**REPUBLIC OF SOUTH AFRICA**

**IN THE SOUTH GAUTENG HIGH COURT**

**(LOCAL DIVISION JOHANNESBURG)**

**CASE NO: 34437/2013**

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

**1 OCTOBER, 2014** **signature**_____
**T MOSIKATSANA**

In the matter between

**STIELER PROPERTIES CC**

**REGISTRATION NUMBER 2003/014057/23** **APPLICANT**

And

**SHAIK PROP HOLDINGS (PTY) LIMITED**

**REGISTRATION NUMBER: 2001/028696/07** **FIRST RESPONDENT**

**OBIFON (PTY) LIMITED**

**REGISTRATION NUMBER: 2010/019027/07** **SECOND RESPONDENT**

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**J U D G M E N T**

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***Sale:*** *Immovable property - Merx in existence and identifiable at time of sale – Contract silent on date for transfer – Purchaser granted vacant possession pending registration of transfer – Relevant factors for the Court in determining reasonable period for registration of transfer.*

***Contract****: Void and voidable contracts – Impossibility of performance – Mora debitoris - Mora ex persona – Factors causing delay in registering transfer will be taken into account in determining reasonable period for registration of transfer if known to the parties or foreseeable.- Whether contract validly cancelled –* ***Contractual terms*** *– Lex commissoria – Rescission rather than specific performance or damages is the more radical remedy – Rescission to be granted where the breach is so serious that it is fair to allow the innocent party to rescind the contract and undo all its consequences.*

**Arbitration:** Arbitration agreement – Effect – Court proceedings – Mere existence of arbitration agreement not meaning that court proceedings incompetent – If court proceedings instituted despite existence of arbitration agreement, other party may either (i) apply for stay of proceedings under Arbitration Act or (ii) raise special (dilatory) plea for stay of proceedings – Neither party to an arbitration contract may terminate the contract without the consent of the other parties to the contract – A party resisting referral of the dispute to arbitration carries a heay onus of showing why the matter should not be referred to arbitration - Court's discretion to refuse arbitration is to be exercised judicially, and only when a very strong case has been made out - Arbitration Act 43 of 1965

**MOSIKATSANA AJ:**

*Introduction*

[1] This is an application for a declaration, that a contract for the purchase and sale of immovable property (contract) is *void ab initio*, in that the property (*merx*) was not in existence, at the time the contract was entered into.

[2] Alternatively, that if it is found that the contract was not void, that it was validly cancelled, due to impossibility of performance.

*Factual Background*

[3] Applicant (purchaser), purchased immovable property, described as "Section 1 Erf 1282 Parkrand Ext 3 situated at 7A Crystal Crescent, Golden Crest Country Estate, Parkrand Ext 3' (the property), from first respondent (seller), for the price of R 3 040 000.00 plus R160 000.00 agent's fees, totalling R3 200 000.00.

[4] The sale of the property was concluded on 18th March 2013. Second respondent (agent), acted as first respondent's estate agent, in negotiating the sale.

[5] On 24 April, 2013 applicant (purchaser), enquired from the conveyancing attorneys, when first respondent (seller), would transfer the property to it as purchaser.

[6] On 25th April, 2013 the conveyancing attorney replied to applicant's (purchaser's) email, by stating that, transfer usually takes about three weeks, and that after that period, they will be in a position, to prepare conveyancing documents.

[7]The conveyancer, also informed applicant (purchaser), that first respondent (seller), had indicated that it is prepared to lease the property, to applicant (purchaser), for R15 000.00 per month excluding levies, electricity and water charges pending transfer.

[8] Alternatively, that if applicant (purchaser), gives instructions for the full purchase price to be deposited into the account of first respondent (seller), it could take possession, in which case, it would only be liable for levies, electricity and water charges.

[9] Pursuant to the above negotiations, the full purchase price was paid into first respondent's (seller's) account. Applicant (purchaser), was given right of possession, to the property.

