IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2023 – 098721

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

DATE
SIGNATURE

In the application by

MUNICIPAL EMPLOYEES PENSION FUND	**Applicant**
And	
ADAMAX PROPERTY PROJECTS MENLYN (PTY) LTD	**First Respondent**
GERALD FARBER *N O*	**Second Respondent**

JUDGMENT

MOORCROFT AJ:

Summary

Arbitration – stay of proceedings – section 3 of Arbitration Act, 42 of 1965 – not in the interests of justice to order a stay

Urgency – self created – case made out on the merits not such that urgent relief is justified even though applicant failed to act timeously

Order

[1] In this matter I make the following order:

1. *The application is dismissed;*
2. *The applicant is ordered to pay the costs of the application.*

[2] The reasons for the order follow below.

Introduction

[3] The applicant ("MEPF") seeks an order in the urgent court staying arbitration proceedings scheduled to proceed on 22 November 2023 before the second respondent ("the arbitrator") pending the latter of

3.1 MEPF's application under section 3 of the Arbitration Act, 42 of 1965 that an arbitration agreement shall cease to have any effect with reference to the disputes between the parties, and

3.2 the final determination of MEPF's envisaged application for a review of

the arbitration award of the arbitrator made on 18 September 2023.

[4] In the alternative MEPF seeks an order staying the arbitration pending the section 3 application only.

[5] The application is opposed by the party that initiated the arbitration, the first respondent ("Adamax"). The arbitrator abides the decision of the court.

[6] An application for a stay of proceedings must be evaluated on the basis of the interests of justice.[1] This must be viewed from the perspective of all parties.

The Arbitration Act

[7] Section 3 of the Arbitration Act gives effect to the principles of party autonomy[2] and *pacta sunt servanda*, and reads as follows:

> ***3 Binding effect of arbitration agreement and power of court in relation thereto***
> *(1) Unless the agreement otherwise provides, an arbitration agreement shall not be capable of being terminated except by consent of all the parties thereto.*
> *(2) The 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 any dispute referred.*

[8] The parties have waived compliance with section 23 of the Arbitration Act.

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1 *Mokone v Tassos Properties CC and Another* 2017 (5) SA 456 (CC) para 67.
2 See also Butler and Finsen *Arbitration in South Africa - Law and Practice* (1993) 63 to 67.

Background:

The co-ownership agreement

[9] The parties entered into a co-ownership agreement on 9 November 2011. The two co-owners were MEPF and Adamax.[3] Adamax was described as 'Propco,' the holding company of three fully owned subsidiaries.[4] These three subsidiaries were not parties to the co-ownership agreement but they held[5] a share in the letting enterprise[6] comprising the Property,[7] in turn comprising various properties[8] listed in Schedule 2.

[10] The co-ownership was constituted by an agreement to carry on the letting enterprise[9] comprising[10] the Property listed in Schedule 2 together with rights flowing from leases and revenue relating to the Property.

[11] It was expressly agreed between the contracting parties that the agreement did not constitute a joint venture or partnership.[11]

[12] The arbitration agreement between MEDF and Adamax is to be found in clause 20 of the co-ownership agreement. In terms of the agreement the arbitrator has the power to fix all procedural rules and to decide on the admissibility of evidence.[12] Unless the arbitrator directs otherwise the Uniform Rules of Court as applied in what is now the Gauteng Division, Johannesburg shall be applicable to the arbitration.

The property management agreement and the second addendum

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3 Clause 1.1(4).
4 Clause 1.1(24).
5 Clause 1.1(25).
6 Clause 1.1(12).
7 Clause 1.1(20).
8 See also the agreement for the sale of land between MEPF as purchaser and the three subsidiaries as the sellers entered into on 9 November 2011.
9 Clause 4.
10 Clause 1.1(12).
11 Clause 7.
12 Clause 20.8.

[13] On the same day, 9 November 2011, MEPF, Adamax, and three other entities[13] entered into a property management agreement in respect of the Property described in the co-ownership agreement. Akani RFA was appointed as the Manager, subject to a cession of its rights and a delegation of its obligations to CRE and M&M.

