

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 2022/006281

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
1 August 2025	
DATE	SIGNATURE

In the matter between:

AIG SOUTH AFRICA LIMITED

Applicant

and

BRIAN MOLEFE

Respondent

In re:

AIG SOUTH AFRICA LIMITED

Plaintiff

and

BRIAN MOLEFE

Defendant

JUDGMENT

CRUTCHFIELD J

- [1] The applicant, AIG South Africa Limited, seeks interlocutory relief in respect of pending action proceedings in the following terms *inter alia*:
- a. A declarator that the arbitration agreement contained in clause 7.6 of the insurance policy referred to in paragraph 3 of the applicant's particulars of claim be set aside, alternatively be declared unenforceable;
 - b. Alternatively, a declarator that the disputes relating to the claim instituted by the applicant shall not be referred to arbitration; and
 - c. Further alternatively, that the issues arising from the defendant's second special plea in the action proceedings and the plaintiff's replication thereto be determined separately from the balance of the issues in the action proceedings.
- [2] In effect, the applicant seeks an order that the disputes relating to the claim instituted by the applicant in the pending action proceedings shall not be referred to arbitration and shall be determined by the High Court.
- [3] The respondent, Mr Brian Molefe, the defendant in the pending action proceedings, opposes these interlocutory proceedings.
- [4] The background facts to this application, shortly stated, are that on 1 April 2017, AIG issued a written Management Liability Insurance Policy 01 CML 539162 ("the policy") to Eskom as the policy holder, in terms of which AIG agreed that in consideration for payment of the premium due under the policy, AIG would provide liability cover to ESKOM's directors, officers and employees, described and defined as "insured persons" in the policy, on the terms set out in the policy.
- [5] The insured under the policy was Eskom, any subsidiary and any insured person. The latter included any natural person who was, during the specified period, a director, officer or an employee of Eskom. Each of the insured persons was insured independently and separately under the policy for their own respective interests.
- [6] It is common cause that the respondent, Mr Molefe, was the Group CEO of Eskom during the relevant period. Accordingly, Mr Molefe qualified as an insured

person under the policy and was eligible, subject to the terms and conditions of the policy, to indemnification thereunder.

- [7] The operative provision of the policy provides that the insurer, AIG, will pay “to or on behalf of each insured person, any loss ...”. In effect, the provision states that AIG will advance cover for liability insurance, being the obligation to pay to or on behalf of an insured person any loss incurred by the insured person.
- [8] During May 2017 or thereabouts, various legal proceedings were issued against Mr Molefe (the “legal proceedings”). Pursuant thereto, Mr Molefe notified the applicant *qua* insurer of the legal proceedings and sought an indemnity under the policy in respect of his legal costs incurred in opposing the legal proceedings.
- [9] AIG agreed to pay Mr Molefe’s defence costs on condition that if it was found by a court that Mr Molefe had gained a profit or an advantage to which he was not legally entitled or that there was a commission of a dishonesty or deliberate fraudulent act, that Mr Molefe would have to repay those costs that had been disbursed or that would be disbursed to him or on his behalf.
- [10] The above stipulation correlates with the terms of the policy that the insured or the policy holder shall reimburse the insurer for any payments that are ultimately determined not to be covered by the policy.
- [11] The applicant alleges in its particulars of claim that the respondent, by notifying the applicant of the legal proceedings and claiming the provision of his defence costs, accepted the benefits conferred on him by the policy and agreed to be bound by the terms of the policy.
- [12] Furthermore, the applicant, in terms of its correspondence dated 27 October 2017, advised that it would advance defence costs to the respondent on a without prejudice basis, and, on the basis that should it eventuate in due course that the defendant was not entitled to an indemnity under the policy, he would refund such costs in full and on demand.
- [13] In effect, General Exclusion 3.1 of the policy and the contents of AIG’s correspondence of 27 October 2017 (the “2017 correspondence”), provide that

the respondent would repay the costs disbursed or that would be disbursed to him, in the event that it was found by a court that the respondent had gained a profit or an advantage to which he was not legally entitled.