[10] On 3 May, 2013 an addendum to the contract was completed, in which the property, was described differently from the contract as:

> 'Portion Erf 1282 Parkrand Ext 3, Registration Division I.R, the province of Gauteng, in extent… square metres'.[1]

[11] Despite the fact that the purchase price had been paid in full two months earlier, transfer had still not been processed. On 5 June, 2013 a representative of the applicant (purchaser), sent an email to first respondent's (seller's) representative enquiring when transfer would be completed.

[12] On 5 June, 2013 first respondent's (seller's) representative, replied as follows to applicant's (purchaser's) email of 5 June, 2013:

> 'Transfer is not in my hands. The following has to happen before my attorneys can transfer the property:
>
> 1. Obtain Council rates clearance from council.
> 2. Obtain Home owners' consent,
> 3. Pay transfer duty to SARS.
> 4. You to pay the attorneys (sic) account and transfer duty.
>
> We are awaiting homeowner's (sic) consent before we can apply for other council requirements.'

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[1] In the offer to purchase, the immovable property was described as Section1 Erf 1282 Parkrand Ext 3 situated at 7A Crystal Crescent, Golden Crest Country Estate, Parkrand Ext 3. Further, in the addendum the place where the property was located was left out and the size of the property which was indicated as 'five thousand three hundred –and- twenty five (5325) square metres was deleted.

[13] On 10 June, 2013 applicant's (purchaser's) attorneys, sent a letter to the conveyancing attorneys, demanding that they attend to the opening of the sectional title register and transfer of the property, and that applicant (purchaser), be provided with copies of the approved sectional title plans and transfer documents, for signing within five days of receipt of the letter, to avoid further legal action. A copy of a letter of demand addressed to the first respondent (seller) was enclosed.

[14] Against the background that the requested transfer documents had still not been received by applicant (purchaser), on 28 June, 2013 a further letter requesting transmission of transfer documents to applicant (purchaser), was sent to the conveyancing attorneys.

[15] On 5 July, 2013 the conveyancing attorneys, acting with instruction from first respondent (seller), replied in a letter stating that the delay in completing transfer, was caused by the Golden Crest Home Owners' Association (GCHOA), which according to Condition 4 of the title deed, first has to approve subdivision. And, that the GCHOA declined to give consent to sectionalisation, but would permit first respondent (seller), to sub divide. It was further stated in the letter, that first respondent (seller), had commenced with the process of sub division, which is costlier to respondent (seller), and more beneficial to applicant (purchaser).

[16] Pending finalization of transfer, first respondent (seller), proposed and advised that:

> '... [T]he entire property be transferred into the Purchaser's name provided that there is a bond registered in favour of the seller for R 1 500 000.00. Upon the property being subdivided the bond will be cancelled and both the purchasers will have separate title deeds. Our client further advises that he has a prospective purchaser for the second unit in the amount of R1 500 000.00'

[17] It was further indicated that all costs related to the above proposal, would be borne by first respondent (seller), and that applicant (purchaser), would bear the transfer costs, after the property has been subdivided.

[18] It was further stated, in paragraph 6 of the letter, that applicant (purchaser), would not be prejudiced, by first respondent's (seller's) proposal, since it is in occupation of the property without payment of occupational rent, except for utilities.

[19] On 7 August, 2013 applicant's (purchaser's) attorneys, wrote a letter to the conveyancing attorneys, who were acting on instruction from first respondent (seller), notifying them that applicant (purchaser), has been informed that first respondent (seller), was unable to effect transfer of the property, to applicant (purchaser), and that first respondent's (seller's) conduct constituted:

> ' [A] breach of the contract, which we hereby call upon you to remedy within 5 (five) days of delivery of this notice, failing which our client will cancel the contract and claim repayment of the purchase paid, without prejudice to any other claim which our client may have arising out of your aforesaid breach.'