[14] Unlike the co-ownership agreement the property management agreement does not contain an arbitration clause. MEFP and Adamax pertinently agreed to arbitration in the co-ownership agreement but the parties to the property management agreement did not.

The arbitration

[15] In the arbitration that was initiated in February 2023 Adamax seeks an order -

15.1 declaring that MEPF was in breach of the co-ownership agreement and that it was terminated on 18 October 2022 ("the breach relief"), and

15.2 directing that the co-ownership be dissolved ("the dissolution relief").[14]

[16] Adamax alleges that MEPF had committed material breaches of the agreement by impermissibly interfering in the conduct of the property management agreement which deprived Adamax of income it was entitled to, thus constituting a breach in terms of clauses 6.1(1) and 12.1 of the co-ownership agreement. The allegation before the arbitrator is that MEPF impermissibly instructed the party responsible for the management of the letting enterprise described below not to pay over an amount of R6,609,145.40 that Adamax was entitled to.

[17] MEPF contends that:

17.1 An arbitral tribunal cannot grant a dissolution of co-ownership.

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13 Akani Retirement Fund Administrators (Pty) Ltd ("Akani RFA"), Christodoulou Real Estate CC ("CRE"), and Mervin & Malan Accounting and Secretarial Services (Pty) Ltd ("M&M").

14 Statement of case, prayers 1 to 3.

17.2 The dissolution of co-ownership falls outside the scope of the arbitration agreement embodied in the co-ownership agreement.

17.3 MEPF prayed that the dismissal relief be dismissed.

17.4 The jurisdiction of the arbitrator was placed in dispute in the arbitration proceedings.

17.5 The disputes referred to arbitration ignore MEPFs claims in pending legal proceedings instituted in the 2016 in the High Court in Pretoria[15] where MEPF as plaintiff together with two other companies[16] seeks a number of orders against six defendants. arising out of a number of agreements including the co-ownership agreement and the addendum to the property management agreement. Adamax is the sixth defendant in the action in Pretoria.[17]

17.6 In the Pretoria High Court action the MEPF and the other plaintiffs *inter alia* claim that Adamax failed to make contributions to the co-ownership expenses that it was obliged to make. In May 2023 the matter was allocated as a Commercial Court matter.

17.7 Adamax did not invoke section 6 of the Arbitration Act in the litigation in the Pretoria High Court.

17.8 The disputes raised by Adamax in the arbitration proceedings are linked to and dependent upon the outcome of the litigation in the High Court in Pretoria, and the claims in the arbitration are *lis pendens*.

17.9 MEPF's claims in the High Court action far exceed Adamax's claim in the arbitration and would totally extinguish it.

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15 Gauteng Division Pretoria, case number 2016-98063. The co-ownership agreement is set out in paras 32 to 38A of the amended particulars of claim.

16 Akani RFA and Akani Properties (Pty) Ltd.

17 The action was instituted in 2016 and in the original particulars of claim relief was sought as against Adamax on the basis of an addendum to the property management agreement but the particulars were amended to also orders against Adamax in respect of other claims.

17.10 The basis for the breach of the agreement relied on by Adamax in the arbitration arises from MEPF's alleged failure to pay over R6,609,145.40 in net income to Adamax and the question of breach is linked to the question whether the amount was in fact due. In the High Court action MEPF alleges that Adamax had failed to contribute its share of expenses of the co-ownership and these expenses constitute a deduction from any net income that might become payable.

17.11 MEPF therefore prayed that the breach relief be dismissed, or alternatively stayed pending the final determination of the action in the Pretoria High Court.[18]

Urgency

[18] The section 3 application was launched on 5 September 2023, seven months after the appointment of the arbitrator and delivery of the statement of claim in February 2023. The founding affidavit in the application for a stay was signed on 29 September 2023.

[19] The facts relied upon by MEPF in the section 3 application were known to MEPF at all times and the application could have been brought at any time since delivery of the statement of claim or even before. MEPF was entitled to invoke section 3 when it became apparent that Adamax was not willing to abandon arbitration in response to MEPF's letter of 24 November 2022. By 5 April 2023 the dates of the arbitration were fixed provisionally at 20 to 30 November 2023. The statement of defence was signed on 22 May 2023.

