

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

JUDGMENT

CASE NO: 2026-116404

In the matter between:

PDS AFRICA (PROPRIETARY) LIMITED

APPLICANT

and

ATLANTIC iBUILD (PROPRIETARY) LIMITED

RESPONDENT

Coram: MTHIMUNYE AJ

Heard: 03 August 2026

Delivered: Electronically on 24 August 2026

Neutral citation: PDS Africa (Proprietary) Limited v Atlantic iBuild (Proprietary) Limited (Case No: 2026-116404) [2026] ZAWCHC ... (24 August 2026)

Summary: Urgent applications – rule 6(12) – applicant to establish the absence of substantive redress at a hearing in due course. Appointment of arbitrator is an abuse of process – waste of judicial resources - pending elected liquidation on opposed roll – waiver of right to arbitrate- Costs of application

including counter application to be paid by the applicant on an attorney and client scale C.

ORDER

1. First point *in limine* raised by respondent is dismissed. Leave is granted that the application be heard as one of urgency.
 2. The second point *in limine* raised by respondent that the application for the appointment of an arbitrator is an abuse of process is upheld.
 3. The application for appointment of an arbitrator in terms of section 12(2) read with section 12(1)(a) of Arbitration Act 42 of 1965 (as amended) is struck off the roll.
 4. The costs of this application, including costs of the counter-application are to be paid by the Applicant, PDS Africa (Pty) Ltd, on the scale as between attorney and client, scale C, including the costs of the counter-application.
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JUDGMENT

Mthimunye AJ:

Introduction

[1] The Applicant urgently seeks an order in terms of Section 12(1)(a) read with Section 12(2) of the Arbitration Act 42 of 1965 (“the Act”) that an arbitrator be appointed. Respondent opposes the relief sought on the basis that

the applicant's application is not a *bona fide* attempt to bring about an arbitration process or for the relief which is sought; as the applicant realises that its chances to succeed in their pending elected liquidation proceedings is severely compromised.

[2] Respondent has also filed a conditional counter-application in terms whereof it seeks in the event that the applicant's application is successful, that the arbitration clause 14.2 in the Subcontractor Agreement be set aside in terms of Section 3(2)(a) of the Act. The applicant opposes the counter-application.

[3] For purposes of convenience I will refer to the applicant in this matter as PDS Africa and the respondent as Atlantic iBuild. Both the main application and counter-application before me are concerned with clause 14.2 of the Subcontractor Agreement ("SCA") concluded between the parties.

Points in limine

[4] Respondents raised two points *in limine*. Firstly, that the relief sought by the applicant is an abuse of process. Secondly, that the application lacks urgency. Both these aspects are intertwined and will be dealt with simultaneously. If the respondents' points *in limine* are upheld and the application to appoint an arbitrator is consequently dismissed, the conditional counter application by the respondent becomes moot and won't need any further determination by this court.

[5] I will deal with the issues in the following order. First, I will outline the procedural history of the matter, together with the background facts. Second, I deal with the points *in limine*. Third, I deal with the urgency of the relief sought in the context of the procedural history. Finally, if the points *in limine* are dismissed, I will deal with the relief sought and the counter-application.

Litigation Facts

[6] On 18 February 2025 and at Durbanville the applicant represented by Hendrick Jacobus Waldeck, sole director of PDS Africa concluded the written SCA with Robert Schroeder who duly represented the respondent, Atlantic iBuild. In terms of the SCA the applicant was the respondent's appointed subcontractor.

[7] On 22 September 2025 under case number 2025-171814 PDS Africa launched liquidation proceedings in this court. Whereas on 12 November 2025 the matter became opposed and was postponed by agreement to 17 November 2026 for hearing on the opposed roll, as per order of Pather AJ.

[8] Atlantic iBuild complied with the order by delivering its answering affidavit, whereas the applicant did not file its replying affidavit by 16 December 2025 as provided for in that order. On the date of the hearing of the current matter, PDS Africa had still not filed its replying affidavit. PDS Africa now eight months later after launching liquidation proceedings seeks to invoke an arbitration clause contained in the SCA.