[20] It appears from my reading of a letter dated 16 August, 2013 from the conveyancers, to applicant (purchaser), that there were further negotiations, between the parties, in which applicant (purchaser), had offered to purchase the second unit, priced at R 1 500, 000.00, at a reduced price of R 800, 000.00. The offer was rejected by the conveyancers, on behalf of first respondent (seller), in correspondence dated 16 August, 2013 and 26 August, 2013 respectively. First respondent (seller), was only prepared, to accept an offer, of R 1 200,000.00 from applicant (purchaser), for the second unit. Eventually, negotiations broke down, leading to this application.

*Applicant's (Purchaser's) Case:*

[21] Flowing from the above facts, it is applicant's (purchaser's), contention that:

21.1 The contract was *void ab initio* based on:

21.1.1 The non-existence of the *merx*; or

21.1.2 first respondent's (seller's) impossibility of performance, occasioned by inability to sectionalize and effect transfer;

21.2 Alternatively, that if it is found that the contract was not *void ab initio*, that it was validly cancelled.

[22] Applicant (purchaser), prayed for the following relief:

22.1 A declaration that the contract entered into between the parties is *void ab initio*;

22.2 alternatively,that the contract entered into between the parties on 18th March, 2013 has been validly cancelled by applicant (purchaser);

22.3 that first respondent (seller) be ordered to pay applicant (purchaser), the amount of R3 200 000, 00 together with interest at the rate of 15.5% per annum with effect from1st June, 2013 to date of payment;

22.4 alternative to paragraph 22.3 above:

22.4.1 That first respondent (seller), be ordered to pay applicant (purchaser), the amount of R3 040 000,00 together with interest thereon at the rate of 15, 5% per annum with effect from the 1st June, 2013 to date of payment;

22.4.2 second respondent (agent), is ordered to pay applicant (purchaser) the sum of R 160 000, 00 together with interest

thereon at the rate of 15.5% per annum with effect from the 1st June, 2013 to date of payment.

22.5 Plus costs of bringing the application.

*First Respondent's (Seller's) case:*

[23] First respondent (seller), raised a special plea that the current dispute be stayed in this Court, so that it can be referred to an arbitrator in term of clause 16.1 of the contract, which states that:

> '16.1 If any dispute arises between the parties... such dispute will be resolved by way of arbitration before a single arbitrator, appointed in terms of the provisions of this clause. Either party/ies ... shall be entitled to notify the other party of its intention to refer such dispute to arbitration.'

[24] In the event that a stay of proceedings is not granted, first respondent (seller), contends that at the time the contract was entered into, the *merx*, did exist. Accordingly, first respondent (seller), denies that the contract is *void ab initio* for reasons alleged by applicant (purchaser).

[25] First respondent (seller) contends that it is not a requirement for the validity of a contract for the sale of land, that transfer take place on the date of sale, and that the inability to effect transfer on the date of sale, does not constitute impossibility of performance. The contract, is silent on the date of transfer.

[26] First respondent (seller), further contends that the applicant (purchaser), was at all material times, aware that first respondent (seller), would first have to obtain the consent, of the GCHOA to sectionalize. According to first respondent (seller), the delay in obtaining such consent, does not constitute impossibility of performance. First respondent (seller) argues that until such time as there is no reasonable

prospect of transfer taking place, it cannot be said that performance has become impossible.

[27] First respondent (seller), deposed to the fact that negotiations between itself and the GCHOA, are still underway and that it is foreseeable, that the requisite permission will be granted. Accordingly, first respondent (seller), insists that applicant (purchaser), has not given it reasonable time, in which to effect transfer.

[28] First respondent (seller), argues that according to clause 7 (*voetstoots* clause) of the contract, the purchaser (applicant), acknowledged that the property is sold with all the conditions of title, including the condition contained in clause 4 of the title deed, which states that:

> '4. The erf may not be transferred without prior consent of the GOLDEN CREST COUNTRY ESTATE HOMEOWNERS ASSOCIATION.'

