IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

JUDGMENT

Case no: 2026- 045799

In the matter between:

CCC CONSULTANCY (PTY) LTD	**Applicant**
t/a CAPECON CONSTRUCTION (PTY) LTD	

and

SPRINGS CAR WHOLESALERS (PTY) LTD	**Respondent**

Coram: Justice J Cloete
Heard: 21 April 2026
Delivered electronically: 29 April 2026

ORDER

---

1. It is declared that clause 30.7 (the arbitration clause) of the Joint Building Contracts Committee Principal Building Agreement Edition 6.2 – May 2018,

hereinafter referred to as the 'JBCC', and which comprises one of the documents governing the building contract concluded between the parties, is binding upon them.

2. Unless the parties agree otherwise in writing within 10 (TEN) days from date of this order on the appointment of an arbitrator, such appointment shall be made by the Association of Arbitrators of Southern Africa in terms of clause 30.7.4 of the JBCC read with clause B 13.0 of the Contract Data – Project & Contract Information, annexed as 'CP 3' to the applicant's founding affidavit.

3. The respondent shall pay the applicant's costs on Scale C (party and party), including the costs of one senior counsel, as taxed or agreed.

JUDGMENT

Cloete J:

[1] The two main issues for determination in this opposed application are: (a) whether the parties concluded a binding contract containing an arbitration clause; and (b) if so, the appropriate referral for purposes of arbitration.

[2] The following facts are common cause. During October to December 2023, the respondent appointed the applicant as principal building contractor to construct a dwelling house on its property in Camps Bay (the house). The appointment was preceded by the following events: (a) on 9 September 2023, the applicant received a written invitation to tender for the construction of the house; (b) on 19 October 2023, the applicant submitted a comprehensive written tender, in accordance with the terms and conditions of the invitation, to the

respondent's duly appointed agent, JZE Architects (JZE) ; (c) on 22 November 2023, JZE issued a 'letter of intent', in which it advised of the respondent's intention to appoint the applicant as principal contractor 'for the abovementioned contract' ; and (d) on 7 December 2023, JZE wrote to the applicant confirming the award, again for 'the abovementioned contract'.

[3] It is also common cause that : (a) the site was handed over to the applicant in November 2023, with execution of the building works commencing in December 2023; and (b) during the period 21 January 2024 to 3 June 2025, JZE issued 15 interim payment certificates (IPC's) to the applicant, all of which were paid by the respondent, save for the last.

[4] It was in July/ August 2025 that a dispute arose between the parties, with the respondent alleging that the applicant had breached its contractual obligations. According to the respondent this entitled it to cancel 'the building contract'. The applicant disputes that it breached the contract and thus denies that the respondent was entitled to cancel. The applicant has calculated its claim against the respondent to be approximately R4.5 million excluding interest and damages. The respondent calculates its claim against the applicant to be in the region of R6 million, of which R4.4 million has apparently already been quantified.

[5] The invitation to tender included the following documents: (a) contract data, which in turn incorporated contract information; (b) a bill of quantities; and (c) a set of drawings. The contract data (and contract information) explicitly refer to the 'JBCC Series 2000 Principal Building Agreement (Edition 6.2 May 2018) published by the Joint Building Contracts Committee' (JBCC) as governing the tender. There is no dispute that the applicant's tender was in accordance with the tender documentation.

[6] The respondent's letter of intent, issued thereafter by JZE, confirmed that the applicant was appointed as principal contractor in accordance with the tender documentation. The JBCC contains an arbitration clause and reads in relevant part as follows:

"**Arbitration**

30.7 Where the dispute is referred to arbitration : …

30.7.4 The arbitrator shall be appointed by the nominating body [CD *i.e contract data*] and shall be deemed to have been appointed by the parties…"

[7] In turn, clause B 13.0 of the contract data identifies the nominating body as the Association of Arbitrators of Southern Africa. The 15 payment certificates issued by JZE on behalf of the respondent reflect that each was issued 'in terms of … the JBCC'.

[8] Mr Abdillah Williams, the architect involved and employed by JZE, deposed to an affidavit (albeit in reply) in which he unequivocally confirmed that: (a) the applicant, in response to the tender invitation, submitted its offer to perform the works subject to the JBCC ; (b) the respondent accepted the applicant's offer; and (c) all processes and work undertaken by the applicant 'and the remainder of the professional team' for the construction of the house occurred in accordance with the provisions of the JBCC.