- [14] Mr Molefe contends that he did not agree to the provisions of the policy and is not bound under the policy. Moreover, that he did not agree to repay the defence costs in terms of AIG's 2017 correspondence.
- [15] It is common cause that AIG disbursed the sum of approximately R4 398 849.00 in respect of defence costs for and on behalf of the respondent (the "defence costs"). Ultimately, judgment was delivered against the respondent by the Supreme Court of Appeal as well as the Constitutional Court and the courts determined that the respondent's conduct was unlawful.
- [16] The applicant claims repayment of the defence costs disbursed by AIG in respect of Mr Molefe's opposition to the legal proceedings, in the pending action proceedings. The applicant brings three distinct claims, each in the alternative. The first claim is premised on the policy. The second is based on AIG's 2017 correspondence. The third claim is for unjustified enrichment. The latter is pursuant to the respondent's contention that he is not bound under the policy or under the 2017 correspondence.
- [17] The respondent, in the action proceedings, pleads specially to the applicant's non-joinder of Eskom. The respondent alleges that AIG must look to Eskom as the policy holder and signatory to the policy, for repayment of the legal fees. AIG contends that Eskom has no legal interest in these proceedings and declines to join Eskom as a party to the proceedings.
- [18] Shortly prior to the hearing of this application, the applicant delivered a supplementary affidavit incorporating correspondence on behalf of Eskom to the effect that Eskom has no interest in these proceedings. The respondent objected to the late delivery of the supplementary affidavit and sought an opportunity to deal with that supplementary affidavit. Ultimately, the matter proceeded before me. I deal with the supplementary affidavit later in this judgment.

- [19] The policy contains an arbitration clause. Clause 7.6 of the policy provides that “ ... except as otherwise specifically provided, any dispute regarding any aspect of this policy or any matter relating to cover thereunder which cannot be resolved by agreement within 30 days, shall be referred to binding arbitration by either party upon 7 days’ notice to the other in terms of the Arbitration Act.”
- [20] The respondent contends that the arbitration clause compels the applicant to refer its dispute in respect of the recovery of the defence costs, to arbitration. The respondent raises a special plea in the pending action proceedings that the applicant’s action be dismissed or stayed pending resolution of the arbitration.
- [21] It is in this context that the applicant approaches this Court for an order that the applicant’s claims for repayment of the defence costs be determined by a High Court and not by way of arbitration.
- [22] The applicant advances three main reasons for the relief claimed by it. The first is that the respondent contends that he is not bound by the policy. As a result, the applicant contends that the arbitration clause cannot apply to its claims for repayment if the respondent is not bound by the policy.
- [23] The second reason raised by the applicant is that two of the three causes of action upon which the applicant places reliance in the pending action proceedings, are not rooted in the policy. These are the applicant’s claim in contract based upon the 2017 correspondence and the claim for unjustified enrichment.
- [24] In the circumstances, the applicant contends that the claim in contract pursuant to the 2017 correspondence and the unjustified enrichment claim do not arise in terms of the policy, are not subject to the policy and cannot be determined in terms of the arbitral clause. Thus, these two claims stand to be determined by the High Court.
- [25] As a result, the applicant raises the potential for multiple court cases dealing with the same facts and possible conflicting judgments emerging from the multiple court cases. Furthermore, multiple proceedings potentially result in increased and unnecessary legal costs and inconvenience to all parties

involved, including witness who may have to testify more than once on the same facts. Moreover, inconvenience to the High Court as a result of the multiple proceedings is not to be overlooked. The applicant also refers to the public interest in the matter as a reason why the claims should be heard by a High Court and not by way of arbitration.

