1915. *December*, 21, 24. DE VILLIERS, J.P.

Arbitration.— Interdict.— Grounds for refusal of.— Ordinance 24 of 1904, sec. 9.—Interpretation.

The Court will not interdict proceedings for arbitration under an agreement of reference on the ground merely that the agreement is void, or that the matter to be referred is outside the submission, or that prejudice may be caused to the credit of the party applying or to subsequent legal proceedings by an adverse award. *North London Railway Co.* v. *Great Northern Railway Co.* (11 Q.B.D. 30) applied; *London and Lancashire Fire Co.* v. *Imperial Cold Storage* (15 C.T.R. 673), disapproved.

The power given to the Court by the proviso to sec. 9 of Ord. 24 of 1904, to set aside the appointment of an arbitrator applies only to cases of personal objection to such arbitrator.

Return day of a rule *nisi* calling upon respondent to show cause why he should not be interdicted from proceeding with a certain arbitration between himself, applicant, and Norman Hill & Co., Ltd.

The material facts were that on the 26th February, 1915, an agreement was entered into between applicant, respondent and Edward Nathan on behalf of a private company to be formed under the style of Norman, Hill & Co., Ltd., whereunder applicant agreed to sell to the company the business, agencies and goodwill hitherto carried on by applicant at Johannesburg, and particularly the agency of the Schuttes Draai Milling Co., Ltd., which were to be deemed the company's property as from the 1st March, 1915, though registration might not then have been effected.

Applicant and respondent were to be the joint managing directors of the company as from the said date, and were to jointly manage the same.

By clause 10 it was agreed that in the event of any dispute arising between the said managing directors in respect to the management of the company's business, such dispute was forthwith to be referred to arbitrators to be appointed and to act in accordance with the arbitration laws existing in the Transvaal Province.

The company was registered on the 13th March, 1915, stating as its main object the acquisition of the business aforesaid in accordance with the above agreement, and immediately on registration the entering into an agreement with applicant and respondent embodying the terms of the said agreement.

The agreement was not formally adopted by the company, but since its incorporation it had acted upon it and derived profits from its working.

On the 18th November, 1915, respondent notified applicant that whereas a dispute had arisen between them with regard to the business of the company, he called upon him forthwith to refer the dispute to the decision of arbitrators in terms of the agreement. The matters which respondent desired to refer were (*a*) the placing of the company into liquidation owing to the impossibility of continuing by reason of applicant's conduct in refusing to carry on or in regard to the agency for the Schuttes Draai Milling Co.; (*b*) paying of damages by reason of deprivation of the said agencies; (*c*) indemnifying respondent against any claim for damages by the said Milling Co. against the Norman Hill Co.

Respondent nominated Mr. Advocate J. G. van Soelen as his arbitrator, and called upon applicant to nominate his within 48 hours, and to sign a proper deed of submission. On the 19th November applicant replied declining to enter upon an expensive arbitration, for which he said that was no reason, as the allegation that he was not duly carrying on the milling agency was untrue.

On the 14th December, respondent wrote that he had been notified by the Milling Co. that by reason of the breaches of the terms of the agency committed by applicant they had cancelled the agency. In respect of this respondent claimed £500 additional damages, and formally notified applicant that as he had failed within seven days after notice to nominate an arbitrator, Mr. van Soelen would now act alone, and this question would also be submitted. On the 17th December applicant replied denying breaches of the agency or that respondent had suffered damage. He again protested against the arbitration being proceeded with on the ground that there was no dispute between respondent and himself which came under the operation of clause 10. He informed respondent that he was that day making an urgent application in this Court for an order restraining him from proceeding with the arbitration. This order was made on the 18th December.

J. T. Barry, for applicant, moved for confirmation of the rule.

M. Nathan, for respondent: Irreparable injury must be shown. The application is premature; the award can be set aside on proper grounds when made; see *Johannesburg Municipality* v. *Transvaal Cold Storage* (1904, T.S. 730). Applicant can attend the arbitra-

tion without prejudice to his rights; see *Hamlyn* v. *Betteley* (6 Q.B.D. 63) *per* SELBORNE, L.C., at p. 65. The Court has no jurisdiction to make this order; see *North London Railway Co.* v. *Great Northern Railway Co.* (11 Q.B.D. 30) *per* BRETT, L.J., at p. 35.

On the question of there being a dispute, see *Willesford* v. *Watson* (42 L.J. Ch. 447) *per* SELBORNE, L.C., at p. 449. The decision in *London and Lancashire Insurance Co.* v. *Imperial Cold Storage* (15 C.T.R. 673) is wrong. The Court will not prejudge an arbitration.

As to the adoption of the agreement by the company, that can be done and was done by conduct. No specific formality is required by the Company Law or the articles.

