**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

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

**SIGNATURE**

**Case no. 28653/2021**

In the matter between:

| | |
|---|---|
| **TJM INVESTMENT TRUST t/a ENGEN THOYOYANDOU CONVENIENCE**<br>(Registration no. T25/2008) | Plaintiff/Applicant |
| and | |
| **SOUTH AFRICAN NATIONAL ROADS AGENCY SOC LIMITED** | Defendant/Respondent |

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**JUDGMENT**

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*The judgment and order are published and distributed electronically.*

**P A VAN NIEKERK, AJ**

**INTRODUCTION:**

[1] Applicant seeks an order against Respondent in the following terms:

> "*1. That the proceedings by the Respondent in case no. 14457/2021 be stayed pending the determination of the dispute by arbitration.*
>
> *Directing that the dispute be referred for determination by arbitration*".

[2] The relief as claimed in the Notice of Motion is incorrect, as the proceedings which Applicant seeks to stay were instituted by the Applicant under case no. 28653/2021 and no proceedings were instituted by Respondent under case no. 14457/2021. Throughout the Founding affidavit reference is made to case number 28635/2021 ("the action") which is the case number of the civil action instituted by Applicant and which the Applicant seeks to stay in this application

[3] The Application is opposed by Respondent on various grounds which will be referred to *infra.*

**BACKGROUND: ACTION AND EXCEPTIONS**:

[4] For purposes of this judgment it is necessary to set out the following concise summary of the background to this application and the action which the Applicant seeks to stay in terms of Section 6(1) of the Act.

[5] The action commenced on 9 June 2021 when Applicant caused a Combined Summons and Particulars of Claim to be issued from this court, therein claiming damages from the Respondent in the action and for which purposes the Applicant relied on a contract

entered into between the Applicant and Respondent, a copy of which was annexed to the Particulars of Claim ("the Agreement").

[6] Respondent filed an exception to the Particulars of Claim, the crux of which was that the Particulars of Claim failed to disclose a sustainable cause of action against the Respondent on the facts as pleaded. The Exception so filed by the Respondent is a relatively complex and lengthy exception but essentially illustrate that the alleged damages suffered by the Plaintiff does not arise from any breach of the Respondent in terms of the Agreement.

[7] Following this Exception the Applicant attempted to cure the defective Particulars of Claim by amending the Particulars of Claim on 25 February 2022. This Amended Particulars of Claim had the following features:

(i) It did not cure the Respondent's Exception in relation to a lack of a proper cause of action found on the agreement as set out in the Exception referred to *supra*;

(ii) It introduced further and new alternative *causae* of action found on Sections 22 and 38 of the Constitution,[1] a claim based on an alleged duty of care which Respondent has in relation to Applicant, as well as a claim purportedly found on delict.

[8] The Amended Particulars of Claim referred to *supra* again drew an Exception from the Respondent, based on several *causae* of complaint. Clearly recognising that this second Exception was sound, Plaintiff gave notice of a second amendment to its Particulars of Claim. This second amendment was substantially similar to the first amendment, failed to cure any of the *causae* of complaint in the previous exceptions, and particularly failed

[1] *Constitution of the Republic of South Africa, 1996*

again to cure the complaint that the Particulars of Claim fails to disclose a cause of action based on the agreement.

[9] The Respondent objected to this proposed amendment on substantially similar grounds that were raised in the Exceptions referred to *supra*.

[10] Applicant thereafter elected not to proceed with this amendment, but instead opted to launch this application on 22 September 2022. This occurred after the Applicant's attorney of record informed the attorney of record acting on behalf of the Respondent in correspondence that the intended amendment should be ignored as the Applicant has elected to refer the matter to arbitration. The obvious result thereof is namely that in the pending action there is presently no sustainable cause of action disclosed in terms whereof Respondent is liable to Applicant for any alleged damages.