- [26] The application before me to determine whether the applicant should proceed by way of arbitration or with all three claims before the High Court, is premised upon section 3(2) of the Arbitration Act, 1965 ("the Act").
- [27] Section 3(2) of the Act provides that "(t)he court may at any time on the application of any party to an arbitration agreement, on good cause shown - set aside the arbitration agreement; or order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or order that the arbitration agreement shall cease to have effect with reference to any dispute referred."
- [28] The applicant accepts that it carries the onus to demonstrate good cause as envisaged in s3(2) of the Act, and that the threshold is high.
- [29] Before me, the respondent raised two primary broad grounds of objection to the relief claimed by the applicant.
- [30] Firstly, that Eskom is not a party to the proceedings and that this application cannot be considered prior to the determination of the proper parties to the proceedings. The respondent insists that Eskom should be joined by the applicant as a party both to this application and to the pending action proceedings. The applicant disagrees and contends that Eskom has no legal interest in the matter and that there is no basis for the joinder of Eskom. Accordingly, the applicant has no intention of joining Eskom to the proceedings.
- [31] The respondent's second ground of objection is that he is not bound by the policy, that he is not a signatory or a party to the policy and cannot be held liable based on the wording of the policy in the absence of his signature thereto. Accordingly, the respondent contends that he cannot be held liable to repay the defence costs paid out on his behalf and that AIG must look to Eskom, the

signatory and party to the policy, for repayment of the defence costs. This is notwithstanding that the respondent sought and received the benefit of payment of the defence costs under the policy.

- [32] The respondent argues that the policy does not provide that an insured person is severally liable in circumstances where the insured is not a signatory to the policy. The respondent contends further that he cannot be isolated and sued under the policy whilst Eskom does not participate in the proceedings.
- [33] Furthermore, the respondent alleges that he did not agree to the provisions of the October 2017 correspondence, and, that all three of the applicant's claims should be determined under the arbitration clause in the policy.
- [34] Accordingly, the respondent seeks enforcement of the arbitration clause in respect of all three of the applicant's claims in the pending action proceedings, notwithstanding his contention that he is not bound by the policy.
- [35] I am mindful that the respondent's submissions are raised for determination in the pending action proceedings.
- [36] As regards the joinder or otherwise of Eskom to these proceedings, Eskom has no legal interest in the claim arising from the 2017 correspondence. Nor does Eskom have a legal interest in the applicant's unjustified enrichment claim. These two claims arise independently of the policy and solely as between the applicant and respondent.
- [37] In respect of the applicant's claim arising from the policy, Eskom is a party and a signatory to the policy. However, notwithstanding, the policy is a several policy taken out by Eskom on behalf of its directors, officers and employees. Clause 7.3 of the policy expressly states that it is a several policy covering each insured. Insured persons in terms of the policy are independently and separately insured for their own respective interests.
- [38] Accordingly, each insured person is insured separately or severally under the policy and can be cited and sued alone, without Eskom or any other insured person being joined to the proceedings.

- [39] Furthermore, clause 5.3 of the policy provides that the policy holder, being Eskom, or the insured person, being Mr Molefe, shall reimburse the insurer for any payments that are determined not to be covered by the policy. The disjunctive “or”, illustrates that the applicant may bring proceedings against either the respondent or the policy holder. The applicant brings proceedings against the respondent as it is entitled to do.
- [40] Section 3(2) of the Act provides for the applicant to apply for an order avoiding the referral and determination of the claim under the policy, to arbitration, if it does not wish the claim to be determined by way of arbitration. Eskom does not have a direct and substantial interest that may be prejudicially affected by an order that s3(2) of the Act be given effect to.
- [41] Accordingly, in the light of the clear wording of the policy and the absence of a legal interest of Eskom in these narrow interlocutory proceedings, I find that it is not necessary for Eskom to be joined prior to my determining this application.
- [42] As a result, it is not necessary for me to admit the applicant's supplementary affidavit and I decline to do so.
- [43] As to the respondent's contention that all three of the applicant's claims should be dealt with in terms of the arbitration provision, clause 7.6 of the policy refers to disputes “regarding any aspect of this policy or any matter relating to cover (under the policy).” The respondent contends that clause 7.6 is wide enough to include and cover both the claims based on the October 2017 correspondence and the unjust enrichment.
- [44] The applicant does not advance the claims based on the October 2017 correspondence and the unjust enrichment in terms of the policy.
- [45] The applicant's claim pursuant to the October 2017 correspondence is contractual and based on the October 2017 correspondence, not on the policy. The claim is self-standing and arises independently of the policy. It is not a dispute contemplated by the arbitration clause. Thus, this is not a claim regarding an aspect of the policy or a matter relating to cover under the policy.

