REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT

DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO: 3187/05

In the matter between

AVENG (AFRICA) LIMITED Plaintiff/Applicant
formerly GRINAKER-LTA LIMITED
t/a GRINAKER-LTA BUILDING EAST

and

MIDROS INVESTMENTS Defendant/Respondent
(PTY) LIMITED

J U D G M E N T

Del. 8 March 2011

WALLIS J.

[1] Aveng seeks to stay the action that it has instituted against the respondent, Midros, in order to pursue the claim that is the subject of the action by way of arbitration. At first blush it is distinctly curious to have a party seeking a stay of proceedings that it instituted. So far as the researches of counsel go it is a novel application for which no precedent exists. The circumstances in which this arises are the following.

[2] The parties concluded a contract in terms of which Aveng (under its previous name) built a shopping mall and car park in Phoenix for Midros. Subject to certain complaints to which I will refer in due course, the shopping centre was completed in 2004 and Midros has taken occupation. On 15 February 2005 Aveng instituted the present action against Midros

to recover R1 573 049.09 as the balance of the price payable to it for the contract works. It relied on three certificates that it contended constitute payment certificates under the contract. Midros opposed the action essentially on two grounds. First it said that the certificates were not payment certificates as contemplated by the contract. Second, and in any event, it contended that there were defects in the work and that the cost of remedying the defects exceeded the amount of Aveng's claim. In addition, it lodged a claim-in-reconvention contending that in consequence of the defects in the work flooding occurred at the premises and this had led to it suffering damages.

[3] The action was placed on the awaiting trial roll but, as ten days were required for the hearing, it was only allocated dates for trial from 28 April to 8 May 2009. In the meantime the parties engaged in discussions aimed at resolving matters between them. In the result Aveng agreed to undertake certain remedial work, against completion of which Midros undertook to pay the full amount of its claim. That undertaking was supported by a post-dated cheque for the full amount payable on 31 July 2008. It is not disputed that certain work was done but Midros contends that not all of it was completed or properly done and says that this constrained it to stop payment on the cheque.

[4] Thereafter further discussions ensued between the parties as a result of which Aveng agreed to undertake some more work. Again it was agreed that on satisfactory completion this would result in it receiving payment. In consequence of these latter discussions the action was removed from the trial roll on 10 March 2009. The notice of removal records that the action had been settled. That has proved overly optimistic. Midros contends that the agreed work has not been properly

performed and continues to withhold payment.

[5] In consequence of these events the attitudes of the parties have shifted somewhat. Aveng continues to contend that it is entitled to payment under the certificates and it also says that the amount of the certificates represents the balance of the contract price due to it, whether under the original contract or as a result of the work done pursuant to the negotiations described above. Midros disputes these contentions. In addition it contends that the action was settled and that the only claim available to Aveng is a claim under the settlement agreement. Any such claim, so it contends, will be resisted on the grounds that the work has not been adequately performed.

[6] The result of this sequence of events is that an action commenced six years ago in respect of building work undertaken in 2003 and 2004 has not reached finality. In view of the likely delay in obtaining trial dates for a trial that will run for at least ten days, if the matter proceeds by way of the current action it is unlikely to be resolved for another two or three years. In addition the issues in dispute between the parties have if anything expanded as a result of the events described above and in consequence of the claim-in-reconvention.

[7] In those circumstances, and perhaps in the hope of achieving a speedier resolution of the disputes, Aveng now wishes to go to arbitration. It relies on the provisions of the contract dealing with the settlement of disagreements and disputes. The relevant provisions read as follows:

‘40.1 Should any disagreement between the employer or his agents on the one hand and the contractor on the other arise out of this agreement, the contractor may request

the principal agent to determine such disagreement by a written decision to both parties. On submission of such a request disagreement in respect of the issues detailed therein shall be deemed to exist.

40.2 The principal agent shall give a decision specifically in terms of 40.1 to the employer and the contractor within ten (10) working days of receipt of such a request. Such decision shall be final and binding on the parties unless either party disputes the same in terms of 40.3.

