



**IN THE TAX COURT OF SOUTH AFRICA GAUTENG
LOCAL DIVISION, JOHANNESBURG**

Case Number: 2020/28987

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| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: NO |

DATE 07 May 2024

SIGNATURE

In the matter between:

In the matter between:

SELECT-A-SALAD CC

Plaintiff

And

MUTSHINYA BUSINESS ENTERPRISES CC

Defendant

ORDER

1. The defendants first special plea is upheld with costs and these proceedings are stayed pending the determination of the dispute in accordance with the clause 11 of the contract.

JUDGMENT

FISHER J

Introduction

[1] This is judgment in a special plea in an action based on a breach of contract. The defendant raises that the contract in issue contains an arbitration clause. It thus raises a dilatory plea claiming that the action be stayed in light of the arbitration clause.

Issues

- [2] The contract's terms are common cause.
- [3] The contract contains the following clause.

“11. RESOLUTION OF DISPUTES

All disputes arising out of this Agreement between the Parties shall be resolved as follows:

- 1) Within 24 hours of either party notifying the other that it has a dispute with respect to any matter relating or arising out of the making, performance or breach of this Agreement. The parties shall each appoint two representatives to negotiate on its behalf. The four representatives so appointed shall meet in Johannesburg, South Africa or other mutually agreed location beginning on the day following their appointment, seeking in good faith to resolve the dispute,
- 2) In the event that after meeting for a total of at least 12 hours and after the passage of seven days from the appointment of representatives they are unable to resolve the dispute then either party may submit the unresolved dispute to arbitration in accordance with the rules of conciliation and arbitration of the international Chamber as to procedure but not as to cost. No bond shall be required of any party. Arbitration proceedings shall be held in Johannesburg, South Africa and shall be conducted in the English language. The findings of the arbitral panel shall be conclusive, final and binding, upon the parties and shall be capable of being entered and/or registered into any court having appropriate jurisdiction. Nothing in this agreement shall be

construed to prevent any Court having jurisdiction from issuing Injunctions, attachment orders or orders for other similar interim relief in support of -any arbitration commenced,
(or to be commenced) pursuant to this clause."

- [4] It is contended on behalf of the defendant that this clause has not been complied with and that the action must be stayed pending compliance.
- [5] The plaintiff relies on clause 12(b) which reads as follows:

"12 (b) Applicable Law and Jurisdiction

The agreement is made under, and shall be governed by, and be construed in all respect in accordance with, the laws of South Africa and with reference to any conflict of law rules.

The parties expressly agree that all disputes and claims arising out of or relating to the agreement or the alleged breach thereof shall be submitted to the exclusive jurisdiction of the High Court sitting in South Gauteng and to service of process by registered mail. However, any decision of the High Court may be enforced in the courts of any country and further, more neither party shall be, precluded from pursuing attachment and/or other conservatory actions in courts of any other country, or exercising any contractual rights in relation to the provisions elsewhere in the Agreement should the other PARTY relocate."

- [6] The argument made on behalf of the plaintiff is that clause 12(b), properly construed is to the effect that the parties must litigate disputes in the High Court. The argument goes that clause 11 is optional and that if it is not invoked clause 12 allows access to this court.
- [7] the plaintiff contends that the clause was not invoked and thus the default position is clause 12.

Legal principles applying

- [8] The proper approach to interpretation of documents is objective, the point of departure always being the language itself read in context and with regard to purpose and background of the document's preparation and production. (see *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹)
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- [9] Thus, the endeavour to discern the meaning is unitary and has regard to language context and purpose.
- [10] The contract, although clumsily drafted in some respects clearly and unambiguously identifies a dispute resolution process which involves a declaration of the dispute and a process following thereon.
- [11] The first part of the process entails an element of mediation. The next phase is resort to arbitration in the event of the mediation failing.
- [12] When a party institutes court proceedings despite the arbitration agreement, the defendant may file a dilatory special plea asking for the stay of proceedings, pending final determination of the dispute by the arbitrator. (see *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co*²)
- [13] If a plaintiff resists the stay of court proceedings in the face of a valid arbitration clause, it bears the onus of convincing the court that, owing to exceptional circumstances, the stay should be refused. In other words, courts will enforce an agreement to arbitrate unless there are compelling reasons to order otherwise. (see *Stieler Properties CC v Shaik Prop Holdings (Pty) Ltd*³⁴

1 2012 (4) SA 593 (SCA) ([2012] 2 All SA 262; [2012] ZASCA 13).

2 *Ltd* [1977] 4 All SA 733 (C), 1977 (4) SA 682 (C))

3 [2015] 1 All SA 513 (GJ))

4 (3) SA 52 (E)

- [14] The plaintiff has not advanced any reasons why the agreement to arbitrate should not be enforced.
- [15] It is not necessary for the defendant to allege a readiness or willingness to arbitrate. (See *Stanhope v Combined Holdings & Industries Ltd*⁴)
- [16] An agreement to arbitrate does not deprive a court of its jurisdiction over the dispute covered by the agreement. *Parekh v Shah Jehan Cinemas (Pty) Ltd*⁵

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- [17] This is important in that it is explanatory the meaning and purpose of clause 12.

Discussion

- [18] the argument on behalf of the plaintiff to the effect that the two clauses are in conflict and that the arbitration clause must be construed as being optional is rejected.
- [19] The arbitration clause makes it plain that it is not optional. It provides that disputes arising out of the contract “shall” be dealt under the machinery provided for alternative dispute resolution and clause 12 (b) deals with jurisdiction. The clauses accord with the applicable legal principles: arbitration accommodates dispute resolution whilst acknowledging overall jurisdiction of the courts. An agreement that a particular court has jurisdiction does not conflict with an agreement to arbitrate.
- [20] The arbitration clause envisages the formal declaration of the dispute by either party as a catalyst for the process to commence and the dispute resolution mechanism in clause 11 to then apply.
- [21] The plaintiff does not dispute that there has been no formal declaration of the dispute under clause 11. Thus the plaintiff has not availed itself of the machinery in the arbitration clause.

5 [1980] 1 All SA 239 (D), 1980 (1) SA 301 (D)

Conclusion

- [22] The arbitration clause is valid and the defendant is entitled to a stay of these court proceedings pending the determination in the arbitration.
- [23] The arbitration clause provides for a speedy determination of the dispute in that it prescribes that the machinery kicks in a mere 24 hours after the formal notification of the dispute under the arbitration process. This alacrity can only benefit both parties.

Order

I make the following order:

1. The defendants first special plea is upheld with costs and these proceedings are stayed pending the determination of the dispute in accordance with the clause 11 of the contract.

FISHER J

JUDGE OF THE HIGH COURT

JOHANNESBURG

This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 07 May 2024.

Heard: 6 May 2024

Delivered: 7 May 2024

APPEARANCES:

Applicants counsel:

Applicants Attorneys:

Adv S Meyer

Ulrich Roux Attorneys

Defendant Counsel:

Defendant Attorneys:

Mr Netshipise

Mudau & Netshipise Attorneys