Barry, in reply: Clause 10 does not cover the matters sought to be referred; arbitration is being forced on us on points outside the submission; see *Transvaal Mines Labour Co.* v. *Robinson Group of Mines* (1911, W.L.D. 191) *per* WARD, J., at p. 199. Next, the company has not acquired the Milling Agency and cannot now adopt the agreement; see *Rand Trading Co.* v. *Lewkewitsch* (1908, T.S. 108). An arbitrator cannot order a dissolution of partnership in the absence of agreement to submit the question of dissolution; see *Joplin* v. *Postlethwaite* (61 L.T. 629) *per* KAY J., at p. 631. This is not a dispute in respect of the company's business, but one between two directors in their private capacity. The Court will restrain an arbitration in the case of injustice or injury which ought not to be borne; see *Farrar* v. *Cooper* (44 Ch. D. 323) *per* KEKEWICH, J., at p. 328. In the *London and Lancashire Co.'s* case (*supra*) the interdict was granted because the applicant there was threatened with something of the ultimate results of which he was apprehensive. Here an adverse award would reflect misconduct by applicant, even if *ultra vires*. In any event under sec. 9 of Ordinance 24 of 1904, the Court has power to set aside the appointment of a sole arbitrator; see Halsbury, *Laws of England*, I., sec. 669. The proviso to sec. 9 is meant to prevent a person being forced to arbitrate without consent; and see sec. 8.

Nathan, in reply: The power given by sec. 9 is limited to cases where there is objection to the person of the arbitrator.

Cur. adv. vult.

Postea (December 24).

DE VILLIERS, J.P. (after stating the facts): The applicant contends that the agreement, which contains a clause providing for a reference to arbitration of all matters in dispute between the parties, is not binding, as it was entered into before the incorporation of Norman Hill & Co., Limited, and was not adopted by that company after its incorporation. Whether it is binding on the company is a matter on which I do not wish to express an opinion. The company has made a record of the agreement in its minutes, and has since its incorporation acted upon the agreement, and derived profits from its working. It is also argued that the agreement is not binding as between the parties who have signed it, as it was entered into with a view to the incorporation of the company. I do not think it necessary to decide this point either, because the real question is whether the applicant is entitled to an interdict restraining the respondent from proceeding to arbitration. When the provisional order was applied for, Mr. *Nathan* did not strenuously oppose it. But he now contends that the Court has no jurisdiction to grant a final interdict. It accordingly becomes necessary to consider what is our law upon the subject. Mr. *Barry* argues that if an arbitration is held the applicant will be injured, as an adverse decision may have a prejudicial effect upon his credit, or upon subsequent legal proceedings. But there is nothing to show that the decision of the arbitrators will be adverse to him. He has to establish a clear right to an interdict, and that he will suffer damage if the arbitration proceedings take place. In England it appears that the Courts are very reluctant to grant injunctions to restrain arbitrators from acting. The general rule is thus stated in *North London Railway Co.* v. *Great Northern Railway Co.* (11 Q.B.D. 30): "The Court has no jurisdiction to grant an injunction on the application of one party against the other party proceeding with an arbitration, whether under an agreement of reference, or under the provisions of an Act of Parliament; although it is suggested that the matter is outside the submission and that the proceedings will be futile." This principle appears to have been applied in a number of cases. The matter must, however, be decided on the principles of our own law. I am not aware of any authority in our common law for granting an interdict in a matter of this kind. I have been referred to the case of *London and Lancashire Fire Co.* v. *Imperial Cold Storage* (15 C.T.R. 673), in which the Court interdicted one party from proceeding with an arbitration where there appeared to

be no subject-matter for arbitration. The case is briefly reported, but the reasons given by HOPLEY, J., do not appear to me to be very satisfactory. Whether there is a subject-matter for arbitration is a question for the arbitrators to decide, and one on which the Court can express no opinion. On the other hand, in *Johannesburg Municipality* v. *Transvaal Cold Storage* ([1904] T.S. 730), the Transvaal Supreme Court declined to grant an interdict on the ground that the application was premature. It seems to me that the applicant is unable to make out a *primâ facie* case of injury. If the proceedings are futile they cannot harm him. If he succeeds in the arbitration proceedings, which he is at liberty to attend under protest, he will have nothing to complain of. Nor can it be said that he has no other remedy. If the arbitrators have acted outside the submission, or on a void agreement to arbitrate, the applicant can always oppose the award being made a rule of Court. The applicant has therefore failed to make out a case for an interdict.

Mr. *Barry* then applied, under the proviso to section 9 of the Arbitration Ordinance, that the appointment of Mr. van Soelen, who has been nominated as the respondent's arbitrator, should be set aside. Mr. *Nathan* objects that this section is only intended to apply to cases such as misconduct, or unfitness, or personal grounds of objection to an arbitrator. I do not think it was intended to apply to cases where the arbitrator has no jurisdiction, or to circumstances such as those which have been relied upon for the granting of an interdict in the present case. The section appears to apply only to cases in which there are personal objections to the arbitrator. In this case the arbitrator, Mr. van Soelen, is an advocate of this Court, and it is usual, and indeed proper, to appoint advocates to act as arbitrators. No grounds of objection are alleged against the arbitrator, and I see no reason for his removal. I have, therefore, come to the conclusion that the application fails, and the rule will be discharged with costs.

Applicant's Attorneys: *Hudson & Friel;* Respondent's Attorney: *Edward Nathan.*

[G. H.]

PRINTED BY CAPE TIMES LIMITED, CAPE TOWN.