40.3 Should the principal agent fail to give a written decision within ten (10) working days or either party dispute the decision in terms of 40.2 by notice to the other and the principal agent within ten (10) working days of receipt thereof, a dispute shall be deemed to exist. Such dispute shall be submitted to arbitration in terms of 40.5…

40.4 …

40.5 Where the dispute is submitted to arbitration:

40.5.1 The arbitration shall be conducted according to the rules stated in the schedule.

40.5.2 The arbitrator shall be the person appointed by the parties in terms of the schedule or within ten (10) working days of the date of submission of the dispute to arbitration. Where the parties make no such appointment the arbitrator shall be appointed by the body stated in the schedule.

40.5.3 The arbitrator shall have the power to open or revise any certificate, opinion, decision, requisition or notice relating to such dispute as if no such certificate, opinion, decision, requisition or notice had been issued or given.

40.5.4 The parties, unless otherwise agreed, shall request the arbitrator to give a reasoned award.

40.6 and 40.7 …

40.8 The cancellation of this agreement shall not affect the validity of this clause 40.0.'

[8] Aveng explains that it commenced proceedings by way of action because it did not, at the time, understand there to be any dispute between it and Midros. It had the certificates on which it relied in bringing the claim and a number of payments had been made in terms of those

certificates, including a partial payment in respect of the final certificate. When the action commenced there was, therefore, so Mr Kemp SC submitted, no disagreement between Aveng, as the contractor on the one hand, and Midros, as the employer on the other, that could be referred to the principal agent for determination in terms of clause 40.1. In the absence of a dispute it was not open to Aveng at the time it commenced this action to have resort to arbitration. Reliance was placed on the following passage from the judgment of Didcott J in *Parekh v Shah Jehan Cinemas (Pty) Limited and Others*[1]

'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 exist before any question of arbitration can arise.'

[9] Ms Annandale SC, for the respondent, contended that this is irrelevant because it must have been apparent to Aveng once an affidavit opposing summary judgment was delivered on behalf of Midros Investments that there was indeed a disagreement between the parties as to Aveng's entitlement to be paid under the certificates, that dispute being the one already described. However, notwithstanding its agreement to do so, Aveng did not resort to arbitration at that stage. Instead a plea and claim-in-reconvention were filed and Aveng delivered its plea to the claim-in-reconvention. The matter was placed on the awaiting-trial roll and further particulars were requested for the purposes of trial. In those

1 1980 (1) SA 301 (D) 304 E-G. Cited with approval in *Telecall (Pty) Ltd v Logan* 2000 (2) SA 782 (SCA) para [11]. The requirement of a dispute is fundamental to arbitration. See Mustill and Boyd, *Commercial Arbitration* (2nd Ed) 46-48. Although the *2001 Companion* to Mustill and Boyd repeats the principle at 22-23 it points out at 40 that under s 9(4) of the 1996 Arbitration Act a stay must be ordered even if the claim is indisputable.

circumstances, she contended that Aveng had elected to pursue its claims by way of litigation and it was no longer open to it to have resort to arbitration.

[10] Midros also contends that any claim based on the settlement agreement that Aveng may have is not a claim that is capable of being subjected to arbitration under the building contract. It says that such claims arise under separate agreements and are therefore outside the scope of the clause. Implicit in this contention is reliance on the principle that where there are several claims some of which are subject to arbitration and others which are not, issues of convenience will frequently dictate that they should all be resolved in a single set of proceedings and by necessity that will be by way of litigation.[2]

[11] I cannot accept this second contention. Whether the certificates on which Aveng relies are certificates issued in terms of the contract is plainly an issue on which the contractor and the employer disagree. So too there is disagreement on whether the work has been properly completed or whether it suffered from defects and, if so, whether the employer has suffered damages as a result. All of these disagreements arise out of the agreement and therefore fall within clause 40 and no-one suggested otherwise. It would be permissible for Midros to meet the claim by Aveng in arbitration proceedings by relying on the alleged settlement agreements and the arbitrator would be obliged to determine the terms and effect of those agreements. For the arbitrator to be precluded from considering an alternative claim by Aveng based on its having fulfilled its obligations under the settlement agreements and being entitled to payment of the same amount in consequence thereof would be

2 *Universiteit van Stellenbosch v J A Louw (Edms) Beperk* 1983 (4) SA 321 (A) at 341G-342G.

extremely artificial. In my view it is incorrect.

