IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED	
_____	_____
DATE	SIGNATURE

CASE NO: 018498/13

In the matter between:-

BUILDIA CONSTRUCTION CAPE PROPRIETARY LIMITED Applicant

VS

ADVOCATE PRINCE VERVEEN First Respondent

KALLEY PROJECTS PROPRIETARY LIMITED

t/a KALLEY FLOORING Second Respondent

Coram: Kooverjie J

Heard on: 15 March 2023

Delivered: _____ 2023 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be __H__ on _____ 2023.

SUMMARY: The court has an inherent discretion to stay arbitration proceedings in instances where a party demonstrates prejudice.

ORDER

It is ordered:-

1. The matter is heard on an urgent basis as contemplated in Rule 6(12) and the applicant's failure to comply with the Rules of Court in respect of service and time periods is condoned.
2. The first and second respondents are interdicted from proceeding with the arbitration proceedings pending the finalization of the review application.
3. The second respondent is ordered to pay the costs of this application.

JUDGMENT

KOOVERJIE J

[1] The applicant seeks urgent relief requesting this court to: interdict the respondents from proceeding with the pending arbitration between the parties until such time the review application is finalised and that the award of the arbitrator (first respondent) of 14 December 2022 be set aside.

[2] In brief, the dispute between the parties is based on payment for services rendered. The second respondent utilized the arbitration route and filed its statement of claim claiming payment. The applicant had, from the outset, disputed the jurisdiction of the arbitration process. Its main contention was that the dispute could not be resolved through arbitration proceedings. The written agreement relied upon and attached as 'SOC1' did not contain any provision that the parties have consented to arbitration. Furthermore the statement of claim does not contain any averment that the parties have agreed, in writing, to arbitration proceedings.[1]

THE DISPUTE BEFORE THE ARBITRATOR

[3] The applicant raised the jurisdictional issue in terms of Article 25 of the Rules[2] where it sought the early dismissal of the second respondent's claim. Article 25(1) provides that *"a party may apply to the arbitral tribunal for the early dismissal of a claim on the basis that such claim is manifestly outside the jurisdiction of the arbitral tribunal".* The arbitrator, in accordance of Article 25(4) was required to determine whether to grant or dismiss the application.

[4] On 14 December 2022, after having heard the parties, the arbitrator dismissed the applicant's application for lack of jurisdiction. The arbitrator found that the matter

[1] Founding Affidavit, par 14, p 01-10
[2] Rules for the Conduct of Arbitrations: 2021 Edition (applicable from November 2021)

is arbitrable. Reliance was placed on the 'JBCC' Agreement which made provision for the proceedings to be by way of arbitration. It specifically included an arbitration clause which made provision for the dispute to be arbitrable.

[5] The applicant disputed the findings of the arbitrator. It was contended that the 'JBCC' Agreement could only be relied upon if same was attached to the statement of claim. Article 21(3) and Article 21(4) of the Rules makes it peremptory for an arbitration clause to form part of the pleadings in this case the statement of claim.

[6] The applicant further contended that by attaching a blank unsigned 'JBCC' Agreement to the respondents' heads of argument, does not cure the defect. Such arbitration clause had to be properly pleaded and reference to such clause had to be referred in the Statement of Claim.

[7] On this basis the applicant requested this court to stay the proceedings until a final decision on this issue is made in terms of the pending review application.

URGENCY

[8] The urgency is primarily premised on the arbitrator's persistence to proceed with the arbitration proceedings on 23 March 2023.[3]

[9] The respondents opposed the urgency arguing firstly that it was self-created and that the applicant was aware that the matter would continue on arbitration since 14 December 2022. In terms of Article 24(3) the arbitrator was entitled to proceed despite the challenge on the jurisdiction point.

[10] It was further argued that the applicant, in failing to timeously file its review application, demonstrated that this matter was never intended to be urgent. The application for the stay of the arbitration proceedings, in fact, was only instituted three months after it was advised of the ruling in terms of Rule 25.

[11] The applicant extensively argued that it had since December 2022, on numerous occasions, requested that the respondent and the arbitrator agree to the stay of the proceedings pending the finalisation of the review application.

[12] I have in fact noted such respective correspondence between the parties from December 2022 to February 2023. I have also noted that the final date for the arbitration proceedings to continue was communicated to the applicants at the beginning of February 2023.[4]

[3] Founding Affidavit Annexure 'BP16' page 01-97
[4] Annexure 'BP17' dated 3 February 2017

[13] In brief, on 9 January 2023 the arbitrator advised the parties, *inter alia*, that since no application for review nor an application to postpone the arbitration pending the review was made, the arbitration should thus proceed.[5] The applicant subsequently informed the arbitrator that it is in the process of filing its review application.[6] It was not disputed that the applicant filed its review application much later. The applicant took considerable time to do so and advised that it had six weeks within which to file the review application. This period is prescribed by the Arbitration Act after being advised of the arbitrator's ruling.