[9] The letter of intent stipulated that the applicant's appointment was to be subject, inter alia, to all relevant contract documentation being finalised 'for signing'. On its plain wording, it was therefore not a requirement that such documentation had to be signed as a pre-condition for the contract to commence. This is consistent with the letter of award which followed on 7 December 2023, in which it was stated that "we confirm the award … in line with, and in terms of the letter of intent…". It is also consistent with the letter of cancellation sent to the applicant by the respondent's attorney on 4 August

2025, in which he informed the applicant that it was cancelling 'the building contract' concluded between the parties.

[10] It was only much later on 24 November 2025, after the applicant formally referred the dispute to arbitration, that for the first time the respondent purported to reserve its rights in relation to the applicability of the JBCC, while at the same time advising that "without prejudice to its rights, our client is amenable to engaging in arbitration through the Association of Arbitrators (Southern Africa)". No mention was made of any other building contract concluded between the parties. Indeed, the contract allegedly relied upon by the respondent remains a mystery, since its terms have still not been disclosed, even in its answering affidavit in this application.

[11] The correspondence further reveals that it was only after the parties could not reach agreement on the identity of the arbitrator to be appointed that, on 14 January 2026, the respondent's attorney advised that 'our client is no longer amenable to this matter being submitted to arbitration'. The respondent also subsequently adopted the stance that it had never agreed thereto under the guise of its earlier 'reservation of rights' pertaining to the applicability of the JBCC. Two further communications by the applicant's attorney to the respondent's attorney disputing this and formally calling on the respondent to submit to arbitration under threat of approaching court for appropriate relief, went unanswered.

[12] The applicant then launched this application in terms of s 12(2) of the Arbitration Act [1] which deals with the power conferred upon a court to appoint an arbitrator, and reads for present purposes as follows:

"If the appointment referred to in the *[written notice requiring appointment or agreement to appoint an arbitrator in accordance with ss 1]* is not made or agreed to, as the case may be,

---

[1] Arbitration Act 42 of 1965.

within seven days after service of the notice, the party who gave the notice, may upon notice to the other party … apply to the court to make the necessary appointment, and thereupon the court may appoint an arbitrator…"

[13] The respondent's grounds of opposition to the relief claimed on the merits are as follows. First, section 12(2) only confers a residual power on the court to appoint an arbitrator. In other words, there must be an antecedent arbitration agreement that is valid and binding between the parties, and the court's function is limited to facilitating the appointment of an arbitrator pursuant to the parties' agreement to arbitrate. This is correct. However, the respondent contends for the first time in its answering affidavit that there is no antecedent agreement in the present instance; the letter of intent and award 'impose a condition' that all relevant documentation be signed, which was never done, and thus 'no operative, binding or enforceable arbitration agreement' came into being between the parties. In these circumstances it is unsurprising that Mr Williams' affidavit was only filed in reply.

[14] This ground of opposition fails to pass muster. It flies in the face of the admitted facts that: (a) the respondent appointed JZE as principal agent for the project; (b) the applicant submitted a comprehensive tender, signed by it on terms including the JBCC, which the respondent accepted in writing, and in which the award to the applicant, and its appointment as principal contractor, were expressly confirmed; and (c) JZE, in its capacity as such, subsequently issued 15 IPC's to the applicant in terms of the JBCC of which all but the last were paid by the respondent. There can be no doubt, in these circumstances, that consensus existed between the parties with regard to the provisions of the building contract.

[15] It is so that an 'arbitration agreement' in the Arbitration Act is defined as meaning "a written agreement providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the

agreement…”. However *Butler & Finsen: Arbitration in South Africa* make it clear that the Arbitration Act “does not require the written arbitration agreement to be signed by the parties; it is sufficient if they have adopted and acted on the written agreement”.[2] Moreover, and albeit in a different context, in *Pillay and Another v Shaik and Others* [3] the Supreme Court of Appeal held as follows:

“I do not agree with the court a quo’s conclusion that there could be no binding contracts between the parties unless each was signed by or on behalf of the buyers and the sellers. In my opinion it is clear from *Goldblatt v Freemantle,* supra, and the authorities cited therein that, in the absence of a statute which prescribes writing signed by the parties or their authorised representatives as an essential requisite for the creation of a contractual obligation (something that does not apply here) an agreement between parties which satisfies all the other requirements for contractual validity will be held not to have given rise to contractual obligations only if there is a pre-existing contract between the parties which prescribes compliance with a formality or formalities before a binding contract can come into existence…”

[16] In the present case, given: (a) my finding that there was consensus on the terms of the contract, which by clear reference includes the arbitration clause in the JBCC; (b) the authorities to which I have referred above; and (c) there is no formality required under the Arbitration Act in the sense for which the respondent contends; as well as my findings in relation to the third ground of opposition (below) I am persuaded in the applicant’s favour on this point.