Historical Background

[9] In terms of the SCA, Atlantic iBuild appointed PDS Africa as a subcontractor to perform the drilling of pre-collar holes as part of its responsibilities under a First Subcontract. PDS Africa had the authority to appoint sub-contractors to assist it in the drilling of the pre-collar holes. The subcontractors together with PDS Africa thereafter agreed to provide their services of drilling pre-collar holes to Atlantic iBuild, as a further subcontractor as per the terms of the SCA.

[10] The contract price for the “Works” in terms of the SCA was R19 485 956,50. The parties agreed that the Works would form part of the project, which is a phased construction project; with timelines subject to the progress of the Project. Atlantic iBuild was to pay PDS Africa a deposit of 20% of the Contract Price for mobilisation of the equipment, and subject thereto that Atlantic iBuild received a deposit from the First Contractor. Atlantic iBuild must then inform PDS Africa once it has received the deposit and will then instruct PDS Africa to proceed with mobilisation. The Deposit would then be proportionately reduced over the duration of the Works on every occasion that PDS Africa presents an invoice to Atlantic iBuild which would include a claim for the meters drilled, subject to Atlantic iBuild having fully paid all prior PDS Africa invoices.

[11] On 5 September 2025 PDS Africa’s attorneys sent a letter of demand to Atlantic iBuild informing them that they are indebted to PDS Africa in the amount of R 11 894 821.94 in respect of drilling and ancillary services rendered by them to Atlantic iBuild pursuant to the SCA. PDS Africa further informed Atlantic iBuild that due to the failure to pay the outstanding amount in terms of a written undertaking between them were indicative of Atlantic iBuild’s commercial insolvency. Furthermore, if Atlantic iBuild should fail to bring their account up to date within 21 days business days upon the receipt of the letter of demand, PDS Africa will exercise their right to cancel the written agreement between the parties.

[12] Consequently, on 16 September 2025 Atlantic iBuild responded to PDS Africa’s letter of demand, denying indebtedness to PDS Africa or that they were in breach of SCA. Atlantic iBuild further alleged that they overpaid PDS Africa an amount of R1 761 255,19 and sought that the dispute between them be resolved amicably. Accordingly, on 17 September 2025 Atlantic iBuild sent

a notice of material breach of the SCA to PDS Africa, asserting that on 11 August 2025 PDS Africa unilaterally and without justification ceased all drilling operations on the Project site. Further that the contractual consequences in terms of the breach in terms of clause 12.1 of the SCA, PDS Africa is deemed to be the “Defaulting Party” and Atlantic iBuild the “Aggrieved Party”. That the afore-mentioned breaches constituted material breaches as defined in clause 12.1.2 of the SCA, being capable of remedy but not remedied within reasonable time. Atlantic iBuild then requested PDS Africa to remedy the material breaches within twenty-one business days from date of receipt of the notice of the breach, by immediately resuming all drilling operations at the Project Site, completing all outstanding redrills in the affected areas, providing a detailed catch-up program to complete all Works within the contracted timeframe and ensuring continuous operation until completion of all contractual obligations.

[13] Failing to remedy the breach by PDS Africa within the specified notice period, Atlantic iBuild would exercise their right in enforcing Clause 12.1 of the SCA to claim immediate specific performance of all outstanding obligations with or without claiming damages, cancel the Agreement with immediate effect and claim damages and recover all costs on an attorney-and-own-client scale as provided for in clause 12.2 of the SCA.

[14] PDS Africa responded to the notice on 22 September 2025 by informing Atlantic iBuild that they have issued a liquidation application against them and that the matter had been enrolled for hearing on 12 November 2025. Atlantic iBuild subsequently opposed the liquidation and matter was then subsequently postponed for hearing on the opposed roll 17 November 2026.

[15] Thereafter, further discussions ensued between the parties, including possible settlement in resolving the dispute, including request by PDS Africa for an indulgence in the late filing of their replying affidavit. In consequences of these events the liquidation is still pending and PDS Africa has yet to file its replying affidavit if any.