**APPLICANT'S GROUNDS FOR REFERRAL TO ARBITRATION**:

[11] It is the Applicant's case that Clause 16 of the Agreement affords the Applicant the right to seek a referral to arbitration. Clause 16 of the Agreement reads as follows:

> "*16. DISPUTE RESOLUTION*
>
> *16.1 In the event of a dispute arising between the parties in regard to any matter relating to this Agreement, howsoever arising, including but not limited to;*
>
> *16.1.1 the interpretation of; or*
>
> *16.1.2 the carrying into effect of; or*
>
> *16.1.3 any of the parties' rights and obligations arising from; or*
>
> *16.1.4 any claims arising out of; or*

> 16.1.5 *determination or purported determination or arising from determination of; or*
>
> 16.1.6 *the rectification or proposed rectification of this agreement; or*
>
> 16.1.7 *out of or pursuant to this agreement;*
>
> 16.1.8 *or any matter which in terms of this agreement requires agreement by the parties (the "Dispute"), this Dispute shall be settled in accordance with the procedures set out in this clause 16;*
>
> 16.2 *If within ten (10) business days of the Dispute occurring, it has not been resolved through informal negotiations, the Disputing Party shall give written notice (the "Dispute Declaration Notice") to the Receiving Party, formally declaring and recording the nature of the Dispute as perceived by the Disputing Party."*

[12] "Dispute" is defined in the agreement to mean a "*dispute or disagreement arising between the parties in regard to any matter relating to this Agreement, howsoever arising, including but not limited to the matters referred to in Clause 11.1 below*". Clause 11.1 referred to *supra* is irrelevant for purposes of this application. On an analysis of the Applicant's Founding Affidavit in support of the relief as framed (albeit incorrectly) in the Notice of Motion, Applicant essentially makes the following averments:

(i) That the Applicant seeks damages against the Respondent for "breach of contract";

(ii) That the Applicant relies on Section 6(1) of the Arbitration Act for the relief claimed;

(iii) That Respondent is not prejudiced by the proposed stay and referral to arbitration;

(iv) That Respondent refuses to agree that the "disputes" be referred to arbitration;

(v) Applicant explains the motive for bringing this application as follows:

> *"… after careful consideration of the memorandum of agreement particularly Clause 16 of MOA. (sic) It became apparent that this claim must be prosecuted in terms of the said MOA*".

(vi) Applicant further makes the following averment namely:

> *"(*Plaintiff*) … does not desire to pursue and prosecute this claim to the court determining the dispute in case no. 28653/2021. The Applicant is therefore obliged refer (sic) the dispute for determination by arbitration*."

[13] On an analysis of the Applicant's Founding Affidavit as well as the Replying Affidavit, no attempt is made to provide any particulars of the "Dispute" save and except for a generalised bold averment that the Applicant instituted an action for damages based on a breach of the Agreement. No attempt is made in the Founding Affidavit to explain why the "Dispute" (whatever it may be) "must" now at this stage be determined by way of arbitration notwithstanding the Applicant's initial election to institute civil proceedings contrary to the provisions of Clause 16 of the Agreement. There is no explanation in the application why Applicant does not any longer "desire" to pursue and prosecute its "claim" in this court resulting in the Applicant being "obliged" to refer the dispute to arbitration. Whereas the Applicant seeks an order that the proceedings in this court be stayed, pending the intended arbitration, no explanation is provided in the application as to what the Applicant's intentions are in respect of the stayed proceedings once the intended arbitration is finalised. On direct questions posed to the Applicant's Counsel during argument of the matter, it was disclosed that in the event of the arbitration proceedings not being disposed of in favour of the Applicant, that the Applicant in those circumstances will then attempt to proceed further with the stayed action. However, in the event that the

arbitration proceedings are disposed of in favour of the Applicant, then the stayed action will be withdrawn. Although this response by the Applicant's Counsel is indicative of a failure to appreciate the legal effect of finalised arbitration proceedings or the applicable legal principles involved insofar as the Applicant simplistically intends to merely proceed with or withdraw the stayed action, it clearly illustrates the fact that the stay of the proceedings may potentially trigger further litigation in the event of the Applicant being dissatisfied with the outcome of the arbitration proceedings.

[14] In Heads of Argument filed on behalf of Applicant, it is submitted that Section 6(1) of the Act "entitles" a party to exercise a right to stay proceedings where such right is provided for in the agreement that binds the parties to the proceedings. It was further submitted in Heads of Argument filed on behalf of Applicant that Clause 16 of the Agreement as quoted *supra* leads to the conclusion that "… *it is inescapable from the reading of this clause (Clause 16 of the agreement) that parties to it are bound to refer their dispute to the arbitrator for adjudication* …". It was also submitted that the discretion afforded to a court in terms of Section 6(2) of the Act should only be refused on "*exceptional and compelling grounds".*