[17] The <u>second</u> ground of opposition is the respondent’s contention that there is a material dispute of fact on the papers which must be determined in the respondent’s favour in accordance with the *Plascon-Evans* test. It is also submitted – somewhat contradictorily - that the applicant failed to make out a case in its founding affidavit, and it is not permissible to seek to bolster it in reply. The short answer to this is that the respondent was required to engage meaningfully with the applicant’s allegations in relation to the terms of the

---

2 Arbitration in South Africa: Law and Practice p38 at 2.1.2. referring to *Fassler, Kamstra & Holmes v Stallion Group of Companies (Pty) Ltd* 1992 (3) SA 825 (W) 828D-I.

3 *Pillay and Another v Shaik and Others* 2009 (4) SA 74 (SCA) para 50.

contract and singularly failed to do so (see inter alia *Wightman* [4]). Indeed, in my view the respondent's allegations are so far-fetched and improbable on this score that they fall to be rejected on the papers as they stand.

[18] The <u>third</u> ground is that the applicant cannot succeed in the relief it seeks because in its founding affidavit it contended expressly for the conclusion of a *written* building contract on the terms set out in its tender, the letter of intent, the award and the contract data (and other documents, including the JBCC, incorporated by reference). The respondent maintains that these documents impose conditions regarding the finalisation and *signing* of the contract documentation, which were not fulfilled. However, as demonstrated earlier, actual signature was not a requirement in terms of the letter of intent and the award. The condition contained therein was that that the documents had to be finalised *for signing.* They quite clearly were when regard is had to the undisputed facts as well as the inherent probabilities.

[19] The respondent also latches onto clause 5.2 of the JBCC, in terms of which it was required of the parties to sign 'the original agreement'. This term is nowhere defined in the JBCC. Furthermore, clause 3.1 of the JBCC provides that 'the objective of this agreement is the execution of and payment for the works for which *there has been* an offer by the contractor and an acceptance by the employer' (my emphasis) ; and in terms of clause 3.3, the JBCC 'shall come into force on the date of acceptance by the employer'. I have been unable to find any provision in the JBCC which makes signature thereof by both parties a pre-condition to an enforceable contract. Counsel for the respondent did not draw my attention to one either.

[20] The <u>fourth</u> ground is that, even if the arbitration clause in the JBCC is found to be binding, the relief sought is incompetent, because the applicant asks for the appointment of an arbitrator other than by the Association of Arbitrators

---

4 *Wightman t/as JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) para 13.

as provided for therein. However, during argument, counsel for the respondent fairly accepted that it is open to this court under the applicant's prayer for alternative relief to order an appointment in terms of the JBCC read with the contract data. That dispenses with this ground.

[21] Finally, it bears mention that after hearing argument on urgency, I ruled this application to be sufficiently urgent to warrant a hearing earlier than on the opposed motion roll (February 2027) which is what the respondent also contended for. For purposes of taxation, the Taxing Master is directed to include the applicant's costs incurred in relation to the issue of urgency.

Order

[22] The following order is made:

1. It is declared that clause 30.7 (the arbitration clause) of the Joint Building Contracts Committee Principal Building Agreement Edition 6.2 – May 2018, hereinafter referred to as the 'JBCC', and which comprises one of the documents governing the building contract concluded between the parties, is binding upon them;

2. Unless the parties agree otherwise in writing within 10 (TEN) days from date of this order on the appointment of an arbitrator, such appointment shall be made by the Association of Arbitrators of Southern Africa in terms of clause 30.7.4 of the JBCC read with clause B 13.0 of the Contract Data – Project & Contract Information, annexed as 'CP 3' to the applicant's founding affidavit; and

3. The respondent shall pay the applicant's costs on Scale C (party and party), including the costs of one senior counsel, as taxed or agreed.

J I CLOETE

JUDGE OF THE HIGH COURT

Appearances

For applicant: Adv P Vivier SC

Instructed by: Enderstein Malumbete Inc (Mr S Pienaar)

For respondent: Adv S W Burger

Instructed by: Knowles Husain Lindsay Inc (Mr M Husain)