[16] Against this background and perhaps in the hope of achieving a speedier resolution of the disputes, PDS Africa now wishes to go to arbitration. It relies on the clause in the SCA dealing with dispute resolution. The relevant clause read as follows:

“14.1 The Agreement shall be governed by and construed in accordance with the Laws of the Republic of South Africa.

14.2 Any disputes arising under this Agreement shall first be resolved through good-faith negotiations. Failing such resolution, disputes shall be referred to mediation or arbitration, as agreed between the parties.”

PDS Africa’s case

[17] PDS Africa explains that it applied for the winding up of Atlantic iBuild, as Atlantic iBuild raised various contractual disputes in its answering affidavit in the liquidation proceedings. PDS Africa confirms that the liquidation application has been postponed to the opposed roll, on 17 November 2026.

[18] PDS Africa avers in their founding papers that the veracity and effect of the contractual disputes raised by the respondent cannot be adjudged in this application and that it is a process best left to the arbitrator to be appointed upon this application. Further, that the dispute raised by Atlantic iBuild is contractual in nature and falls squarely within the ambit of the arbitration clause of the SCA.

[19] In addition, that it does not abandon its liquidation application, as should the arbitral tribunal confirm the indebtedness of Atlantic iBuild, they will persist with the current pending liquidation application. Further if the debt should be found not to exist the liquidation application will fall away. Further that the approach by them in referring the dispute to arbitration balances the statutory nature of liquidation proceedings with the parties' contractual commitment to arbitrate disputes and avoids the duplication of proceedings or the risk of inconsistent findings.

[20] Furthermore, if the liquidation application is only finally determined after the expiry of three years from when the debt arose, its debt will become prescribed. That as a result of this consideration they are compelled to refer the matter to arbitration given the realistic delays in the time that the liquidation matter is expected to be heard and finally determined as a result of the court's congested rolls.

[21] In addition that they have sent various communications demanding payment from Atlantic iBuild as well as an *in mora* notice informing Atlantic iBuild about the liquidation application. Further, that they have good prospects of success in the liquidation proceedings. They have also attempted to settle the matter with Atlantic iBuild through mediation but have so far been unable to resolve their disputes through good-faith negotiations, thus they are now opting to refer the matter for arbitration. Therefore, they are now entitled in terms of Section 12(2) of the Act, upon notice to Atlantic iBuild to apply to this court to make the necessary appointment of an arbitrator, as the parties were unable to reach an agreement within 7 days as to the appointment of an arbitrator.

Respondent's ("Atlantic iBuild") case

[22] Atlantic iBuild on the other hand avers in their answering papers that PDS Africa's application is fundamentally misconceived, in that it seeks to invoke an arbitration clause after having elected to pursue liquidation proceedings against them, based upon the very same alleged indebtedness which PDS Africa now seeks to refer to arbitration. Further, that Atlantic iBuild delivered a comprehensive answering affidavit in the liquidation proceedings, which is still pending and has not been withdrawn by PDS Africa.

[23] In their conditional counter-application Atlantic iBuild avers that PDS Africa should not be allowed to invoke the arbitration clause in the SCA and/or that the arbitration agreement it contains (if any) be set aside in terms of section 3(2) of the Act. The grounds upon which Atlantic iBuild relies in support of their opposition to the relief sought by PDS Africa and their counter-application are as follows:

- “1. Waiver of the right to arbitration;
2. That PDS Africa elected not to arbitrate and approbated the remedy to apply for liquidation which remedy it now seeks to reprobate;
3. That the present application is an abuse of the legal process and/or *mala fide*.
4. That the liquidation was a debt collection exercise in terrorem of the Atlantic iBuild;
5. The application was brought as one of urgency in terms of Rule 6(12) whilst it is not urgent at all.
6. That the arbitration clause 14.2 is inchoate and/or void for vagueness and unenforceable in that it does not define the language or seat of the arbitration, the applicable rules or how the Arbitrator is to be selected in the absence of an agreement between the parties.”