**DID APPLICANT ESTABLISH A "DISPUTE" SUBJECT TO REFERRAL TO ARBITRATION**?

[15] Respondent, relying on the judgment of **Goodman Stable Trust v Douhex (Pty) Ltd & Another**[2] submitted that a party who wishes to rely on an arbitration clause bears the *onus* to allege and prove the underlying jurisdictional facts. In that judgment Selikowitz J. held as follows on p. 615 c - p:

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[2] *1998 (4) SA 606 (C)*

"*Applicant now contents that the first respondent bears the onus of proving that the arbitration can proceed. Mr MacWilliam, who appears for applicant submits that although his client has initiated these proceedings the onus to prove that there is a valid arbitration agreement which permits it to make a claim; an arbitrable issue and that the arbitrator has been validly appointed rest upon first respondent who wishes to proceed with the arbitration.*

*These issues go to jurisdiction and the party wishing to utilise the arbitration procedure should, in my view, establish that it is competent in the particular circumstances to do so. Jurisdiction either exists or does not. Jurisdiction cannot arise simply because Applicant fails to prove that the jurisdictional requirements are absent*."

[16] It was submitted that one of the jurisdictional facts which the Applicant has to establish and prove is namely that the arbitration clause or agreement is applicable to the dispute between the parties. Deciding whether the arbitration clause applies to the dispute or not is a matter of interpreting the arbitration clause in the light of the dispute.[3]

[17] Respondent's counsel further referred to the judgment of Lewis JA. in **North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd**[4] where the learned judge concluded that ultimately, in order to determine whether a question was the subject of an arbitration clause or not, including for instance the invalidity of the agreement itself, depended on the context in which the agreement was concluded. The learned judge found that this was in line with the South African approach to the interpretation of contracts generally[5].

[18] Importantly, in order to determine whether or not a dispute fits within an arbitration clause, gives rise to two further related requirements namely that there must be an existing

[3] *Vide: Universiteit van Stellenbosch v J A Louw (Edms.) Beperk 1983 (4) SA 321A; Stocks Construction (OFS) (Pty) Ltd v Metter-Pingon (Pty) Ltd 1980 (1) SA 507 (A)*

[4] *2013 (5) SA 1 (SCA)*

[5] *North East Finance (supra) para. 17 – 23*

dispute between the parties, and the dispute must also be defined. Counsel acting on behalf of Respondent referred in this regard to the judgment of Cloete JA. in **PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd**[6] where the following was held:

> "*In the present proceedings, the defendant has simply pointed out that the lease contains an arbitration clause in wide terms. That is not sufficient. The defendant was obliged to go further and set the terms of the dispute. As Didcott J succinctly pointed out in Parekh v Shah Jehan Cinemas (Pty) Ltd & Others; 'arbitration is a method for resolving disputes. That alone is its object, and its justification. A disputed claim is sent to arbitration so that the dispute which it involves may be determined. No purpose can be served, on the other hand, by arbitration on an undisputed claim. There is then nothing for the arbitrator to decide. He is not needed, for instance, for a judgment by consent or default. All this is so obvious that it does not surprise one to find authority for the proposition that a dispute must be exist before any question of arbitration can arise. It includes re: Cars-Wilson & Greene (1887) 18 QBD 7 (CA); London & Lancaster Fire Assurance Company v Imperial Cold Storage and Supply Company Ltd (1905) 15 CTR 673; King v Harris 1909 TS 292'. This passage just quoted was approved by this Court in Telecall (Pty) Ltd v Logan and Pluman JA went to say:*
>
> *'[12] I conclude that before there can be a reference to arbitration a dispute which is capable of proper formulation at the time when an arbitrator is to be appointed, must exist and there cannot be an arbitration and therefore no appointment of an arbitrator which can be made in the absence of such a dispute. It also follows that some care must be exercised in once use of the word 'dispute'. If for example the word is used in a context which shows or indicates that what is intended is merely an expression or dissatisfaction not founded upon competing contentions no arbitration can be entered upon*."

[19] In my view, what is required of the Applicant in establishing the existence of a "dispute" for purposes of relying on the arbitration clause cannot be put more clearly than in the

[6] *2009 (4) SA 68 (SCA) p. 72, par. 7*

authorities as quoted *supra*. As already alluded to *supra,* the highwater mark of any attempt to disclose the existence of a "dispute" is the assertion to be found in the Applicant's Founding Affidavit that the Applicant has a claim for damages arising from breach of contract. In my view, this is tantamount to "*merely an expression of dissatisfaction not founded on competing contentions* …." as referred to in the judgment quoted *supra*.