[29] First respondent (seller), argues that by purchasing the property subject to the above condition, applicant (purchaser), foresaw the possibility of delays in effecting transfer, and reconciled itself to the possible delay.

[30] First respondent (seller), also argues that applicant, has not suffered real prejudice, in that it has vacant possession of the property, and enjoys all the benefits akin to ownership.

[31] First respondent (seller), further argues, that the contract was not validly cancelled by applicant (purchaser), in that it did not offer restitution, of the part performance, made by the first respondent (seller).

[32] In the circumstance, first respondent (seller), contends that applicant (purchaser), brought this application prematurely, and is therefore, not entitled to the relief sought.

[33] Accordingly first respondent prays for:

[33.1] Stay of proceedings so that the dispute may be resolved by means of arbitration as provided for in clause 16 of the contract.

[33.2] Costs of this application, to be determined by an arbitrator.

[33.3] Alternative to [33.2] that the applicant (purchaser), is to pay the costs of this application on an attorney and client scale.

[34] As an alternative to the prayer contained in paragraph [33] above, that the present application is dismissed with costs on an attorney and client scale against the applicant (purchaser).

[35] Second respondent abides with the Court's decision.

*Issues to be determined*

[36] The issues for determination in this application are:

36.1 Whether the contract was *void ab initio,* due to either the non-existence of the *merx*, or first respondent's (seller's) impossibility of performance; or

36.2 if it is found that the contract was valid, whether it was validly cancelled by applicant (purchaser); and

36.3 whether, a stay of proceedings, pending referral to arbitration, ought to be granted.

*Voidness due to non- existence of the merx*

[37] Applicant's (purchaser's) contention that the contract is void due to non-existence of the *merx* is unavailing, as there was in existence a valid contract whose terms were partly that:

37.1 Land bearing the legal description in the contract was the subject of a contract of sale between the parties[2];

37.2 such land, bearing the legal description in the contract, though physically in existence, was still to be registered;[3]

37.3 the time for registration of transfer was not made a material element of the contract,[4] it being agreed between the parties in clause 7.1.1 of the contract that the *merx* is sold *voetstoots,* subject to existing conditions of title.

37.4 According to condition 4 of the deed of transfer, one of the conditions of title was that obtaining the consent of the GCHOA is an administrative detail that first had to be accomplished before the *merx* could be registered.

[38] It is, therefore, unavailing for applicant (purchaser), to argue that the *merx* was not in existence at the time the contract was concluded, because the *merx* did physically exist and it continues to exist. It is for this reason that applicant (purchaser), is in occupation and even sought to purchase the second unit at a reduced price of R800, 000.00. If the *merx* did not exist, applicant's offer for the second unit would not have been possible. What did not exist and this remains so, is

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[2] This indicates that the property was sufficiently identified to meet the criteria for a valid contract for the sale of land as stipulated in s 6(1) of the *Alienation of Land Act* 68 of 1981. See *Phone-A-Copy Worldwide (Pty) Ltd v Orkin and Another* 1986 (1) SA 729 (A); *Forsyth and Others v Josi* 1982 (2) SA 164 (N).

[3] See *Conlon and Fletcher v Donald* 1951 (3) SA 196 (C) where it was stated that the fact that the property was not sub-divided at the time of sale does not make it non-existent.

[4] Section 6(1)(q) read with s 6(4) of the *Alienation of Land Act* 68 of 1981 impose a limit of five years from the date of sale for registration of transfer.

a title deed bearing the legal description identified in the contract.[5] However, the merx was identifiable[6].