[24] Atlantic iBuild avers that PDS Africa has waived any right it may have had to insist upon arbitration. Further, that the doctrine of election is well-established in our law. In that PDS Africa elected to pursue liquidation proceedings against them instead of invoking the arbitration clause contained

in clause 14.2 of the SCA. Further that PDS Africa had full knowledge of the existing dispute between them at the time they launched the liquidation proceedings.

[25] They aver that on 16 September 2025 prior to the liquidation proceedings they had addressed detailed correspondence to PDS Africa's attorneys identifying numerous *bona fide* disputes relating to the alleged indebtedness, incorrect invoicing, overcharging, defective and unworkmanlike performance, breach by PDS Africa, damages suffered by them and misapplication of tariffs. Notwithstanding the knowledge that the debt was disputed by them, PDS Africa deliberately elected to invoke the jurisdiction of this court and abused the drastic remedy of winding-up as a debt recovery process, which according to them was designed to intimidate and terrorise Atlantic iBuild. They further aver that PDS Africa only sought to invoke arbitration proceedings months after having received their answering affidavit in the liquidation proceedings.

[26] Furthermore, that the liquidation application remains pending and has not been withdrawn by PDS Africa. Thus, PDS Africa's conduct is wholly inconsistent with an intention to insist upon arbitration as the exclusive mechanism for determining the dispute between the parties.

[27] Atlantic iBuild further avers that the present application before court constitutes an abuse of process and falls to be dismissed on that basis alone. Further that PDS Africa was compelled to file its replying papers on/or before 16 December 2025 in terms of the 12 November 2025 court order by Pather AJ. They seek the court to note that PDS Africa by their own admission seek to

act in contempt of the court order by filing their replying papers only after the proposed arbitration has been concluded.

[28] In substantiation of this averment, Atlantic iBuild referred the court to paragraph 47.1 of PDS Africa's founding papers which expressly states that, should the arbitration be determined in its favour, the outcome thereof will guide the formulation of a replying affidavit to be filed in the pending liquidation application. They aver that PDS Africa is thus acknowledging that the contemplated arbitration is intended to influence, supplement and strengthen their case in the liquidation proceedings. Furthermore, on 10 February 2026 in a correspondence addressed to PDS Africa's attorney's PDS Africa was warned that their proceedings and litigious strategy constituted an abuse of this court's process.

[29] Atlantic iBuild further avers that the commercial consequences flowing from this pending liquidation application are profound. As, whilst the liquidation is pending, it is impossible for them to obtain a tax clearance certificate from SARS. This severely impairs their ability to tender for large contracts which almost inevitably require tenderers to submit tax clearance certificates with their tenders, in the absence of which, the tender being rejected as "unresponsive". Further they are unable to apply for credit to purchase new equipment and to access new suppliers for their operations, and present suppliers threatened to withdraw their credit facilities, which is the cause of immeasurable reputational damage to a company.

Applicant's ("PDS Africa") Reply

[30] PDS Africa in their replying affidavit avers that the present application is not an application for the determination of the contractual dispute between the parties, or for the determination whether a declarator must be made whether

liquidation proceedings must proceed or not. Further, the only issue for determination is whether the jurisdictional requirements of Section 12(1)(a), read with section 12(2), of the Arbitration Act, have been satisfied.

[31] They aver that Atlantic iBuild's counter-application and its defence based on alleged vagueness directed at clause 14.2 of the SCA is wrong, as clause 14.2 creates a binding dispute-resolution mechanism, and not a meaningless or optional provision which either party may ignore once a dispute arises.

[32] Further, they aver that the clause contains two-stages. The first is a mandatory attempt at good-faith negotiation. That stage has been exhausted as demonstrated by the extensive engagement, including settlement discussions and an in-person meeting on 26 February 2026. PDS Africa further claims that the second stage is introduced by the peremptory words "disputes shall be referred". In that these words show that once negotiations fail, the dispute must be referred to arbitration as a private dispute-resolution process. In addition, the words "as agreed between the parties" do not nullify the obligation to refer the dispute but rather regulate the practical choice and machinery of the process, namely mediation and arbitration.

