

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

CASE NO: 404/2016

In the matter between:

20 TWENTY (PTY) LTD

Plaintiff

and

TSANTSABANE LOCAL MUNICIPALITY

Defendant

JUDGMENT

CHWARO AJ:

Introduction

[1] This interlocutory application concerns the adjudication of the special plea raised by the defendant on whether the trial action ought to be stayed pending finalisation of the underlying dispute through arbitration process as provided for in terms of the agreement concluded between the parties.

[2] To give a proper context to the underlying dispute, it is apposite to set out a brief background of the material and relevant facts. The plaintiff, which

was previously known as Axsys Infrastructure, is a Gauteng province-based entity involved in, amongst others, civil construction work. The defendant is one of the local municipalities within the Northern Cape province, with its head office situated at 13 Springbok Street, Postmasburg.

[3] On 1 December 2014, the parties concluded a written construction agreement in terms whereof the defendant appointed the plaintiff to execute construction works at one of the internal roads within the municipality. The total value of the construction works was an amount of R29 958 683-24, (*twenty-nine million nine hundred and fifty-eight thousand six hundred and eighty-three rand and twenty-four cents*).

[4] The construction agreement comprised of the General Conditions of Contract for Construction Works ("GCC"), the special conditions, form of offer and acceptance, contract data, pricing data, scope of work, site information and drawings and related documents.

[5] In terms of the construction agreement, the plaintiff was to submit monthly payment certificates which were to be certified by the defendant's engineer. The defendant was expected to pay the amount due and reflected on the payment certificate within a period of twenty-eight days after receipt of the payment certificates from its engineer.

[6] Acting in accordance with the terms of the construction agreement, the plaintiff completed the construction works and submitted a payment certificate number 4 in the amount of R4 888 107-65 (*four million eight hundred and eighty-eight thousand one hundred and seven rand and sixty-five cents*) to the defendant's engineer for certification. The payment certificate was certified on 8 December 2015. Notwithstanding certification by its engineer, the defendant has not paid the plaintiff the said amount or any amount emanating from the certified payment certificate.

Pending litigation

[7] Aggrieved by the defendant's conduct, on 24 February 2016, the plaintiff proceeded to issue simple summons seeking payment of an amount of R4 888 107-65 from the defendant. The matter was opposed and thereafter the plaintiff launched an application for summary judgment. The defendant was granted leave to defend, and the plaintiff filed its declaration on 25 May 2017.

[8] In defending the plaintiff's claim, the defendant filed a plea on the merits incorporating a special plea relating to referral of the dispute to arbitration. On the merits, the defendant posits that the value of the re-measured works undertaken by the plaintiff does not amount to the claimed amount of R4 888 107-65 but a reduced amount of R1 675 902-90, which amount the defendant has tendered to pay to the plaintiff.

[9] In its special plea, the defendant contends that in accordance with clauses 10.3 read with 10.7 of the GCC and the contract data containing special conditions, the dispute between them is arbitrable and therefore, the action proceedings ought to be stayed pending the finalisation of the arbitration process. The relevant clauses upon which reliance is placed by the defendant provide as follows:

"10.3 Dispute notice

10.3.1. The Contractor or the Employer, hereinafter referred to as "the parties", may deliver to the other a written notice, hereinafter referred to as a "Dispute Notice", of any dispute arising out of or in connection with the Contract;

Provided that:

10.3.1.1. The dispute arises from an unresolved claim.

10.3.1.2. Reference shall be made to this Clause in the Dispute Notice.

10.3.1.3. A copy of the Dispute Notice shall be delivered to the Engineer.

10.3.1.4. The Dispute Notice shall clearly state the nature of the dispute and the extent of the redress sought.

10.3.1.5. *The Dispute Notice shall be delivered within 28 days of the event giving rise to the dispute has arisen, failing such delivery, the parties shall have no further right to dispute the matter.*

10.3.2. *If either party shall have given notice in compliance with Clause 10.3.1, the dispute shall be referred immediately to adjudication in terms of Clause 10.5, unless amicable settlement is contemplated.*

10.3.3. *In respect of a ruling given by the Engineer, and although the parties may have delivered a Dispute Notice, the ruling shall be in full force and carried into effect unless and until otherwise agreed by both parties, or in terms of an adjudication decision, an arbitration award or court judgment.*

.....

10.7 Arbitration

10.7.1. *If the Contract Data provides for determination of disputes by arbitration and a dispute is still unresolved, the matter shall be referred to a single arbitrator. Any such reference shall be deemed to be a submission to the arbitration of a single arbitrator in terms of the Arbitration Act (Act No. 42 of 1956, as amended), or any legislation passed in substitution therefor.*

10.7.2. *In the absence of any other agreed procedure, the arbitration shall take place in accordance with the Rules of Conduct of Arbitrations issued by the Association of Arbitrators (Southern Africa) which is current at the time of the referral to arbitration.*

10.7.3. *The arbitrator shall, in his award, set out the facts and the provisions of the Contract on which his award is based."*

[10] The pending action between the parties has reached various milestones. Pleadings have closed, both parties have made discoveries and two pre-trial conferences were held on 13 May 2021 and 26 August 2021 respectively.