[20] Apart from the aforesaid, it was submitted on behalf of the Respondent that the terms of the arbitration clause relate only to matters relating to the Agreement. On a proper perusal of Clause 16.1 of the Agreement, specific specified categories of disputes arising between the parties "relating to this agreement" is recorded, save and except for the introductory paragraph of paragraph 16.1 of the Agreement which refers to "a dispute arising between the parties in regard to any matter relating to this agreement". Dispute, as already referred to *supra*, is defined in Clause 1.1.5 of the Agreement to mean "a dispute or disagreement arising between the parties in regard to any matter relating to this agreement". In order to determine whether or not the "dispute" which Applicant wish to refer to arbitration falls within the ambit of a class of disputes which arise between the parties in regard to any matter relating to the Agreement as set out in Clause 16.1 of the Agreement read with the definition of "dispute" in Clause 1.1.5 of the Agreement, the pleadings in the action and the affidavits in this application must be analysed in order to determine whether the Plaintiff has made out a case for a referral to arbitration. [7]

[21] As already referred to *supra,* an analysis of the pleadings (and in this respect I refer to the Plaintiff's Particulars of Claim the amendments which Applicant intended to effect thereto, and the exceptions and objections filed by Respondent in the action) to date hereof failed to disclose any discernable cause of action based on the Agreement. A claim arising from

[7] *Vide: Universiteit van Stellenbosch v J A Louw (Edms.) Beperk supra, par. 329 D – 333 B and 334 E - G*

delict, in terms of the Constitution or as a result of any alleged "legal duty" which the Respondent owes the Applicant, is clearly not a claim which arises from the Agreement.

[22] In Heads of Argument filed on behalf of Respondent a thorough and accurate analysis of the pleadings is made which essentially illustrate that the alleged duty to maintain a certain specifically identified portion of road, which goes to the root of the Applicant's claim in the action, is clearly not a duty which flows from the provisions of the Agreement. For this reason, so argue the Respondent's Counsel, the alleged damages claimed in the Particulars of Claim is not a claim found on the Agreement. Considering the pleadings filed in the action, read with the Agreement, and in the context of Clause 16(1) of the Agreement, I agree with this submission.

[23] It is clearly for this reason, having realised that the exception raised by the Respondent was well founded, that the Applicant attempted to introduce various alternative claims found on delict, an alleged duty of care, and the Constitution. These alternative *causae* of action do not arise from the Agreement. Applicant has therefore failed to establish an essential jurisdictional requirement required in terms of Section 6(1) of the Act namely to establish a "right" to seek a referral of a "dispute" to arbitration in terms of Section 6(1) of the Act read together with Clause 16(1) of the Agreement.

**CAN APPLICANT RELY ON SECTION 6(1) OF THE ARBITRATION ACT?**

[24] In the Applicant's Founding Affidavit it is averred that the Applicant relies on the provisions of Section 6(1) of the Arbitration Act no. 42 of 1965 ("the Act") which reads:

> *"6.* ***Stay of legal proceedings where there is an arbitration agreement***
>
> *(1) If any party to an arbitration agreement commences any legal proceedings in any court (including any inferior court) against any other party to the agreement in respect of any matter agreed to be*

*referred to arbitration, any party to such legal proceedings may at any time after entering appearance but before delivering any pleadings or taking any steps in the proceedings, apply to that court for a stay of such proceedings.*

*(2) If on any such application the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement, the court may make an order staying such proceedings subject to such terms and conditions as it may consider just."*

[25] Respondent raised a further bar to the application based on the submission that Applicant, being the Plaintiff in the action, cannot rely on Section 6(1) of the Act. It was submitted that a proper interpretation of Section 6(1) of the Act mitigates against an interpretation that a plaintiff who institute an action can thereafter apply to have such action referred to arbitration. Relying on various authorities[8] where it was repeatedly held that a document (including legislation) should be interpreted having regard to purpose, the context and the wording thereof it was argued that it is clear from the language of Section 6(1) of the Act itself that a plaintiff who has instituted an action in the first place, cannot rely on Section 6(1) of the Act for a referral to arbitration of its own case.