[20] Had MEPF timeously applied for a court order in terms of section 3, it might not have been necessary to apply to the arbitrator for a postponement and any such application would have been decided on different facts. MEPF can therefore not rely on the award in the postponement application as a ground of urgency.

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[18] Statement of defence, special prayer (a).

[21] MEPF now also seeks a stay on the ground that it will seek to review the award in the postponement application on the basis that the arbitrator committed a gross irregularity by deciding the issue of *lis pendens* when he was not called upon to do so. MEPF argues that the award now precludes MEPF from relying on its *lis pendens* defence even though *lis pendens* was not the question to be decided in the application. I deal with the award below.

[22] The urgency[19] is self-created. The question of urgency can however not be divorced from the merits and I therefore find it necessary to evaluate the merits of the application.

The postponement application before the arbitrator.

[23] MEPF applied for a postponement before the arbitrator. The arbitrator delivered his award on 18 September 2023. He postponed the arbitration proceedings in respect of the dissolution relief but ordered that the arbitration proceed on the questions of jurisdiction and the breach relief.

[24] The arbitrator found that:

24.1 The dissolution relief in prayer 3 of the statement of claim is not a matter which should now be dealt with in the arbitration. MEPF has a reasonable prospect of persuading the Court in the section 3 application that the dissolution relief ought to be dealt with in the High Court.

24.2 The question of jurisdiction should nevertheless be dealt with in the hearing scheduled to commence on 22 November 2023 because the Court may in the exercise of its discretion in terms of section 3 of the Arbitration Act refuse the relief sought by MEPF.

24.3 The claims brought by MEPF in the High Court are not open to easy and

[19] See Van Loggerenberg *Erasmus Superior Court Practice* RS 20, 2022, D1-84A and particularly authorities in footnote 16.

speedy proof and set-off cannot be relied upon to extinguish the debt allegedly owed to Adamax.

24.4 The hearing will commence on 22 November 2023 on the special plea of jurisdiction, and prayers 1 and 2 of the statement of claim i.e. the breach relief.

[25] In this matter the existence of the arbitration agreement is not in dispute. What is in dispute is whether the claim now before the arbitrator falls within the four corners of the arbitration clause. The question of jurisdiction is therefore a question that may and should be dealt with by the arbitrator subject to the ultimate control of the Court.[20]

[26] The arbitrator also found that the claims in the High Court action do not impact on the breach relief claimed by Adamax in the arbitration, and that the dispute relating to the termination of the co-ownership agreement and the termination of co-ownership ought to be resolved as a priority.

[27] MEPF's postponement application before the arbitrator was based *inter alia* on its jurisdiction and *lis pendens* arguments in the special pleas. The arbitrator proceeded to deal with both as he had to. He made no order on jurisdiction and held that this would have to be dealt with at the arbitration in November 2023. In respect of the *lis pendens* argument he did not make a final finding on the special plea, but dismissed the postponement application on the basis of his finding that set off did not apply

[28] He said:[21]

> *"If set-off might notionally operate, then there would obviously be much force in the MEPF's argument that the matter ought to be determined by the High Court and that the pleadings before it are to be enlarged to include prayers 1 and 2 of Adamax's Statement of Claim. However, in the event of the claims before the High Court being in character such that the operation of a potential set-off is not capable of attainment, then it seems to me that subject to additional considerations, (which I will presently address), there is no sound reason for me not to deal with the prayers in 1 and 2."*

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[20] *Canton Trading 17 (Pty) Ltd t/a Cube Architects v Hattingh NO* 2022 (4) SA 420 (SCA) paras 30 to 36.

[21] Award para 14.

[29] MEPF intends to approach the Court for an order setting aside the award on the basis that the arbitrator committed a gross irregularity. Section 33 of the Arbitration Act contains statutory review provisions. MEPF relies on section 33(1)(b):

> ***33 Setting aside of award***
> *(1) Where-*
> *…*
> *(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or*
> *…*
> *the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.*

[30] The grounds of review in section 33 are closely linked to the rules of natural justice.[22] Dishonesty or moral turpitude is not[23] a requirement for a finding that an arbitrator committed a gross irregularity - a gross irregularity may be committed with the best of intentions. An error of law[24] can constitute a gross irregularity and it seems to me that the true question is not whether the arbitrator made an error of law, but whether the dissatisfied party was prevented from presenting its case.