Evaluation

[11] It is a settled principle of our law that courts are not rendered incompetent to determine disputes between the parties who have agreed upon arbitration process as a dispute resolution mechanism.¹

¹PCL Consulting (Pty) Ltd v Tresso Trading 119 (Pty) Ltd 2009 (4) SA 68 (SCA)

[12] In **PCL Consulting** referred to above, the court went on to hold as follows regarding available options in cases where one party to the agreement decides to litigate in court rather than referring the dispute to arbitration:

"[I]f a party institutes proceedings in a court despite such an agreement, the other party has two options:

- (i)** *It may apply for a stay of proceedings in terms of s 6 of the Arbitration Act 42 of 1965; or*
- (ii)** *It may in a special plea (which is in the nature of dilatory plea) pray for a stay of the proceedings pending the final determination of the dispute by arbitration."*².

[13] The onus rests with the party seeking stay of proceedings to allege and prove (a) that there is a genuine dispute between the parties, (b) that there is a written arbitration clause in the underlying agreement, (c) that the arbitration clause is applicable to the dispute in question and (d) that it has complied with the preconditions contained in the agreement for commencing arbitration.³

[14] It is uncontroversial that the defendant has, in its special plea, outlined the existence of the dispute which emanates from its failure to pay the plaintiff's claim in full. The dispute existing between the parties can therefore not be regarded as not being genuine, despite the defendant's tender of a lesser amount than the claim by the plaintiff.

[15] In **Parrekh v Shah Jehan Cinemas (Pty) Ltd and Others**⁴ the court held as follows regarding the obligation placed on the defendant to set out the dispute:

"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...."

²Ibid, at para 7

³LTC Harms: Amler's Precedents of Pleadings, 7th ed, LexisNexis, p38

⁴1980 (1) SA 301 (D) at 304E-G

[16] The conspectus of written documents comprising the GCC, and the Contract Data contain arbitration clauses that set out in elaborate detail, how the dispute ought to be raised, the manner of resolving same and how the arbitration process must unfold.

[17] In as far as compliance with all jurisdictional facts leading towards arbitration process, it is the contention of the plaintiff that the defendant has failed to meet any if not all of the procedural steps set out in clauses 10.3 and 10.7 of the GCC. In this regard, it was contended during argument that the defendant has not taken any of the prescribed steps to declare a dispute within the stipulated periods and has not adhered to the steps that ought to be undertaken to refer the dispute for arbitration.

[18] The contention by the plaintiff is not without merit. As of 18 July 2016, when the defendant filed an affidavit resisting summary judgment, it was quite aware of the existence of the dispute between the parties which was unresolved at the time and which was supposed to have been referred for arbitration. There is no record indicating any endeavour undertaken by the defendant to utilise the dispute resolution mechanisms contained in clauses 10.3 and 10.7 of the GCC, prior to filing its plea incorporating the special plea.

[19] On perusal of the contents of the court file in the pending proceedings, it becomes evident that the conduct of the defendant since the close of pleadings does not accord with a party desirous of a speedy resolution of the dispute relating to payment of the amount of money due to the plaintiff. My view on this matter is buttressed by the clear and unequivocal lacklustre manner in which the defendant has conducted this matter, including its apparent delay to discover which led to an application to compel, and its failure to revert to the plaintiff on crucial matters raised during pre-trial conferences, which includes the question whether it was still pursuing its special plea on the matter. This much was confirmed in a separate judgment involving the same parties herein and delivered on 22 April 2022.

[20] The hearing of the special plea was only made possible by the active initiative of the plaintiff who set it down for hearing through a notice dated 27 September 2022, presumably after the judicial case management conference held before Nxumalo J on 6 September 2022.

[21] I am mindful of the fact that by its very nature, the special plea relating to arbitration clause is dilatory and does not necessarily terminate the pending proceedings. However, regard being had to the defendant's non-compliance with the preconditions for arbitration set out in the relevant GCC clauses referred to above, progress already made in preparation for the hearing in the pending proceedings, the conduct of the defendant as mentioned above and the need to obtain finality in the matter, it is my view that the special plea relating to arbitration cannot be upheld.

[22] Any further endeavour at stalling the pending proceedings, albeit temporarily, has the potential of not only delaying the adjudication of the underlying dispute, which is at an advanced stage, but will also further serve to increase the costs implications for both parties.

Costs

[23] In the normal course, costs of an interlocutory application are reserved for adjudication by the court dealing with the main matter. I do not find it prudent to burden the trial court with the determination of costs herein. It is an established principle of our law that costs follow the result, unless the court, in the exercise of its judicial discretion, determines otherwise. There are no peculiar circumstances persuasive enough to deviate from the norm. The plaintiff is successful in resisting the dilatory special plea raised by the defendant and it follows that it is entitled to its costs.

Order

[24] In the premises, the following order is made:

1. The defendant's special plea is dismissed.
2. The defendant is ordered to pay the costs.

**O.K. CHWARO
ACTING JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION, KIMBERLEY**

DATE OF HEARING: 28 February 2023

DATE OF JUDGMENT: 10 March 2023

REPRESENTATION:

For the Plaintiff:

Adv. A. Eillert

Instructed by:

Matthews & Partners, Kimberley

For the Defendant:

Adv. MC Roux

Instructed by:

Van De Wall Inc, Kimberley

Peyper Attorneys, Bloemfontein