[33] Further that the interpretation by Atlantic iBuild would render the words "shall be referred" commercially ineffective. That would mean that, notwithstanding the inclusion of a dispute-resolution clause, either party could prevent any binding private process merely by refusing to agree. In addition, the absence of a detailed appointment mechanism, procedural rules, a seat, language or an identified arbitrator does not render the arbitration agreement void for vagueness.

[34] PDS Africa further avers in their replying papers that the pending liquidation application and arbitration are two processes that operate on different planes. Furthermore, they claim that the fact that the outcome of the arbitration may bear upon whether they persist with the liquidation application does not make the process inconsistent. That it merely reflects the commercial reality that the existence and quantum of the debt are relevant to the liquidation application.

[35] Furthermore, PDS Africa avers that Atlantic iBuild bears the onus of establishing waiver, by showing a clear, unequivocal and intentional abandonment of their right in relying on arbitration, which they aver that Atlantic iBuild has failed to do. In addition, their conduct is not consistent with abandonment of arbitration, on the contrary they demonstrated, through their attorney, repeatedly that they sought to resolve the dispute by negotiation and only raised arbitration expressly thereafter. In substantiation of their averment, they refer to correspondence annexures “FA 11”, “FA 13”, “FA 15”, “FA 18”, “FA 19” and “FA 21” of their founding papers.

[36] PDS Africa further avers that the fact that the liquidation application was launched before the arbitration was invoked does not constitute waiver. Furthermore, they aver that the doctrine of election is equally not engaged, as election applies where a party is faced with inconsistent remedies, and with the full knowledge, chooses one to the exclusion of the other. Whereas in this matter liquidation and arbitration are not inconsistent remedies as although they serve different purposes, they are capable of co-existing.

[37] Further, PDS Africa avers that Atlantic iBuild’s reliance on approbation and reprobation is similarly misplaced, as they do not seek to affirm and disaffirm the same instrument or take inconsistent positions. They aver further,

that they rely on the SCA for the arbitration clause. They further deny that they only sought arbitration because the liquidation application has become inconvenient or strategically disadvantageous.

[38] In so far as to the abuse of process allegation by Atlantic iBuild, PDS Africa avers that the allegation is unfounded and denied. In that the present application seeks a statutory appointment of an arbitrator, where the parties failed to agree to the appointment. Further that the reliance placed on paragraph 47.1 of their founding affidavit by Atlantic iBuild is misplaced. As paragraph 47.1 does not say that arbitration is being used to manufacture a new case in the liquidation application but merely records that a binding arbitral determination of the disputed indebtedness will simplify the liquidation proceedings and assist the court hearing the proceedings.

[39] PDS Africa further denies that they are in contempt of the Order made by Pather AJ, dated 12 November 2025, as they requested an indulgence and invited Atlantic iBuild to indicate whether a formal condonation application was required, whereafter matter was overtaken by trying settlement negotiations between the parties. They however concede that the order by Pather AJ is not optional, to the extent that an extension or condonation is required in the pending liquidation proceedings. However, they submit that it is a matter to be regularised in the liquidation proceedings before the court is seized with it. They aver that, it cannot be a basis to refuse the appointment of the arbitrator in this application.

Applicants' ("PDS Africa") submissions

[40] Counsel on behalf of PDS Africa submitted during argument that the liquidation application is not before this Court and thus need no consideration by this Court. That if this Court were to make a determination on the

liquidation, then this Court will *de facto* close the book on the liquidation proceedings which still has to be heard in November 2026. Further, that the argument raised by Atlantic iBuild that they are in contempt of the Order made by Pather AJ is fundamentally flawed, in that an applicant has to make out its case in its founding affidavit and not in the replying affidavit which is still outstanding. Furthermore, even if they were to decide to supplement their papers in the liquidation or want to file their replying affidavit in order to introduce the award that might be awarded by the arbitrator, they can still do so by applying for condonation.

[41] They submitted further, that the outcome of the arbitration will determine the fate of the liquidation. That one of the scenarios are that if the arbitrator makes an award in favour of PDS Africa and Atlantic iBuild fails to make payment, the liquidation application will proceed.