[31] The Courts should not be over-keen to intervene in arbitration awards.[25] The parties chose to arbitrate and the principles of party autonomy dictate that the powers of review should be used sparingly.[26] For an award to be set aside on the ground of a gross irregularity, the arbitrator must have committed an irregularity of a nature so serious that the applicant was precluded from having its case fully and fairly determined.[27] The enquiry is focused on the conduct of the proceedings (i.e. the process) rather than the result (i.e. the outcome.) In *Bester v Easigas (Pty) Ltd and Another:*[28] Brand AJ (as he was then) said that:

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22 *Nemo iudex in sua causa, audi alteram partem*, and the rule that justice must be seen to be done. See Butler and Finsen *Arbitration in South Africa – Law and Practice* (1993) 265.

23 Section 33(1)(a) of the Act provides for the setting aside of an award on the basis of misconduct. Dishonesty and moral turpitude are relevant considerations. See *Bester v Easigas (Pty) Ltd and Another* 1993 (1) SA 30 (C).

24 *Goldfields Investments Ltd v City Council of Johannesburg and Another* 1938 TPD. 551 at 560, referring to *Ellis v Morgan; Ellis v Dessai* 1909 TS 576 at 581. See also *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA).

25 See *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 (QBD), quoted in *SA Breweries Ltd v Shoprite Holdings Ltd* 2008 (1) SA 203 (SCA) para 22.

26 See *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) para 236. See also *Palabora Copper (Pty) Ltd v Motlokwa Transport & Construction (Pty) Ltd* 2018 (5) SA 462 (SCA) para 8 and *Umgeni Water v Hollis NO and Another* 2012 (3) SA 475 (KZD) para 42.

27 Butler and Finsen *Arbitration in South Africa - Law and Practice* (1993) 294.

"…. the ground of review envisaged by the use of this phrase relates to the conduct of the proceedings and not the result thereof. This appears clearly from the following dictum of Mason J in Ellis v Morgan; Ellis v Dessai 1909 TS 576 at 581:

> *'But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result but to the method of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined.'*

(See also, for example, R v Zackey 1945 AD 505 at 509.)

Secondly it appears from these authorities that every irregularity in the proceedings will not constitute a ground for review on the basis under consideration. In order to justify a review on this basis, the irregularity must have been of such a serious nature that it resulted in the aggrieved party not having his case fully and fairly determined. (See, for example, Ellis v Morgan (supra); Coetser v Henning and Ente NO 1926 TPD 401 at 404; Goldfields Investment Ltd and Another v City Council of Johannesburg and Another 1938 TPD 551; and cf also S v Moodie 1961 (4) SA 752 (A).)"

[32] The arbitrator's award on the postponement application is not subject to appeal on the basis that his decision was wrong. The review application on the ground of an alleged gross irregularity has not yet been launched but for the purposes of this urgent application I am not persuaded that a *prima facie* case is made out for a review on any ground, and that the matter is urgent, and that it would be in the interest of justice to grant the application for a stay.

[33] For the reasons set out above I make the order in paragraph 1.

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J MOORCROFT

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

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[28] *Bester v Easigas (Pty) Ltd and Another* 1993 (1) SA 30 (C) 42E to 43. See also Brand *Judicial Review of Arbitration Awards* Stell LR 2014 2 p 247 and *Anshell v Horwitz and Another* 1916 WLD 65 at 67.

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **31 OCTOBER 2023**.

COUNSEL FOR THE APPLICANT:	A E FRANKLIN SC J P V McNALLY SC B L MANENTSA
INSTRUCTED BY:	WEBBER WENTZEL
COUNSEL FOR THE FIRST RESPONDENT:	D R VAN ZYL
INSTRUCTED BY:	MALATJI & CO ATTORNEYS
DATE OF ARGUMENT:	18 OCTOBER 2023
DATE OF JUDGMENT:	31 OCTOBER 2023