- [46] So too, the claim for unjust enrichment is not a claim regarding an aspect of the policy or a matter relating to cover under the policy. The claim is self-standing and arises from an alleged unjust enrichment, independently of the policy and not from the policy. It is not a dispute contemplated by the arbitration clause. Furthermore, the enrichment claim arises in the alternative, in the event that the applicant does not succeed on the policy claim and the October 2017 correspondence claim.
- [47] In the circumstances, the applicant's claim pursuant to the October 2017 correspondence and the unjust enrichment claim do not arise under the policy and are not capable of determination under the arbitration clause. This is notwithstanding similarities between the various claims given that they are based on the same factual matrix.
- [48] Additionally, the parties have not agreed that arbitration should apply in respect of the applicant's claims pursuant to the October 2017 correspondence and the unjust enrichment.
- [49] Accordingly, the two latter causes of action do not arise from the policy and cannot be subject to the arbitration clause in terms of the policy. Hence, absent agreement between the parties that the two causes be determined by arbitration, they stand to be determined in the High Court.
- [50] Pursuant to my finding that the two latter causes of action are to be determined in the High Court, the question is whether I should exercise this Court's discretion not to enforce the arbitration clause in respect of the applicant's claim arising under the policy, and thereby permit all three of the applicant's causes of action raised in the pending action proceedings, to be determined in a single hearing by the High Court.
- [51] Whilst our courts generally defer to litigants' agreements that disputes be determined in terms of arbitration clauses given the autonomy of litigants to

make that choice, courts retain jurisdiction over such disputes, and an arbitration clause does not serve to oust the jurisdiction of a court.¹

- [52] The respondent contends, correctly in my view, that he will be prejudiced if the applicant's claim under the policy is determined by arbitration and the claims pursuant to the 2017 correspondence and the unjustified enrichment, are determined separately by the High Court. Accordingly, the respondent argues that all three claims should be determined by way of arbitration under the policy. The respondent relies on the sanctity of contract, that the applicant is the author of the policy and must be forced to stand by that contract. Thus, the arbitration clause should be enforced and all three claims be dealt with under arbitration.
- [53] I agree with the applicant and the respondent that all three of the applicant's claims should be dealt with simultaneously in terms of a single proceeding.
- [54] The alternative is untenable – multiple proceedings with the attendant unnecessary and unjustifiable wasteful increase in costs and witnesses potentially testifying on more than one occasion on the same facts.
- [55] The applicant's three causes of action are separate and distinct but arise from the same factual matrix. A piecemeal determination of the applicant's claims results in the potential for competing and differing outcomes on the same facts, that the outcome of the claim under the arbitration will be different to conclusions reached on the same factual issues by way of another forum.
- [56] The case law² is consistent that a multiplicity of claims proceeding in different fora on the same facts should be avoided in the light of the possibility of conflicting decisions. The appellate courts have referred to the advantages of single proceedings in respect of a saving of time, expenses and costs and to which I would add finality of proceedings and a saving of judicial resources. This is particularly so where the same facts are involved and witnesses are required

¹ *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) at 393; *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* 1977 (4) SA 682 (C) at 693; *Foize Africa (Pty) Ltd v Foize Beher BV & Others* 2013 (3) SA 91 (SCA) at [21]. ("Foize")