[42] PDS Africa further submitted that the argument raised by Atlantic iBuild aligned with the “Badenhorst Principle” is a non-starting argument. In that the defence raised by Atlantic iBuild whether the debt is disputed on reasonable grounds will be tested when they are given a chance to vindicate themselves. They further submitted that there is no abuse of process at issue, as had they approached this court first by way of summons Atlantic iBuild would have raised arbitration as a defence.

[43] Furthermore, they submitted that Atlantic iBuild is disputing the validity of the arbitration clause, while they are facing prescription. They concede that only an action can stay prescription or if they go to arbitration. In addition, they submitted as a result of the court’s congested rolls, if this matter had to be placed on the ordinary court roll, they will not have substantial redress in due course as the matter might become prescribed. They further concede that if three processes were to run in the court it will make no sense and create havoc.

[44] PDS Africa further submitted that waiver is not easily offered or presumed. That the onus is on Atlantic iBuild to show that by unequivocal conduct PDS Africa has chosen to enforce its right to elect the liquidation process and waived their right to pursue arbitration. They further concede that they had enforced the SCA in the liquidation, by asking for a liquidation order. They dispute that they have waived their right to arbitrate and elected liquidation proceedings as these remedies arose from the same SCA.

[45] They further submitted they leave it in the courts discretion to determine the costs to be awarded, alternatively that attorney and client costs be awarded on scale C against Atlantic iBuild for the waste in opposing this application.

Respondents' ("Atlantic iBuild") submissions

[46] Counsel on behalf of Atlantic iBuild submitted during argument that in order to determine the urgency of PDS Africa's application we need to holistically look at the agreement and when the dispute was raised in relation to the timeline of this application. The agreement on which the PDS Africa relies was signed on 18 February 2025. The claim of PDS Africa will thus only become prescribed, at the earliest in 2028. Further that the second date the court has to look at is 16 September 2025, when a letter was sent by Atlantic iBuild to PDS Africa's attorneys disputing the debt and the reasons for the dispute.

[47] They further submitted that on 20 September after being informed of the disputes, PDS Africa proceeded to issue liquidation proceedings. Consequently, PDS Africa placed it on the urgent roll 17 November 2025, and Pather AJ made an order by agreement, for further papers to be filed and the matter to be postponed to the opposed roll. As per agreement between the

parties PDS Africa had to file their replying affidavit which they have failed to do so until now.

[48] Atlantic iBuild submitted that the argument of prescription by PDS Africa has no merit as PDS Africa knew by 17 November 2025 that there was a dispute, yet they did absolutely nothing until February 2026 when PDS Africa started sending letters to their attorney's. They submitted that on the papers before this court no case for prescription is made out by PDS Africa. They submitted further that if PDS Africa sue on the breach in terms of the SCA and that contract contains an arbitration clause it is Atlantic iBuild's right to raise the arbitration as a defence.

[49] Atlantic iBuild further submitted that the reason why PDS Africa brought this urgent application can be found in PDS Africa's founding affidavit at paragraph 47, where they state that the result of arbitration will guide the formulation of their replying affidavit. That is an utmost abuse of the process of the liquidation as well as the arbitration process. Further, they submitted that PDS Africa wants the disputes of fact to be determined by arbitration as it cannot be adjudged in the liquidation. Further, they submitted that PDS Africa is aware of the Badenhorst Principle and knows that their liquidation application is doomed for failure.

[50] Atlantic iBuild submit further that the choice by PDS Africa not to file their replying affidavit in the liquidation application is deliberate as demonstrated in their founding papers where they do not state that they want to use the arbitration for the final determination of the dispute but only to use the arbitration for the formulation of their replying affidavit. They further submitted that the application for the appointment of an arbitrator should be dismissed with costs on an attorney and client scale C.

[51] Further they submitted that the matter is not urgent as the explanation by PDS Africa, that they tried to settle the matter which resulted in them waiting for almost 8 months to refer the matter to arbitration is flawed as PDS Africa does not say why the matter is urgent. That on this basis alone the matter should be struck off the roll for lack of urgency with costs on an attorney and client scale C.