[12] There was a time, particularly in England from where we have derived much assistance in developing our law relating to arbitration,[3] when arbitration clauses were narrowly scrutinised and their language carefully parsed to determine whether a particular dispute was within or outside the terms of the clause.[4] Such an approach has not I think been adopted by our courts, although there are cases where debates have been raised as to the application of an arbitration clause where one party contends that the agreement containing that clause is invalid or void for some reason.[5] However that is not the issue in the present case. Nor does Midros contend that in concluding the alleged settlement agreements the parties effected a consensual cancellation of the original building contract, which would raise different issues.[6] All that it says is that the parties agreed upon the work that would be done to complete the contract against which the balance of the contract price would be paid. A disagreement between the parties over whether the work has been done and whether it was done satisfactorily is, like the other disputes, a disagreement arising 'out of this agreement' in terms of clause 40. Whilst it requires consideration of what the parties discussed and agreed in 2008 and 2009 and what was done thereafter, the basis for those discussions was the obligation of Aveng to construct the shopping centre in accordance with the agreement and the disagreement between the parties remains whether it has done so and whether it is entitled to be paid the

3 This is not to say that our law is the same as English law. Care must be exercised to observe the different origins of the law in both countries before applying decisions in England to South African circumstances. *Van Heerden v Sentrale Kunsmis Korporasie (Edms) Bpk* 1973 (1) SA 17 (A) 29A-H.
4 See the discussion by Lord Porter in *Heyman v Darwins Ltd* [1942] 1 All ER 337 (HL) 360 of the difference between a dispute 'arising under' and one 'arising out of' an agreement.
5 See the citation from the speech of Lord Simon LC in *Heyman v Darwins Ltd, supra,* 343 in *Scriven Bros v Rhodesian Hides & Produce Co Ltd and Others* 1943 AD 393 at 400 and *Allied Mineral Development Corporation (Pty) Ltd v Gemsbok Vlei Kwartsiet (Edms) Bpk* 1968 (1) SA 7 (C) 14B.
6 *Atteridgeville Town Council and another v Livanos t/a Livanos Brothers Electrical* 1992 (1) SA 296 (A) 304D-305C

balance of the contract price for doing so. That is in my view a disagreement arising out of the original building contract.

[13] I am fortified in this approach to clause 40 by the fact that the modern approach to arbitration clauses is to respect the parties' autonomy in concluding the arbitration agreement and to minimise the extent of judicial interference in the process. The historical desire of courts to protect their own jurisdiction and their consequent suspicion of arbitration as a means of resolving disputes has been replaced by a recognition that arbitration is an acceptable form of dispute resolution with which the courts should not interfere.[7] As O'Regan ADCJ said in *Lufuno Mphaphuli and Associates v Andrews*[8]

'[219] The decision to refer a dispute to private arbitration is a choice which, as long as it is voluntarily made, should be respected by the courts. Parties are entitled to determine what matters are to be arbitrated, the identity of the arbitrator, the process to be followed in the arbitration, whether there will be an appeal to an arbitral appeal body and other similar matters.'

[14] An arbitration clause is inserted in a contract at the time of its conclusion because the parties contemplate as a matter of commercial convenience that it is desirable to adopt this as a mechanism for resolving the disputes that may arise in the course of their business relationship. Its construction should therefore be influenced by a consideration of the underlying commercial purpose of including such a clause in the agreement. Lord Hoffmann explained this in *Fiona Trust & Holding Corporation and others v Privalov and others*[9] when he said:

'4 … I shall for the sake of convenience discuss the clause as if it was a simple arbitration clause. The owners say that for two reasons it does not apply. The first is that, as a matter of construction, the question is not a dispute arising under the charter.

