

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
DATE: 10 January 2024
SIGNATURE:

CASE NUMBER: 006243/2023

In the matter between:

KEYSTONE WORX (PTY) LTD

PLAINTIFF

And

MG COWN NO

FIRST DEFENDANT

H BESTER NO

SECOND RESPONDENT

NY SERITI NO

THIRD RESPONDENT

Delivery: *This judgment is issued by the Judge whose name appears herein and is submitted electronically to the parties /legal representatives by email. It is also uploaded on CaseLines and its date of delivery is deemed 10 January 2024.*

Summary: *Removal-opposed motion roll. Existing order – 31 January 2023 - arbitration processes. Parties did not reach a compromise and process collapsed before being born. Prayer 4-order-opposed motion roll. Application-granted-pending arbitration proceedings.*

JUDGMENT

NTLAMA-MAKHANYA AJ

[1] This is an application for the removal of the matter from the opposed motion roll because this court granted an order on 31 January 2023 which was by agreement between the parties for the matter to be considered through the arbitration process in dealing with the disputed facts. By agreement, the following agreement was made an order of court in that:

[1.1] the respondents shall not proceed with the sale or disposal with the property known as 600 Denneboom Road; 155 Bronberg Park, Bronberg, Waparand, Pretoria, pending the resolution of the dispute of the temporary structures known as Octagon, Workshop and Storeroom (Octagon Structures) located on the property.

[1.2] the applicant and respondents agree that the dispute regarding the ownership of the structures described as the Octagon Structures is to be referred to arbitration.

[1.3] the arbitration will be conducted in terms of the Commercial Rules of Arbitration Foundation of Southern Africa (AFSA), with the parties jointly to appoint an arbitrator.

[1.4] the parties will after granting of the order, and by no later than 14 calendar days, conclude a formal arbitration agreement in line with Commercial Rules of Arbitration Foundation of Southern Africa (AFSA), setting out the rights and obligations of each party, failing which, either

party may approach the court on such supplemented papers as may be necessary for appropriate relief.

[1.5] The costs of this application and the wasted cost relating to the postponed auction to be the costs in the arbitration.

[2] It is this order that had since become dormant, and the parties could not find a common ground in which to operationalise it. Instead, the main cause of action has found its way back to the opposed motion roll as evident herein and was prayed for it to be struck off the said roll to ensure compliance with prayer 4 (1.4 herein) of the notice of motion as endorsed in the court order.

[3] The First-Third Respondents duly appointed as liquidators of **Vendor Management Solutions (PTY) LTD Reg Nr 2012/056951/07 and Masters Reference Number: T00063/21** opposed the removal of the matter from the roll. For ease of reference, I will refer to them as “Respondents”.

[4] The contentious issue which has become the subject of the dispute in this case is the removal of the matter from the opposed motion roll considering the above order of this court.

Background

[5] This application arose from the order granted by this court as noted above for the main cause regarding the factual dispute that had to be referred to the arbitration process. The parties could not agree and reach a concession on the way in which the arbitration process should have been undertaken. The applicant contended that the defendant's heads of arguments dealt with the merits of the case that were not before this court regarding the removal of the matter from the roll. Therefore, since the parties never went for arbitration, the conduct of the defendant was not within the ‘decorum’ of the court. The plaintiff emphasised that the respondents are prohibited from selling Octagon Structures until resolved by arbitration as envisaged in the 31 January 2023 court order. In a letter dated 23 October 2023, the applicant wrote to the defendants indicating that having reached a stalemate on the arbitration, the latter have not filed a rescission or

variation of the court order and may reconsider its position and remove the matter from the roll.