Points in Limine

Urgency

[52] The law on urgency is clear. In *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd and Others*,¹ it was held that in determining whether a matter should be treated urgently an applicant must state why he claims he cannot be afforded substantial redress in due course if the application is not heard immediately.² An applicant cannot sit idly and rely on urgency after there has been a long delay.

[53] The urgency of PDS Africa is set forth explicitly in their papers. It is common cause that the parties were busy with good-faith negotiations in trying to settle the breach of contract between them. They explain the delay from September 2025, in that after the failed negotiations between themselves and Atlantic iBuild, they immediately approached this Court in order to enforce an arbitration clause by applying to appoint an arbitrator as they believed that a hearing in due course will not afford substantial redress as their claim against Atlantic iBuild suffers the risk of prescription due to the congestion of the court rolls.

¹ *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd and Others* [2011] ZAGPJHC 196; (2011) JDR 1832 (GSJ).

² *Ibid* para 6; and *Cape Town Minstrel Carnival Association v City of Cape Town* (Reasons) [2026] ZAWCHC 34 paras 23&4.

[54] In commercial matters the court has to view urgency objectively as an applicant in certain situations may suffer dire consequences if they do not act swiftly. Taking into consideration the circumstances of this matter, and having considered the affidavits, oral submissions and case law cited I am satisfied and find that there are sufficient and satisfactory grounds including an explicit explanation by PDS Africa why the ordinary time periods would not provide substantial redress in due course. I therefore find that the matter is urgent and condone in terms of Rule 6(12) of the Uniform Rules of Court that PDS Africa's non-compliance with the forms, service and timelines be condoned and direct that the application be heard as one of urgency. First point *in limine* raised by Atlantic iBuild is thus dismissed.

Abuse of Process

[55] An arbitration clause is inserted in a contract at the time of its conclusion because parties usually, in contracts, contemplate that disputes might arise that will need to be resolved before instituting costly legal proceedings against each other. Where a party who has the option in an agreement to refer a matter to arbitration commences legal proceedings against another party to that agreement the other party has got a right to apply for a stay in the proceedings and in this case for the matter not to be referred to arbitration as the other party already elected the process to resolve the matter. PDS Africa's argument that they have not waived their right to arbitrate by electing liquidation proceedings first as both these remedies arose from the same SCA is fatally flawed and incorrect.

[56] It is clear from the founding papers and the annexed correspondence that PDS Africa was aware that there was a dispute between them and Atlantic iBuild. Despite PDS Africa's attorneys already being made aware by Atlantic iBuild on 20 September 2025, that they were disputing being in breach of

contract, PDS Africa still proceeded with liquidation proceedings. It is my considered view that a party may only commence litigation rather than arbitration where it genuinely believes that there is no dispute between it and the other party.

[57] Even after failed settlement negotiations, PDS Africa instead of withdrawing their elected liquidation application by removing it from the opposed roll, proceeded to approach this court to enforce arbitration proceedings by appointing an arbitrator. In my view once PDS opted to continue with the liquidation proceedings, they abandoned their right to resort to arbitration under the SCA. It is my considered view that by ignoring its contractual obligation under the arbitration clause by pursuing its claim by way of litigation, PDS Africa elected to waive their right to arbitration. What is further concerning while keeping the liquidation in place, PDS Africa wants to use the arbitration process as a phishing expedition in order to formulate their replying affidavit, as evidenced in paragraph 47 of their founding affidavit:

“47 The latter would prevent undue process in the motion court because if the arbitration is concluded:

47.1 In favour of the applicant the result will guide the formulation of replying affidavit that the applicant is still to deliver (by simplifying it and making the final determination known to the court.”

I pause to note that this replying affidavit had to be filed by PDS Africa by 16 December 2025 as per the order made by Pather AJ. In *Beinash v Wixley* [1997] ZASCA 32; 1997 (3) SA 721 (SCA), the Supreme Court of Appeal held that an abuse of process in general terms occurs “where the procedures permitted by the rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective”.³

³ *Beinash v Wixley* [1997] ZASCA 32; 1997 (3) SA 721 (SCA) at 30.