7 *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) paras [4] and [5].
8 2009 (4) SA 529 (CC)
9 [2007] UKHL 40; [2007] 4 All ER 951 (HL)

The second is that the jurisdiction and arbitration clause is liable to be rescinded and therefore not binding upon them.

5 Both of these defences raise the same fundamental question about the attitude of the courts to arbitration. Arbitration is consensual. It depends upon the intention of the parties as expressed in their agreement. Only the agreement can tell you what kind of disputes they intended to submit to arbitration. But the meaning which parties intended to express by the words which they used will be affected by the commercial background and the reader's understanding of the purpose for which the agreement was made. Businessmen in particular are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language.

6 In approaching the question of construction, it is therefore necessary to inquire into the purpose of the arbitration clause. As to this, I think there can be no doubt. The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction.

7 If one accepts that this is the purpose of an arbitration clause, its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts. Could they have intended that the question of whether the contract was repudiated should be decided by arbitration but the question of whether it was induced by misrepresentation should be decided by a court? If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another, one would need to find very clear language before deciding that they must have had such an intention.

8 A proper approach to construction therefore requires the court to give effect, so far as the language used by the parties will permit, to the commercial purpose of the arbitration clause. But the same policy of giving effect to the commercial purpose also drives the approach of the courts (and the legislature) to the second question raised in this appeal, namely, whether there is any conceptual reason why parties who have agreed to submit the question of the validity of the contract to arbitration should not be allowed to do so.'

[15] I can discern no sound commercial reason why Aveng and Midros should have agreed to submit disagreements concerning the quality of Aveng's work and its entitlement to be paid to arbitration, where those disagreements arose on completion of the contract works, but would

exclude an arbitrator from considering the selfsame issues when they arose from discussions between the parties in a bid to resolve the initial disagreements between them. The source of the disagreements is the rights and obligations of the parties under the agreement and the differences between them are disagreements arsing out of the agreement. All of them accordingly are disagreements falling within the terms of the arbitration clause.

[16] That brings me back to the issue of whether it is open to Aveng to change course at this stage and proceed to arbitration under clause 40. The contention by Midros is that it cannot do so because it has elected to pursue its claim by litigation and it is now precluded from retracing its steps. Election is generally regarded as a form of waiver[10] the onus of proving which rests on Midros. This requires it to show that Aveng, with full knowledge of its right to arbitrate, decided to abandon it.[11] The argument is that Aveng had two alternative remedies. It was entitled either to litigate or to go to arbitration. Having chosen the former route it is precluded now from changing track and seeking to arbitrate.

[17] There are fundamental difficulties in the path of a contention that Aveng has elected to abandon its right under the contract to refer disagreements between it and Midros for decision to the principal agent and if not satisfied with the outcome of that reference to arbitration. These flow from the relationship between arbitration and the courts. It is now well-established that an arbitration agreement does not oust the jurisdiction of the courts.[12] Where a party to an arbitration agreement commences legal proceedings against the other party to that agreement,

10 *Moyce v Estate Taylor* 1948 (3) SA 822 (A) 830; *Thomas v Henry and another* 1985 (3) SA 889 (A) 895J-898C
11 *Laws v Rutherfurd* 1924 AD 261 at 263
12 *The Rhodesian Railways Limited v Mackintosh* 1932 AD 359 at 375.

