IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: A30/2022

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

23/08/23

…….. ……..

DATE SIGNATURE

In the matter between:

KAAN PROPERTY DEVELOPMENT NR.2 Appellant

(Reg. NR: 2005/035232/23)

and

SEIPATI MAUREEN DITSHWENE Respondent

(ID: 790227 0466 089)

JUDGMENT

MNGQIBISA-THUSI, J.

[1] The appellant (plaintiff in the court *a quo*) appeals against a portion of an order handed down on 30 November 2021 in the Regional Court for the Regional Division of Gauteng, Pretoria, in particular, paragraphs 1 and 3 of the order which read as follows:

> "ORDER:
>
> 1. The first special plea of arbitration is upheld.
> 2. The second plea of lack of jurisdiction is dismissed.
> 3. Each party is ordered to pay its own costs."

[2] It is apposite at this stage to set out a brief factual background leading to this appeal.

[3] On 8 November 2017, the appellant and the respondent (defendant in the court *a quo*) concluded a written building contract ("the agreement") in terms of which appellant undertook to erect a residential dwelling and do other ancillary work on the respondent's property situated at Erf 3014, Amandasig Extension 76, Pretoria North. The agreement contained, amongst others, an arbitration clause which reads as follows:

> 22.1 If any dispute or difference shall arise between the Consumer and the Contractor, during the progress and before completion of the Works or after the

> termination of the employment of the Contractor under this contract, abandonment or breach of the contract, as to the construction of the contract, or as to any matter or this arising there under, or as to the withholding by the Bank of any draw to which the Contractor may claim to be entitled, then the parties will jointly appoint an architect, civil engineer, quantity surveyor or any other professional person involved in the Building Industry to determine such dispute or difference (Arbitrator) by a written decision given to the Contractor. The said decision shall be final and binding on the parties, unless the Contractor or the Customer within fourteen days of the receipt thereof by written notice to the Arbitrator disputes the same in which case or in case the Arbitrator for fourteen days after a written request to him by the Customer or the Contractor fails to give a decision as aforesaid, such dispute or difference shall be referred to the arbitration and the final decision of an arbitrator selected by the President-in-Chief for the time being of the Institute of South Africa Architects, and the award of such Arbitrator shall be final and binding on the parties."

[4] After completion of the works and on 15 May 2018, the respondent signed a final request form acknowledging that she was satisfied with the work done and authorising the Bank to pay the final draw in terms of the agreement. However, on the same day the respondent withdrew this authorisation. In her plea the respondent contends that the construction work done was not according to the building plans and denies having agreed to deviations made to the building plans and prayed for the appellant's claim to be dismissed.

[5] It is common cause that after a dispute arose regarding the payment of the last draw, the appellant did invite the respondent on two occasions (28 August and 11 September 2018), to refer the dispute to arbitration, to which invites the respondent did not respond. As a result on 8 October 2020 the appellant

instituted an action against the respondent in the court *a quo* for payment of the sum of R211, 585.62 and other ancillary relief.

[6] The respondent delivered a notice to defend in her plea raised two special pleas, namely, lack of jurisdiction and the application of an arbitration (clause 22.1 of the agreement).

[7] The court *a quo* dismissed the special plea on lack of jurisdiction and upheld the special plea on the arbitration clause. Further, the court *a quo* ordered each party to pay its own costs.

[8] In upholding the special plea on arbitration the court *a quo* stated that:

> "[5] The parties may approach this court after having submitted themselves for arbitration should any of them not be satisfied by the decision of the arbitrator as outlined in clause 22 of this agreement."

[9] The appellant is appealing part of the order on the ground that the court *a quo* erred in granting incompetent relief in relation to the special plea on arbitration in circumstances where the respondent failed to seek a stay of proceedings pending the finalisation of the arbitration process and in circumstances where the respondent failed to follow the process and procedure in terms of section 6(1) of the Arbitration Act 42 of 1965 ("the Act").

[10] Section 6(1) of the Act provides that if any party to an arbitration agreement commences legal proceedings in any court against any other party to the

agreement in respect of a matter which it was agreed should be referred to arbitration, any party to such proceedings may at any time after entering appearance, but before delivering pleadings, apply to court for the stay of such proceedings.

[11] It is the appellant's contention that the dismissal of its claim based on the upholding of the special plea of arbitration is incompetent in that the respondent should have sought a stay of proceedings pending the finalisation of the arbitration process. Further that since the appellant had before the court *a quo* pleaded exceptional circumstances in the form of the fact that the appellant had invited the respondent to refer the matter to arbitration and the respondent had not responded, the respondent's non- response constituted a waiver of her right to invoke the arbitration clause.