- [6] The defendants opposed the removal of the matter from the opposed motion roll in that the arbitrator was granted by a court order and argued that the attack on the integrity of the court order was not justified. In response to the above letter from the applicant, the defendants averred that they are following prayer 4 of the court order after the parties reached a deadlock regarding the arbitration process. The respondents then refused to take up the invitation to remove the matter from the roll as the case needed to be brought to finality by the court.
- [7] The summary of this matter is traceable from an agreement to construct the above Octagon Structures wherein the defendants remained indebted to the applicant in the amount of R3 384 469.94. The parties entered into the agreement in the year 2019 for the construction of the said structures and at the height of the COVID 19-pandemic, the defendants struggled to honour the payment conditions due to the restrictions that were imposed then. On 15 May 2020, the parties reached a compromise for the payment conditions which was meant to pass ownership of certain assets belonging to the defendants to the applicant. As the applicant alleged, the compromise was for a formal transfer of ownership of the assets pending payment from the defendants.
- [8] The crux of this application was also founded on the applicant's awareness of the insolvency of the defendants wherein its properties were to be sold in auction by the Vendors Management Solutions (Pty) Ltd in Liquidation (hereinafter referred as Respondents). The applicant then sought an urgent interdict to prohibit the sale of assets on liquidation of the Respondents and without the debt being satisfied. In turn, it claimed ownership of the property (Octagon Structures) which it intended to remove from the property. I do not intend to exhaust to facts of this case as they touch on the factors that are a determinant of the main cause of the application. The quest is limited to an application for the removal of matter from the opposed motion roll and the effect of the 31 January 2023 court order has in such a request.

Evaluation

- [9] It is of essence to state that the context of this application was the removal of the matter from the opposed motion roll which (in)directly could have given meaning to the order of this court as indicated above. The respondents argued for the retention of the matter in the motion court roll in the face of the glaring court order of 31 January 2023. It is not this court to be seen as promoting '**judicial apathy**' and disregard not just its 31 January 2023 order but the deeper content of the arbitration process. The arbitration process is not the '**poor cousin**' of the adjudication process but a legitimate and an essential system in the resolution of disputes in South Africa. Arbitration is not the easy way out but a due process of law that gives substance to the resolution of the dispute in question. The Arbitration Act 42 of 1965 is envisaged to '*provide for the settlement of disputes by arbitration tribunals in terms of written arbitration agreements and for the enforcement of the awards of such arbitration tribunals*'. Of particular significance in this Act is the definition of an arbitration agreement as a '*written agreement providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement, whether an arbitrator is named or designated therein or not ...*'. The Arbitration Act carries the substance of the Commercial Rules Arbitration Foundation of Southern Africa (AFSA). The arbitration process in terms of AFSA is defined as a '*unique South African process that provides the parties with the essential supervisory and logistical support vital for an effective outcome*'.
- [10] This matter was already scheduled to be heard before me in the motion court on 30 October 2023 and with the applicant's letter dated 23 October 2023 for the defendants to reconsider going ahead and remove it from the roll. The applicant raised several issues which touch on the core content of the parties having '**played far from the goal posts**' of resolving the matter through the arbitration process. The defendants responded to the said letter on the same day (23 October 2023) rejecting the proposed removal of the matter from the roll and cited the serving of the Heads of Arguments on 10 August 2023 and notice of set down on 13 September 2023 and the applicant to only respond on 23 October with the proposed removal was not justified.
- [11] Following the scheduling of the matter on 30 October 2023, this court has also not lost sight of the prescripts of Rule 41(1)(a) that is indicative of the time frames in which a matter may be removed from the roll. The latter Rule provides that '*a person instituting any proceedings may at any time **before** the matter has been set down and **thereafter***

by consent of the parties or leave of the court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs; and the taxing master shall tax such costs on the request of the other party'. In this instance, the matter had been placed on the roll and the respondents had vehemently opposed the removal and this court is exercising its discretion to consider the merits of the removal in this application. Of particular importance for this court is the court order for a failed arbitration process that was not honoured by the parties as they blamed each other on papers and during argument. This court is not to deal with the reasonableness of prayer 4 of the court order and focus on '**flexing legal muscles**' and determine who is better muscled in this litigation as opposed to the other since the parties could not agree on the terms and the way in which they were going to administer the arbitration process. The '**legal-slinging**' by the parties missed an opportunity for the operationalisation of their own agreement.