[26] I agree with this submission. In my view the reference in Section 6(1) of the Act to " *… any party to such legal proceedings may at any time after entering appearance but before delivering any pleadings or taking any steps in the proceedings apply to the court for a stay of proceedings*" can not refer to the plaintiff, for the following reasons:

[8] *Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at [18]; Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd 2013 (6) SA 520 (SCA) at [16]; University of Johannesburg v Auckland Park Theological Seminary & Another 2012 (6) SA 1 (CC) at [65]*

(i) In the context of the Act as quoted *supra*, it is not the plaintiff but the defendant who will enter such appearance to defend and thereafter take a further step such as to file a plea or raise and exception.

(ii) The use of the term “any party” in itself does not necessarily lend support to an argument that “any party” refers to both the plaintiff or the defendant. “Any party” refers to the fact that a number of different defendants may be joined in one action, and/or a defendant may join a third party thereby affording the remedy in terms of Section 6(1) of the Act to anyone or a number of these defendants or third parties joined in the action;

(iii) Reference is made in the provisions of Section 6(1) of the Act as quoted *supra* to “any party” in the context of a right to seek a referral to arbitration after appearance to defend was entered but before delivering any pleadings. In my view, this clearly refers to the Defendant and not the Plaintiff. To interpret this part of Clause 6(1) of the Act otherwise namely that it entitles the Plaintiff, when one or more defendants enter an appearance to defend, to the right to apply for a referral to arbitration is in my view an interpretation which would mitigate against the principle that a party to an agreement, in this instance an agreement containing an arbitration clause, may chose not to abide to such agreement (in other words, to approbate) and then institute an action and when faced with opposition to such action, thereafter insist on relying on such a clause (in other words, to reprobate). In my view, this interpretation will lead to an absurd result;

(iv) The objective fact that Plaintiff is a party who has already delivered a pleading in the form of the Particulars of Claim, clearly also mitigate against an argument that Section 6(1) of the Act affords the Plaintiff a right to apply for a referral.

[27] Section 6(1) of the Act furthermore clearly disentitle a party who has delivered a pleading after appearance to defend, or who has taken a further step in the proceedings, to the remedy afforded in terms of Section 6(1) of the Act. *In casu* Plaintiff has taken various further steps after Respondent entered an appearance to defend, including the delivery of Notices of Intention to Amend on two occasions, filing an Amended Particulars of Claim, and delivered Notices in terms of Rule 35(1), (6), (8) and (10), albeit before close of pleadings and therefore irregularly. Applicant further irregularly launched an application to compel such irregular request for discovery which application was later wisely withdrawn. Taking these further steps is clearly a bar to the present application.

[28] Arguing contrary to the position as set out in paragraphs [24] to [27] *supra*, Counsel acting on behalf of Applicant relied on the following passage quoted from the judgment of Wallace J. (as he then was) in the matter of **Aveng Africa Ltd t/a Grinnaker LTA Building East v Midros Investments (Pty) Ltd**[9] where the learned Judge Wallace held as follows:

> " *… that a party to an arbitration agreement who commences litigation instead of proceeding to arbitration does not, merely as a result of adopting that course, abandon its rights to have resort to arbitration under the agreement*."

[29] Applicant's counsel went further and submitted that there is no obligation on Applicant to abandon or withdraw the action before resorting to Section 6(1) of the Act and relying on Clause 16.1 of the Agreement for which purpose reliance was placed on the judgement of Swain J. (as he then was) in **BDE Construction v Balfour 3581 (Pty) Ltd**[10] where it was held at follows:

> "*The applicant is accordingly entitled to seek a stay of proceedings and is not obliged to withdraw them, before referring the parties' dispute to arbitration*".

[9] *2011 (3) SA 613 (KZD)*
[10] *2013 (5) SA 160 (KZP)*

[30] Neither of these authorities referred to *supra* assist the Applicant. In both the matters referred to the party seeking a referral to arbitration did not rely on the provisions of Section 6(1) of the Act, but relied on the provisions of an agreement which provided an arbitration clause whereas *in casu* the Applicant relies on Section 6(1) of the Act. Furthermore, Wallace J. held in the **Aveng** matter that a party cannot rely on an agreement in respect of which that party is in breach of (with reference to a breach of the arbitration clause) to seek a referral to arbitration and then relying on such clause in the agreement of which the party is in breach of. In other words, a party may not approbate and then reprobate. It was then specifically held in that matter that a party who commenced litigation must first abandon the litigation before he can proceed to arbitration.[11]

[31] In the ***BDE Construction*** matter Swain J. differed from Wallace J. and held if the innocent party, being the party who did not elect to stay the proceedings in terms of an arbitration clause but condoned the conduct of the guilty party who instituted litigation contrary to an arbitration clause by failing to seek a stay of the proceedings, the guilty party is not obliged to abandon such litigation when it seeks a stay of the proceedings for purposes of a referral.[12] Those facts clearly do not apply *in casu*.