² *Foize* id at [28]; *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* 2014 (3) SA 265 (GP).

to testify more than once on the same facts. In addition, the fees and costs of arbitration proceedings and potential proceedings before this Court in addition, are factors to be considered when determining this issue.³

- [57] Furthermore, the inconvenience to the High Court and potential waste of scarce judicial resources arising from multiple proceedings, cannot be countenanced.
- [58] In these circumstances, all three of the applicant's claims should be dealt with simultaneously in terms of a single proceeding before one forum.
- [59] The issue is whether the three claims should be dealt with simultaneously by the High Court or by way of arbitration. The respondent insists that he is not bound by the policy. Whether that is so or not is an issue for the trial proceedings. I am not called upon to deal with that issue.
- [60] However, the respondent's stance that he is not bound by the policy whilst simultaneously relying upon and claiming the enforcement of the arbitration clause in respect of all three of the applicant's claims, is untenable and not sustainable in law.
- [61] The respondent's contention that he is not bound under the policy means that he did not agree to and is not bound by the arbitration clause. That means that the applicant's claim in terms of the policy cannot be determined under the arbitration clause. It follows that the applicant's claim under the policy has to be determined by the High Court.
- [62] I have already found that the applicant's claims arising from the 2017 correspondence and the unjust enrichment do not arise in terms of the policy. They cannot be determined under the policy by way of the arbitration clause. As a result, those two claims must be determined in the High Court.
- [63] The respondent's stance that he is not bound by the policy results in the applicant being unable to prosecute its claim arising from the policy in terms of

³ *Foize id.*

the arbitration clause. Thus, all three of the applicant's claims cannot be dealt with under the arbitration clause.

[64] In the circumstances, it will facilitate the administration of justice if all three of the applicant's claims are heard together before the High Court. That is sufficient to constitute good cause as envisaged in s 3(2) of the Act and is sufficient to justify the grant of an order in terms of s 3(2) of the Act.

[65] In the circumstances and regard being had to the fact that the applicant's three claims should be dealt with simultaneously, all three claims should be determined simultaneously in a single hearing before the High Court and I intend to grant an order giving effect to s 3(2) of the Act.

[66] As to the costs of this application, the applicant has achieved success. There is no reason why the order on the costs should not follow the order on the merits. Costs on scale B of rule 69(7) are justified in the light of the degree of complexity of the matter, the arguments raised by the respondent and the importance of the matter to both parties. These factors justify the costs of senior counsel and two counsel where two counsel were utilised by the applicant.

[67] I am obliged to deal with the circumstances giving rise to the delay in delivering this judgment. I regret the delay. I heard this application on 17 February 2025. The delay resulted from the number and nature of matters that I was allocated to deal with during the week of 17 February 2025. In the circumstances, I was unable to deliver judgment timeously within the three month time period that is considered acceptable.

[68] In the circumstances, I grant the following order:

1. The disputes in respect of the claim instituted by the applicant/plaintiff under case number 2022/006281 shall not be referred to arbitration.
2. The respondent is ordered to pay the costs of this interlocutory application, such costs to include the costs of two counsel where two counsel were utilised by the applicant, including senior counsel, on scale B.

1. The disputes in respect of the claim instituted by the applicant/plaintiff under case number 2022/006281 shall not be referred to arbitration.
2. The respondent is ordered to pay the costs of this interlocutory application, such costs to include the costs of two counsel where two counsel were utilised by the applicant, including senior counsel, on scale B.



CRUTCHFIELD J
JUDGE OF THE HIGH COURT
PRETORIA

For the Applicant:	Adv M A Chohan SC assisted by Adv M F B Clark instructed by Clyde & Co Inc.
For the Respondent:	Adv M Danisa instructed by Setshedi Makgale & Matlapeng Inc.
Date of the hearing:	17 February 2025.
Date of the judgment:	1 August 2025.