[14] The respondent persisted that there was no genuine intention to institute the review proceedings. Furthermore, the applicant's delay in instituting this application, two months later, is indicative of the fact that the matter does not deserve urgent attention.

[15] I am, however, of the view that the matter should be dealt with on an urgent basis. The applicant had since the inception of the arbitration proceedings placed the jurisdiction in dispute and requested a stay of the arbitration proceedings. Eventually it was the arbitrator's setting of the date for 23 March 2023 that renders this matter urgent.[7] It could clearly not obtain substantial redress in the normal

[5] Annexure 'AA3'
[6] Annexure 'AA4'
[7] Annexure 'BP17', notice of set down of the arbitration was served by the respondents' attorney on 3 February 2023

course of events. Moreover, I have noted the various correspondence since December 2022 when the applicant sought the stay of the arbitration proceedings.

STAY OF PROCEEDINGS

[16] The arbitrator communicated his intention to proceed with the arbitration proceedings in terms of Article 24(3) of the Rules. The first respondent's main contention was that the arbitrator was entitled to proceed with the arbitration proceedings and that the pending review proceedings could not deter the arbitration from proceeding.

[17] I do not dispute that Article 24(1) of the Rules makes provision for the arbitrator to rule on its own jurisdiction and Rule 24(3) prescribed that the arbitrator may continue with the proceedings notwithstanding any pending challenged to its jurisdiction before a court.

[18] The issue then is, does this court have a discretion to stay the arbitration proceedings until the outcome of the review findings? If so, then under what circumstances can a court interfere?

[19] The applicant persists with its view that no arbitration clause or agreement exists that directs it to proceed to arbitration. The arbitrator's finding on the jurisdiction

point was repeatedly challenged. It was argued that the outcome of the review would guide the process going forward. It was emphasized that it would not practical to proceed to arbitration, if one has regard to the unwarranted costs and time spent on arbitration and then to learn after that it was a wasteful process.[8]

[20] Although I do not dispute that the determination of the jurisdiction issue falls squarely within the purview and jurisdiction of the arbitrator in terms of Article 24 of the Rules and that where the arbitrator's finding on jurisdiction is being reviewed, he/she may continue with the arbitration proceedings in terms of Article 24(3), one must however have regard to the circumstances of the matter.

[21] In considering the issues before me, I find guidance in the approach of the Supreme Court of Appeal in ***Canton Trading***.[9] In the said matter, the court was required to consider whether the court could direct a party to submit to arbitration when the jurisdiction point remained in dispute. The court, in ***Canton***, acknowledged the difficulty and noted that the submission of a dispute to arbitration requires the consent of the parties and if the very agreement that requires the submission is challenged on the basis that such agreement never came into existence, a dispute exists as to whether there was a submission of the dispute to arbitration. The problem that then arises is: who decides the "jurisdiction" dispute, the courts or the arbitrators?[10]

[8] Founding Affidavit, para 60, p 01-19
[9] Canton Trading 17 (Pty) Ltd t/a Cube Architects v Fanti Bekker Hattingh NO 2022 (4) SA 420 (SCA)
[10] Para 31 and 32 of Canton

[22] It further expressed that a court should be careful not to undermine the achievement of the goals of private arbitration by extending its powers of sanctioning imprudently. The Constitution requires our courts to consider the grounds for setting aside an award reasonably strictly.

[23] The court recognised that arbitrators may determine the existence of the agreement to arbitrate and they are entitled to make a finding. It, however, also acknowledged a court may be called to determine whether the arbitrator correctly assumed jurisdiction over the dispute when the arbitrator's award is taken on review, in other words, reviewing the arbitrator's decision.