*Voidness due to impossibility of performance*

[39] Applicant's (purchaser's) argument that the contract is *void ab initio* due to impossibility of performance, occasioned by the delay in effecting registration of transfer, is not legally sustainable. According to Sharrock:

> 'The fact that an obligation can no longer be performed on time does not, as a rule, mean it is physically impossible of performance in the eyes of the law. The test in each case is whether the substance of the obligation is still capable of being performed. If it is, the obligation is not impossible of performance.'[7]

[40]The alleged impossibility is supervening, relative (subjective) and not absolute. It therefore, does not render the contract *void ab initio*, but possibly voidable. First respondent (purchaser), deposed that given enough time, it may successfully negotiate and obtain the GCHOA's consent and effect transfer of the property to applicant (purchaser).

[41] Indeed, time is not made a material element of the contract. The contract is silent on the time for transfer. In such instances, where the time for performance is not stipulated in the contract, but a reasonable time within which performance should have taken place has elapsed, applicant's (purchaser's) right to resile from the contract, is limited to only those failures to perform, which go to the root of the contract, such as where the failure amounts to repudiation of the contract.[8]

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[5] This is not an essential ingredient for validity of a contract for the sale of land as stipulated in s 6(1) of the *Alienation of Land Act* 68 of 1981.
[6] See note 2 supra.
[7] Robert Sharrock *Business Transactions Law* (2012) Juta at 699; See also *Protea Property Holdings (Pty) Ltd v Boundary Financing Ltd (Formerly known as International Bank of Southern Africa Ltd)* 2008 (3) SA 33 (C).
[8] RH Christie & GB Bradfield *Christie's The Law of Contracts in South Africa* (2007) Juta 530.

[42] The delay in effecting registration of transfer, cannot be construed as a repudiation of the contract by first respondent (seller), in that when it became apparent that there was delay in obtaining consent of the GCHOA, on 5 July, 2013 first respondent proposed that the entire property be transferred into the purchaser's (applicant's) name, provided that there is a bond registered in favour of the seller (first respondent) for R 1 500 000.00. The bond would be cancelled when the property is subdivided and both purchasers would have separate titles.[9] Further, applicant (purchaser), was at all material times aware, that registration of transfer was contingent upon first respondent (seller), obtaining the GCHOA's consent. The cause of the delay in effecting transfer was known to the parties and it was foreseeable. It therefore, cannot be said that the delay is unreasonable.[10] First respondent (seller) will escape liability on the basis of supervening impossibility because he is not responsible for the delay in effecting transfer[11] and the cause of the delay was known to applicant (purchaser).

[43] First respondent (seller) has rendered part performance on material aspects of the contract, in that it has afforded applicant (purchaser) vacant possession, which allows the applicant (purchaser), to enjoy *some* of the benefits akin to ownership.

*Validity of cancellation for breach*

[44] There is no automatic right of cancellation of a contract on the basis of the debtor's *mora*. Cancellation is an extraordinary remedy. In *Sweet v Ragerguhara*

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[9] See para 16 *supra*.

[10] See *Young v Land Values Ltd* 1924 WLD 216 and *Nel v Cloete* 1972 (2) SA where it was said that delay in effecting transfer will be considered unreasonable if the cause of the delay was not foreseeable or was unknown to the creditor.

[11] For liability to attach on basis of supervening impossibility it must be shown that first respondent is responsible for the delay. However, it need not be shown that first respondent's conduct was unlawful. See Sharrock *supra* note 7 at 700-1; See also SJ Cornelius 'Mora debitoris and the principle of strict liability: Scoin trading (Pty) Ltd v Bernstein 2011 2 SA 118 (SCA)' PER/PELJ 2012 (15) 5 601-38.

*NO and Others*[12]it was stated that where cancellation is claimed in motion proceedings the applicant should state unequivocally in his founding affidavit that his cancellation is based on a material breach of the agreement and he should thereafter fully outline the facts on which he relies for his assertion. It was further stated, that a notice of rescission (*interpellatio*) is of no legal consequence unless it relates to a failure to perform a 'vital' or 'important' term of the contract timeously. However, the right to cancel will avail, where the contract specifies, the date for performance and the debtor fails to perform (*mora ex re*), or where the contract, as in the present case, contains a cancellation clause (*lex commissoria),* or the creditor fixes a date for performance by making a demand (*interpellatio*) which gives the debtor a reasonable period[13] for performance, and the debtor fails to perform (*mora ex persona*).