[32] *In casu* Applicant refuse to abandon or withdraw the action which it seeks to stay and Respondent has not yet filed any Plea. In such Plea Respondent would be entitled to raise as a Special Plea the arbitration clause in the Agreement or condone the institution of the action by joining issue on the pleadings.

[33] Neither of the matters relied upon by Applicant concerned an interpretation of Section 6(1) of the Act and this section was therefore not interpreted in those matters. In the premises,

[11] *Aveng judgment (supra), p. 639 H – 640 C*
[12] *BDE judgment (supra), par. [9] to [13] at 162 G – 164 C*

I am of the view that Applicant cannot rely on the provisions of Section 6(1) of the Act for the reasons set out *supra*.

**EXERCISE OF DISCRETION IN TERMS OF SECTION 6(2) OF THE ARBITRATION ACT**:

[34] Furthermore, even if the Applicant would have been entitled to rely on Section 6(1) of the Act and it could be found that the jurisdictional requirements of Section 6(1) of the Act had been complied with, I would have refused to exercise the discretion afforded to this court in terms of Section 6(2) of the Act in favour of the Applicant for the following reasons:

(i) In my view the objective facts show that the motive for this application is not to advance any dispute which may legitimately have arisen between the parties to finalisation, employing a process agreed between the parties in the agreement, but is clearly an attempt to escape the Applicant's persistent inability to establish a sustainable cause of action against the Respondent in the action which Applicant elected to institute contrary to the arbitration clause in the agreement.t;

(ii) The conduct of the litigation by Applicant thus far is characterised by a failure to appreciate the legal principles involved or the rules applicable. This has resulted in substantial costs already incurred by Respondent and which the Applicant simply refuses to tender. The prejudice to Respondent is clear;

(iii) Considering paragraph [ ] *supra*, the stay of these proceedings has the potential of a multiplicity of proceedings to follow which is not conducive to the principle that disputes should be ventilated speedily, once and for all and clearly will lead to a duplication of costs.

**COSTS**:

[35] Respondent gave notice of its intention to seek a punitive order for costs on the basis that the application is an abuse of the procedure. I am of the view that a court should be hesitant to find that the application of a remedy, even when done incorrectly, constitutes an abuse of process merely due to the fact that it may lead to unnecessary litigation or costs. Courts exist for the very reason that parties and their legal representatives may hold different interpretations of the law or the application of the rules, and parties should not be penalised simply because the interpretation of the law or application of the rules are incorrect.

[36] However, in an instance like this, where there is a history of legal blundering followed by an attempt to escape the consequences thereof without accepting the liability to pay the costs so occasioned can only lead to the inference that the application was launched with an ulterior motive namely to escape the consequences of such legal and procedural blunders. Furthermore, after launching an application which deals only superficially with the jurisdictional requirements of Rule 6(1), Applicant was presented with an Opposing Affidavit which raised various defences to the application, and which was followed by comprehensive Heads of Argument which clearly explains the legal issues involved and which properly referred to the applicable authorities including the fact that the authorities upon which the Applicant relies do not support the Applicant. Notwithstanding, the application was persisted with as if the Applicant is simply entitled as of right to seek a stay of the proceedings and a referral to arbitration, without having to disclose justifiable grounds therefore.

[37] I therefore exercise a discretion against the Applicant and award the Respondent's claim for punitive costs against the Applicant.

**ORDER**:

[38] In the result, I make the following order:

1. The application is dismissed;

2. The Applicant is ordered to pay the Respondent's costs on the scale as between attorney and client, including costs of senior counsel.

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**P A VAN NIEKERK**

**ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA**

Appearances:

For the Applicant: Adv M O MUDIMELI

Instructed by: SIGMA ATTORNEYS

For the Respondent: Adv A C BOTHA (SC)

Instructed by: SIM ATTORNEYS