[24] In ***Canton***, the court expressed at paragraph [33]:

"There are a large variety of issues that may be raised by a litigant opposing arbitration at the commencement of a dispute. It may be said that the agreement containing the arbitration agreement is invalid and unenforceable, that no arbitration agreement came into existence, that the arbitration agreement Is not in writing, that the dispute dos not fall within the scope of the arbitration agreement or that the right to arbitration has been waived. This list, although not exhaustive, is simply illustrative. A court faced with issues of this kind will want to steer a course between the discouragement of time wasting obstruction and protecting a

party from being forced to arbitrate a dispute without their consent." (my emphasis)

[25] The court suggested two approaches that can be adopted when considering the aforesaid challenges, namely:

(i) the first approach is based on separability of the agreements. Ordinarily the parties enter into a contract that contains an arbitration clause. If the challenge is that the contract is invalid, either unenforceable or the fact that it never came into existence, then arbitration clause may fail. However, the arbitration clause may give expression to the intention of the parties that the question of validity, enforceability or the very existence of the main contract is to be submitted to arbitration. If that is the case, then the court may be inclined to conclude that the parties concluded an arbitration agreement that is separate from the main agreement. In these instances the parties consented to having the arbitrator determine the question of validity or existence of the contract;

(ii) the second approach is the principle of "competence – competence". In this instance, the reasoning is that arbitrators enjoy the competence to rule on their own jurisdiction and are not required to stay their proceedings to seek judicial guidance.[11]

[11] para 34 and 35 of Canton

[26] Consequently courts would be inclined to allow the arbitrator to decide questions of jurisdiction, unless the challenge before the court shows that there is a manifest basis to resist the submission to arbitration.

[27] A court may also decide that it would be preferable to decline the invitation to do so, and under the guidance of the "competence-competence" principle, where the arbitrator to first render an award on the question of the jurisdiction.

[28] Ultimately, the application of the principles aforesaid is a matter of discretion. It does not vacate the court's ultimate power to determine the question of an arbitrators' jurisdiction but defers its exercise in favour of allowing the arbitrator to render an award, including an award on the issue of jurisdiction. The principle thus favours the facilitation of arbitration and prevents pre-emptive court challenges pertaining to the jurisdiction of an arbitrator, except in the clearest of cases.[12]

[29] The court in ***Canton*** acknowledged that parties are entitled to agree to submit their disputes to arbitration and which decisions are in accordance with Section 39(1)(b) and (c) of the Constitution.[13]

[12] Para 35 & 36 of "Canton"
[13] Para 36 of "Canton"

[30] The court also acknowledged that once an arbitrator has made a ruling at first instance and rendered an award, a court may intervene and determine the issue of jurisdiction.

[31] In exercising my discretion, I am ultimately required to weigh the prejudice the applicant may suffer if forced to arbitrate their dispute without consent or whether it is appropriate for the court to intervene and review the arbitrators' ruling on jurisdiction.[14]

[32] In my view, Article 24(3) must be read in context. It is not a peremptory provision. The arbitrator has a discretion, hence the wording *"The arbitral tribunal may continue with the arbitral proceedings…."*

[33] I find that the applicant will suffer irreparable harm should the arbitration proceedings proceed before the review application is finalised. From the outset the applicant has opposed the forum of arbitration. It would be impractical to continue with the arbitration proceedings.

[34] The common sense approach determines that if the applicant is successful later on review and the findings confirm that the matter was not arbitrable, then the applicant would have not only incurred unnecessary expenditure and time but was

[14] Test laid down in "Canton"

forced to participate in proceedings it did not concede to. In this instance, the applicant is further prejudiced as it has not pleaded to the statement of claim in light of the dispute. The prejudice suffered by the applicant most certainly outweighs the prejudice the respondent would suffer if the arbitration proceedings are not stayed.

[35] The respondent's contention that, if the applicant waited for the matter to be finalised on the merits and the arbitrator handed down an award in its favour on either a special plea or jurisdiction or on the merits, it would have been the end of the matter and no review application would be necessary, in my view, does not address the prejudice the applicant would suffer.[15]

[36] The respondent's further argument that an applicant does not have a *prima facie* right to approach the court for the stay of the arbitration proceedings, is flawed. This court does have an inherent jurisdiction to stay proceedings when the court is satisfied that a party would be prejudiced and in the clearest of cases.[16] This is one such case.

[37] The ***Canton*** approach makes provision for the court to stay these proceedings, particularly once an arbitrator has at first instance ruled on jurisdiction. This court is entitled to consider the arbitrator's decision on review.

[15] Para 18 of the answering affidavit p 01-127
[16] Answering affidavit, p 01-131

COSTS

[38] In exercising my judicial discretion, I am of the view that the costs should follow the result.

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H KOOVERJIE

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

Counsel for the Applicant:	*Adv WJ Botha*
Instructed by:	*Herman Vermaak Attorneys*
Counsel for the 2nd Respondent:	*Adv WF Wannenburg*
Instructed by:	*CR Botha & Jooste Attorneys*
Date heard:	*15 March 2023*
Date of Judgment:	*22 March 2023*