[45] Clause 11 of the contract contains a *lex commissoria*, which gives an innocent party, the right of cancellation for breach, on five days' notice to the defaulting party. Applicant (purchaser), duly exercised its right of cancellation, by giving first respondent (seller), notice to effect registration of transfer, within five days from the date of the notice, and that failure to perform within the five day period, will constitute breach leading to cancellation.[14]

[46] Tritely, applicant (purchaser) rightly exercised its right to cancel, stipulated in the *lex commissoria*. However, given the administrative hurdle faced by first respondent (seller), in obtaining the GCHOA's consent, five days' notice, though specifically provided for in the *lex* commissoria, may not have been a reasonable period, for first

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[12] 1978 (1) SA 131

[13] *Nel v Cloete* 1972 (2) SA 150 (A); see also *Willowdale Landowners Pty (Ltd) v St Martin's Trust* 1971 1 SA 302 (T).

[14] See paragraph 19 supra.

respondent (seller), to effect registration of transfer to the applicant (purchaser). I am fortified in my view, by the fact that subsections 6(1)(q)[15] read with s 6(4)[16] of the *Alienation of Land Act* 68 of 1981 set a limit of five years, from date of sale, for registration of transfer. The applicant (purchaser), brought this application six months after the date of sale, which in my judgment did not allow first respondent sufficient time to seek and obtain the GCHOA's consent.

[47] It is manifest, that restitution is not part and parcel of the act of rescission, but a consequence of it. … '[I]f, having rescinded, the innocent party fails to make restitution when he is obliged to do so, his failure will invalidate his act of rescission.'[17]

[48] It is my view that in a case such as the present, where restitution is practical, cancellation may not be complete or valid, because the applicant (purchaser) has not tendered restitution when it was due. Applicant (purchaser) continues to enjoy vacant possession of the property during the alleged period of cancellation.

*Enforceability of the arbitration clause*

[49] The contract provides for arbitration in clause 16.[18] The current dispute falls within the scope of the arbitration clause. Arbitration clauses are governed by the *Arbitration Act* 42 of 1965 (The Act).

[50] When parties, exercising their contractual autonomy, make provision as, in the present dispute, for the private resolution of their disputes, the Courts are enjoined to

[15] Subsection 6(1)(q) provides that the contract for the sale of land which is not the subject of a separate title deed at the time the contract is concluded, shall contain the latest date at which the land shall be registrable in the name of the purchaser.
[16] Subsection 6(4) stipulates that the date stated in a contract in terms of subsection 6(1)(q), shall not be later than five years from the date of the contract.
[17] Sharrock supra note 7 at 142. Compare *Extel Industrial (Pty) Ltd and Another v Crown Mills (Pty) Ltd* 1999(2) SA 719 SCA where restitution was found to be impractical
[18] See para 23 *supra* for the provisions of clause 16.1 of the contract.

respect the parties' choice of method for resolving their disputes.[19] The Courts' deference, to the parties' choice to arbitrate their disputes, does not amount to an abdication of jurisdiction. Arbitration clauses do not oust the Courts' jurisdiction.[20] Under the Act,[21] the Courts retain the powers to assist, supervise and intervene in the dispute and the arbitration before, during and after the arbitration.[22]

[51] Due to the binding nature of the arbitration clause, neither party to this dispute, may, unilaterally initiate Court proceedings. The Act, stipulates that, if either party, unilaterally, initiates Court proceedings, as the applicant (purchaser) has done, the other party, in the position of first respondent (seller), may apply to Court for an order, staying proceedings.[23]

[52] Unless it is specifically provided in the contract, neither party to an arbitration contract may terminate the contract without the consent of the other parties to the

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[19] See *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another* 2009 (6) BCLR 527 (CC) where it was stated that:

> '[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'

[20] See *Universiteit van* Stellenbosch *v JA Louw (Edms) Bpk* 1983 (4) SA 321 at 333G-H.