[12] In brief it was submitted on behalf of the respondent that the court *a quo* was correct in dismissing the appellant's claim in that it failed to refer the dispute to arbitration as envisaged in clause 22.1 of the agreement. Further that an order staying the proceedings in the main trial would not assist the appellant as in terms of the arbitration clause the decision of the arbitrator is final and binding except that if the appellant is aggrieved by the arbitrator's decision it can either review or appeal the decision.

[13] The special plea of arbitration is not a plea on the merits and does not provide a defendant with a defence to the merits. Its purpose is to allow for a stay of the

proceedings on the merits pending finalisation of the arbitration process. The plaintiff bears the onus of convincing the court that exceptional circumstances exist justifying an order refusing the referral of the dispute to arbitration. In *Aveng Africa t/a Grinaker-LTA v Midros Investments* 2011 (3) SA 631 (KZD) the court stated that:

> "[17] … It is now well-established that an arbitration agreement does not oust the jurisdiction of the courts.[1] Where a party to an arbitration agreement commences legal proceedings against the other party to that agreement, the defendant is entitled either to apply for a stay of the proceedings pursuant to s 6 of the Arbitration Act 42 of 1965 or to deliver a special plea relying upon the arbitration clause. Whichever course it adopts the onus then rests on the claimant to persuade the court to exercise its discretion to refuse arbitration. This requires a very strong case to be made out. … The stay does not afford the defendant an absolute defence to the claim. Its purpose is to have the claim determined by the forum to which the parties have agreed to submit themselves. Nor can it matter in those circumstances how far the litigation has progressed. After all, if the question of arbitration is raised by way of a special plea rather than under s 6 of the Arbitration Act the litigation will proceed on all issues until the stage when the special plea is determined as a separate issue under Rule 33(4). If a stay is granted at that stage then the claimant is entitled to pursue its claim by way of arbitration."

[14] It is common cause that the agreement between the parties in relation to the building works at the respondent's property contained an arbitration clause which was to be invoke in the event of a dispute relating to the execution of the agreement. It is also common cause that when the respondent refused to authorise payment of the last draw, the appellant did approach the respondent

[1] *The Rhodesian Railways Limited v Mackintosh* 1932 AD 359 at 375.

for the dispute to be referred to arbitration and that the respondent did not respond to such request. The issue is whether, the respondent by not responding to the request for the referral of the dispute to arbitration has waived her right to invoke the arbitration clause as contained in the agreement and whether under the circumstances the court *a quo* was correct in dismissing the appellant's claim mainly on the ground that the dispute was not referred to arbitration.

[15] It cannot be disputed that the respondent, with full knowledge of her rights under the agreement, had, through not reacting to the invitation to have the matter referred to arbitration, waived its right to have the matter referred to arbitration. As correctly argued by counsel for the appellant, the non-responsiveness of the respondent to the invitation to refer the dispute to arbitration is an exceptional circumstance in terms of which the special plea of arbitration should have been dismissed.

[16] I am satisfied that, despite being invited to have the dispute referred to arbitration, the respondent waived her right to have the dispute resolved by way of a process the parties had initially agreed to. The responded has not provided any plausible explanation for not accepting the invitation to arbitrate, and cannot, once litigation started seek to rely on the arbitration clause. I am further of the view that once the court *a quo*, correctly or incorrectly, upheld the special plea of arbitration, it should have referred the dispute to arbitration rather than

dismissing the appellant's claim. In the hearing of the special plea, no determination on the merits of the appellant's claim as made.

[17] The appellant is also appealing against the cost order made by the court a quo and seeks a punitive cost order against the respondent should its appeal succeed, on the basis that the respondent had ignored invitations to refer the matter to arbitration. An order of *costs de bonis propriis* is usually made against the attorneys where a court is satisfied that there has been negligence of a serious nature, warranting an order of costs being made as a mark of the court's displeasure. Having considered the facts of this case, I am not convinced that the circumstances warrant an order of costs on a punitive scale.

[18] In the result the following order is made:

1. The appeal is upheld with costs.
2. The order of the court *a quo* is set aside and substituted by the following:

2.1 The first special plea of arbitration is dismissed.

2.2 The second special plea of lack of jurisdiction is dismissed.

2.3 The defendant is ordered to pay the costs of the application.

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NP MNGQIBISA-THUSI
Judge of the High Court

I agree.

_____
C E THOMSON
Acting Judge of the High Court

Date of hearing :03 November 20222

Date of Judgment : 23 August 2023

Appearances

For Appellant: Adv L Van der Westhuizen (instructed by F Van Wyk Incorporated Attorneys)

For Respondent: Adv H Legoabe (instructed by KP Seabi & Associates)