[12] With the arbitration process having found no space in the resolution of this matter, it is unjustifiable for this court to grant permission to remove the matter from the roll due to what it considers as '**legal power struggle**'. The sore point in this matter was the '**throwing out of the baby with the bath water**' wherein the arbitration process was not afforded an opportunity to be a determinant of the disputed facts. This court could not find any tangible and persuasive reasons that could have warranted not honouring the order of this court in ensuring the resolution of factual disputes through the arbitration process. Van der Schyff J in ***Dey Street Properties (Pty) Ltd v Salentias Travel and Hospitality CC (25461/21) [2021] ZAGPPHC 462*** held that '*the implication was that a party cannot unilaterally [remove] a matter where the opposing party's consent cannot be obtained. It is the discretion of the court seized with an application for postponement that prevails. Similar logic as applies to Rule 41(3) applies to the removal of a matter from the roll after it's enrolled for hearing. An applicant, dominis litis, is bound to the date determined by it in the notice of motion, for the matter to be heard*', (para 5, my emphasis). In the context of this case, this court could not deal with the merits of the main application instead had to divert its attention and consider the removal of the matter from roll because of the differences between the parties on how to make an earlier order of this court work. The removal of the matter from the roll has the '*potential to negatively affect the proper administration of justice and the operation of this court, particularly after the allocation of judges that have since been allocated and ready*

to disperse with the matter', (Crutchfield J in *Mnguni v Ngwenya and Another (A3065/2020) [2023] ZAGPJHC 117, para 30*). This court is not the '*playing field for a cat and mouse game between litigants*' (Van der Schyff J in *Dey* judgment above, *para 6*). The removal of a matter from a roll is by mutual agreement between the parties and in this instance, despite their original agreement for an arbitration process which was endorsed by this court, the process could not even take off the ground because of the unjustifiable differences of opinion on the way in which the process should have been administered.

[13] The exercise of '*power-strength*' is not rationally connected to the resolution of this matter. This court confirmed an agreement which was by consent of the parties who then reneged in making it work by exercising and indicating the strength of each other's legal muscles.

[14] This court was therefore not misdirected in granting the said order that could have served as a '*tight-knot*' that is integral in the adjudication and arbitration processes. There was no misplacement of its order in that as the parties themselves identified, there were factual disputes that could not had been decided on papers and argument before the court. Arbitration was therefore an essential process and engagement in dealing with the said dispute. The in-depth ventilation of this matter through the arbitration process could have enabled this court to determine the legitimacy of the award, if either party saw it fit to bring it to the attention of this court for the validation of the said award, may be due to some factors that could have tainted the rationality of the process. The interrelationship that exists between the arbitration and the adjudication processes was left '*floating in the sky*' in that this court was denied an opportunity to determine and /or endorse the legitimacy of the arbitration award. I must state that there was no substance regarding the implementation of prayer 4 which could have opened an opportunity for either party to approach the court to present factors that could have justified their bringing before the attention of this court. Let me reiterate, the parties did not even agree on the terms of the arbitration process which foreshadows the outcome of the process. This court acknowledges that the arbitration process has a binding effect on the outcome of its determination, and the court may also be called upon to validate and enforce the arbitration award if either party is seeking such a validation or enforcement. It is only in rare instances that an award may not be reviewed wherein an irregularity is contended

and the recent judgment by Petse AP in ***OCA Testing and Certification South Africa (Pty) Ltd v KCEC Engineering Construction (Pty) Ltd (1226/2021) [2023] ZASCA 13 (17 February 2023)*** is indicative of this essential role of the court in ensuring the linkage between arbitration and judicial review which the parties denied this court by failing to honour their own agreement and if not satisfied with the outcome of the process and approach this court as was the case in the ***OCA Testing*** judgment above. Therefore, the content of the endorsed prayer 4 is not limited to either party approaching this court, but the latter was kept at '**bay**' as the parties, of their own volition and power flexing could not agree on the basics that could have led, may be through either party for the consideration of the rationality of the arbitration award.

[15] Both parties (applicants arguing for the removal and defendants for the retention) dragged the finality of this matter which had an effect not just on the costs of litigation but the development of the principles of arbitration.

[16] In this context I found difficulty in not removing the matter in circumstances wherein a justified court order which the parties had agreed upon, could not be translated into reality and give meaning to the principles of the arbitration process.

[17] In result, I accordingly make the following order:

[17.1] The application is granted for the removal of the matter from the opposed motion court roll pending the conclusion of the arbitration proceedings as per the court order granted on 31 January 2023.

[17.2] The costs of this application are ordered on a party and party scale.

**N NTLAMA-MAKHANYA
ACTING JUDGE, THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

Date Heard: 07 November 2023

Date Delivered: 10 January 2024

Appearances:

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