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.[13] If a stay is granted the only recourse that the claimant then has in order to pursue the claim is to proceed by way of arbitration. But, if the commencement of legal proceedings constituted an abandonment of its right to arbitrate, the defendant could oppose the arbitration on that ground alone. That does not make sense and is clearly incorrect. If it were correct it would make a nonsense of the process of seeking, and the grounds for granting, a stay. 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]

[18] A party may commence litigation rather than arbitrate because it genuinely believes that there is no dispute between it and the defendant. Were the contention on behalf of Midros to be correct it would not be permissible for the claimant, once a dispute emerged, to withdraw the litigation, against a suitable tender in regard to costs, and refer the dispute

13 *Rhodesian Railways v Mackintosh, supra,* 375; *Universiteit van Stellenbosch v A J Louw (Edms) Bpk, supra,* 333 F-H. *MV Iran Dastghayb: Islamic Republic of Iran Shipping Lines v Terra-Marine SA* 2010 (6) SA 493 (SCA) para [19]

14 Conceivably issues of prescription may then arise but it is unnecessary to determine those in these proceedings.

to arbitration. It is conceivable that on realising that a dispute of a technical nature had been raised, such as a claim that the work done under a building contract is defective, the contractor might prefer to have it determined by way of arbitration in an informal fashion by an arbitrator having expertise in the field, rather than by means of the time-consuming procedures in a court of law. Yet, if the contention on behalf of Midros is correct, it is debarred from following that route.

[19] The answer in my view is 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 right to have resort to arbitration under the agreement. That being so it is not open to the other party to contend that it has 'accepted' the resort to litigation by not itself seeking a stay, and that this 'acceptance' debars subsequent resort to arbitration. Whilst parties can, by mutual agreement, put an end to an arbitration agreement that requires the elements of a contractual agreement to be present. The act of litigating instead of arbitrating is not in my view an offer in the contractual sense available to be accepted. Nor is the act of the defendant in failing to raise arbitration as a dilatory plea or by way of an application for a stay a contractual acceptance. The election for which Midros contends cannot therefore be sustained on the basis of agreement. In my view the commencement of litigation does not preclude Aveng from invoking the arbitration clause in the contract.

[20] That does not however mean that Aveng is entitled to seek a stay of this action. It does mean that it is free to abandon the litigation and proceed to arbitration although conceivably it would face problems of prescription were it to do so. But that is not what it wishes to do. It wishes to keep the present litigation in place but stayed whilst it pursues

its claim by way of arbitration. The problem is that it commenced this action in breach of a binding agreement to arbitrate. Midros has chosen not to contest this by seeking a stay, but Aveng's conduct remains a breach of its obligations under the arbitration clause. It does not cease to be such merely because Midros, for its own reasons, does not seek to rely upon that breach.

[21] Aveng is in breach of its obligations under the arbitration agreement, but claims nonetheless to enforce that agreement against Midros. That is an untenable situation and contrary to basic principle. An arbitration agreement is a clear example of an agreement where the obligations of the parties are reciprocal in the sense that performance by the one party is conditional on performance by the other.[15] Hitherto Aveng has ignored its contractual obligations under the arbitration clause and pursued its claims by way of litigation. Midros has chosen not to challenge this.[16] Now Aveng, whilst keeping in place the litigation commenced in breach of its obligations, seeks to enforce against Midros the very contractual provision of which it is in breach. It is hardly surprising that Midros objects to this. Whilst it has phrased that objection in the language of election its character remains that it objects to having the arbitration clause enforced against it for so long as Aveng remains in breach of its obligation to arbitrate. It is not in my view an answer for Aveng to say that it is now willing to arbitrate and comply with its obligations. It seeks to do so whilst maintaining the present litigation that was commenced and has been conducted in breach of the arbitration agreement. In other

15 *Valasek v Consolidated Frame Cotton Corporation Ltd* 1983 (1) SA 694 (N) 697C-F and 698G-F; *B K Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) 418B – 419H.

16 Whether as a result Midros has taken a step in the proceedings and can no longer rely upon the arbitration clause is unnecessary for me to decide. See in this regard Ramsden, *supra*, para 7.1.6, p 104. If it is precluded from invoking the arbitration agreement in consequence of its response to Aveng's initial breach of its terms that is merely a further reason for holding that Aveng cannot invoke it.

words it seeks to take advantage of its existing breach whilst trying to hold Midros to the terms of the agreement. That is not something that a court will countenance.

[21] For those reasons the application is dismissed with costs.

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DATE OF JUDGMENT:	8 MARCH 2011
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