[21] See for example sections 3(2), 6, 7, 8, 10 and 13 of the Act.

[22] See Parekh v Shah Jehan Cinemas(Pty) Ltd and Ano 1980 (1) SA 301 at 305E-H, where Didcott J opined:

> 'An arbitration agreement does not deprive the Court, of its ordinary jurisdiction over the disputes which it encompasses. All it does is to oblige the parties to refer such disputes in the first instance to arbitration, and to make it a prerequisite to an approach to the Court for a final judgment that this should have happened. While the arbitration is in progress, the Court is there whenever needed to give appropriate directions and to exercise due supervision. And the award of the arbitrator cannot be enforced without the Court's imprimatur, which may be granted or withheld. But that is by no means all. Arbitration itself is far from an absolute requirement, despite the contractual provision for it. If either party takes the arbitrable disputes straight to Court, and the other does not protest, the litigation follows its normal course, without a pause. To check it, the objector must actively request a stay of the proceedings. Not even that interruption is decisive. The Court has a discretion whether to call a halt for arbitration or to tackle the dispute itself. When it chooses the latter, the case is resumed, continued and completed before it, like any other. Throughout, its jurisdiction, though sometimes latent, thus remains intact.'

[23] See section 6(1) of the *Act*.

contract.[24] However, the Court on application and on good cause shown, as to why the matter should not be referred to arbitration in accordance with the contract, may hear it.[25]

[53] No argument has been made before me or on papers, to show 'good cause', why the current dispute, should not be referred to arbitration, in accordance with the parties' choice, to resolve their disputes privately. It is the practice of our law that *pacta sunt servanda*. As Cameron J observed, in *Brisley v Drotsky*[26] Courts, are required to respect the parties' contractual autonomy, as it informs, *inter alia*, the constitutional values of dignity and equality.[27]

[54] Absent any special circumstance why the parties' choice of arbitration, as a dispute resolution mechanism, should not be respected, It is my view, that this application was brought prematurely. This dispute, should first, have been referred to arbitration. Consequently, first respondent's (seller's) application, for stay of proceedings, is granted. However, I do not consider it fair, to order costs against the applicant (purchaser).

*Order*

[55] In the result the following order is made:

55.1 The contract is declared valid.

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[24] See section 3(1) of the *Arbitration Act*

[25] Section 3(2) read with 6(2) of the *Arbitration Act*. The onus is on the party resisting referral to show that the matter should not be referred to arbitration (*Universiteit van Stellenbosch v JA Louw (Edms) Bpk* at 333H). The onus is a heavy one. The Court's discretion to refuse arbitration 'was to be exercised judicially, and only when "a very strong case" had been made out' (Universiteit van Stellenbosch v JA Louw (Edms) Bpk at 334A).

[26] 2002 (4) SA 1 (SCA) at p 34-5.

[27] See *Barkhuizen v Napier* 2007 (5) SA 323 (CC) par [29] where a similar opinion is expressed.

55.2 Applicant's claim is stayed pending referral to arbitration as contemplated in clause 16 of the contract.

55.3 There is no order as to costs.

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**T MOSIKATSANA**
**ACTING JUDGE OF THE HIGH COURT**

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| ***COUNSEL FOR APPLICANT*** | ***Adv AP Bruwer***<br>***Instructed by Malherbe Rigg & Ranwell Inc*** |
| ***COUNSEL FOR FIRST RESPONDENT*** | ***Adv E Vawda***<br>***Instructed by A R Kazi & Company*** |
| ***SECOND RESPONDENT'S ATTORNEYS*** | ***UNREPRESENTED*** |
| ***DATE OF HEARING*** | ***25 FEBRUARY 2014*** |
| ***DATE OF JUDGMENT*** | ***01 OCTOBER 2014*** |