[58] The doctrine of election generally involves waiver. It is trite that it arises in the context of a breach of contract, where a party is faced with an election to keep the contract alive and claim damages or cancel the contract. Provision is made in the SCA at clause 12 for PDS Africa to claim damages or cancel the contract. In addition, at clause 14.2 PDS Africa was afforded a further remedy to either mediate or arbitrate the matter. PDS Africa although being fully aware of both these remedies as set out in the SCA, elected to proceed with litigation by instituting liquidation proceedings.

[59] In *Bowditch v Peel & Magill* 1921 AD 561 at 572-3; *Culverwell v Brown* 1990 (1) SA 7 (A) at 17, it was observed that once a party has made an election it is final and irrevocable unless the other party agrees to its reversal. It can be inferred on a balance of probabilities that by keeping the liquidation on the opposed roll, while being aware of the arbitration process, PDS Africa intends to proceed with the liquidation in favour of rejecting the arbitration. Thus, the only option for PDS Africa in this case, where they have already elected liquidation proceedings, is to remove the matter from the roll and follow the correct process or to get the consent of Atlantic iBuild to refer the matter to arbitration, as was held in *Bowditch* [supra] that where a party has already elected to make use of a process he needs the other party to agree to the reversal of the election. The argument by PDS Africa that their claim might prescribe is as a result of their own actions, because had they elected from the onset to abide by the SCA by making use of the arbitration clause, they would not have found themselves facing this possible eventuality of prescription.

Conclusion

[60] By electing to pursue litigation proceedings against Atlantic iBuild, PDS Africa cannot now claim the right to submit the dispute to arbitration without the consent of Atlantic iBuild. When a litigant contemplates any procedure in

an agreement, it must do so by taking into consideration the agreed terms of that agreement as between the parties that regulates the process to follow. A litigant cannot upon subsequently realising that he had elected a procedure not provided for in the agreement and not beneficial to him, decide on his own take a new course and without the consent of the other party to the agreement. Not only is this a litigious abuse of process but also a waste of judicial resources. It is trite that every court is entitled to protect itself and others against an abuse of its processes (*Beinash supra*).

[61] As discussed above and after consideration of both the merits and the motive by PDS Africa for bringing this application to appoint an arbitrator it is obvious that there is an abuse of process which is prejudicial to Atlantic iBuild and which this court cannot allow. The second point in limine that the application by PDS Africa is an abuse of process is upheld. As a result, the court will not venture into the merits of this matter nor the optional counter-application of Atlantic iBuild.

[62] I am therefore of the considered opinion that the proper order to be made is to strike, the matter from the roll due to an abuse of process.

Costs

[63] The Appellate Division in *Union Government v Gass* 1959 4 SA 401 (A) at 413 observed, that as a general rule, costs follow the result, and the successful party should be awarded the costs. I have considered the complexity of the matter and that PDS Africa was aware from September 2025 that there was a dispute raised by Atlantic iBuild, and instead of first making use of the remedies as provided for in the SCA they elected to institute liquidation proceedings. This is not only a waste of judicial resources, but it also forced Atlantic iBuild to incur costs in drafting opposition papers and coming to court

to oppose this matter. For all the reasons set out above, I am of the view that an attorney and client costs order should be awarded in favour of Atlantic iBuild on scale C, including costs of the counter-application.

Order

[64] In the result, the following order is made:

- (a) First point in limine raised by respondent is dismissed. Leave is granted that the application be heard as one of urgency.
- (b) The second point *in limine* raised by respondent that the application for the appointment of an arbitrator is an abuse of process is upheld.
- (c) The application for appointment of an arbitrator in terms of section 12(2) read with section 12(1)(a) of Arbitration Act 42 of 1965 (as amended) is struck off the roll.
- (d) The costs of this application, including costs of the counter-application are to be paid by the Applicant, PDS Africa (Pty) Ltd, on the scale as between attorney and client, scale C including the costs of the counter-application.

S MTHIMUNYE

ACTING JUDGE OF THE HIGH COURT

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