudice could be served by having all the parties' disputes resolved in a single set of judicial proceedings. But these concerns are ameliorated by a likelihood that the success of the Samsung SDS application will bring about a single, expeditious and final arbitral determination of the central contractual dispute between Samsung SDS and Rhenus.

94. Save for that observation, as noted in paragraphs 79 to 82 and 87 to 92 above, competing considerations of convenience and prejudice, including those of the court itself, require a multi-faceted and nuanced enquiry in this matter.

95. For reasons of prematurity, I am of the view that such an enquiry would not properly be undertaken at this time:

95.1. a plea (or exception) and any replication, third party notice(s) and subsequent pleading(s) are yet to be delivered in the Samsung ESA action;

95.2. a statement of defence (or exception) and any replication are yet to be delivered in the Samsung SDS arbitration;

- 95.3. a plea (or an exception) and any replication, third party notice(s) and subsequent pleading(s) are yet to be delivered in the Samsung SDS action;
- 95.4. any Rhenus action is yet to be initiated and pleaded to;
- 95.5. unless and until pleadings close in each of the Samsung actions and there is certainty whether there exists any *lis* between Rhenus and RAPS, Menzies and/or WFS, it cannot be predicted whether there would be a sufficient overlap in issues of fact and/or law to merit conjoining the contractual and delictual claims of distinct (albeit related) entities, including whether:
- 95.5.1. not doing so would expose the parties and the court to risks of duplicated proceedings and conflicting findings; and/or
- 95.5.2. doing so would be favoured by the balance of convenience and would not cause any party substantial prejudice; and thus
- 95.6. it is unnecessary to determine whether *C v R* and *Siyakhula v Redpath* establish a rule that a consolidation application is invariably incompetent before close of pleadings or apply a principle that a consolidation application is usually unviable at that stage of proceedings. It suffices to

conclude that the Rhenus counter-application is premature in the circumstances of this case.

96. In the result, I consider that the Rhenus counter-application should fail.

THE ORDER

97. As regards costs, all the participating parties were represented by, and sought the costs of, senior counsel. Although each of Rhenus and WFS was represented by one counsel, I am satisfied that the matter is of sufficient complexity to warrant the engagement of two counsel. There was consensus between the parties – and I agree – that costs should be agreed or taxed on scale C.

98. In the circumstances, I make the following order:

98.1. The action initiated by Samsung SDS against Rhenus under case number 2023-079688 (the Samsung SDS action) is stayed pending the final determination of the arbitration referred by Samsung SDS against Rhenus under AFSA reference number S.383 (the Samsung SDS arbitration);

98.2. Rhenus is directed to pay the costs of the application launched by Samsung SDS against Rhenus seeking *inter alia* to stay the Samsung SDS action pending the final determination of the Samsung SDS

arbitration, including the costs of two counsel where so employed (one of whom being senior counsel), as agreed or taxed on scale C;

98.3. The application launched by Rhenus against the Samsung parties, RAPS, Menzies and WFS seeking *inter alia* to consolidate the actions under case numbers 2023-076450 and 2023-079688 (the Rhenus counter-application) is dismissed; and

98.4. Rhenus is directed to pay the costs of the Rhenus counter-application, including the costs of two counsel where so employed (one of whom being senior counsel), as agreed or taxed on scale C.



PEARSE AJ

This judgment is handed down by uploading it on CaseLines and emailing it to the parties or their legal representatives. The date of delivery of this judgment is 18 June 2025.

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Date of Hearing:	02 May 2025
Dates of Supplementary Submissions:	14 and 21 May 2025
Date of Judgment:	18 June 2025