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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 24014/2013

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
.....
DATE	SIGNATURE

In the matter between:

ZELPY 1866 (PTY) LTD

Applicant

and

ROSA GOMES

Respondent

J U D G M E N T
(iro Stay Application)

BHAYAT, AJ

INTRODUCTION

Main Application

[1] The applicant brought an application for an order in the following terms:

- (a) Directing the respondent to install a prepaid electricity meter from City Power at premises situated at Shop no. [...] (“the premises”);
- (b) Directing the respondent to do all such things and sign all such documents as may be necessary to procure the said installation, within a period of ten (10) days from the granting of this order;

Alternatively

- (c) Permitting and authorising the applicant to install a prepaid electricity meter on the premises and to take all such steps as may be necessary to procure the installation of the said meter;
- (d) Directing the respondent to furnish to the applicant all invoices issued by the respondent to its tenants situated at the premises, in respect of electricity consumption and invoices received from the Johannesburg Municipality in respect thereof, for the period December 2012 to date.

Stay of the Proceedings Application (“Stay Application”)

[2] In reply to the Main Application, the respondent made an application for an order in the following terms:

- (a) The application instituted by the respondent be stayed pending the final determination of the disputes between the parties by way of alternative dispute resolution (“ADR”);
- (b) In the event of any opposition to the relief sought above, the respondent to pay costs of the application on an attorney and client scale;

[3] The parties agreed that the Stay Application be heard first and be disposed of before the Main Application can be considered.

[4] The applicant (Zelpy) relies on the fact that there exists a dispute between the parties which falls within the ambit of the alternative dispute resolution clause contained in clause 25 of the written lease agreement concluded between the parties on 23 January 2013 which reads as follows:

“25. DISPUTE RESOLUTION

25.1 Should any dispute or disagreement arise between the parties relating to:-

25.1.1 any matter in respect of which provision is made in terms of this agreement for such dispute to be determined by an adjudicator; or

25.1.2 the interpretation of the parties’ rights and obligations in terms of this agreement and in circumstances where neither party alleges that a material breach of this agreement has been committed by the other party which entitles such party to cancel this agreement,

such dispute or disagreement shall be resolved by an adjudicator in accordance with this clause 25, it being the intention of the parties that any dispute or disagreement shall be resolved as amicably, quickly and in the most cost-effective manner possible in the circumstances. . .”

APPLICANT'S (ZELPY) CASE

[5] The applicant wishes to invoke the ADR clause and bears the onus to allege and prove the jurisdictional facts required in order to rely on the clause.

[6] The onus is on the applicant to allege and prove:

- (a) the existence of the ADR clause;
- (b) the ADR clause is applicable to the dispute between the parties;
- (c) that the dispute has been properly raised.

[7] Once the requisite jurisdictional facts have been established, the onus shifts to the respondent to satisfy the court that it should not in the exercise of its discretion, refer the matter to adjudication.

The existence of an ADR clause

[8] Clause 25 of the lease agreement provides for ADR in the event of any dispute or disagreement arising between the parties.

Applicability of clause 25 to the dispute

[9] The applicant denies that a dispute has not been identified which falls within the ambit of the ADR clause. The dispute is clearly illustrated and identified in the correspondence attached to the founding affidavit in the Main Application and reference is also made to the disputed issues in founding affidavit in the Stay Application.

[10] The dispute is whether the applicant is obliged to install a prepaid meter on the premises leased by the respondent; whether the installation will resolve the underlying allegation by the respondent against the applicant, that the respondent is being over charged for electricity consumption and whether

any agreement reached between the parties is binding, if it is not reduced to writing and signed by the parties.

[11] There are disputes between the parties that have been identified which falls within the ADR clause.

The manner in which the applicant raised the dispute

[12] The applicant has two options, namely to apply for a stay of the proceedings or it may, in a special plea, pray for a stay of the proceedings pending the final determination of the dispute by ADR.

[13] The applicant has followed the correct procedure in launching an application for stay of the proceedings before delivering an answering affidavit.

RESPONDENT'S (GOMES) CASE

[14] The onus is on the applicant to allege and prove:

- (a) the existence of the ADR clause;
- (b) that the ADR clause is applicable to the dispute between the parties;
- (c) that a disputes exists between the parties; and
- (d) that such dispute must be demarcated.

[15] In the event of the applicant discharging the onus, the respondent is required to demonstrate that due to exceptional circumstances, the stay should be refused.

Lack of arbitral dispute

[16] The applicant has not positively alleged the existence of a dispute in its affidavit. It is not clearly demarcated.

[17] The respondent alleges that the applicant had agreed to install a prepaid electricity meter at the premises and had subsequently reneged. The applicant had already exercised its sole discretion as per clause 7.5 of the lease agreement to install a prepaid electricity meter. The dispute therefore does not arise out of the lease agreement but out of the subsequent undertaking to install a prepaid electricity meter.

[18] There is no dispute and therefore the ADR clause is not triggered.

ASSESSMENT

[19] Its common cause that the onus is on the applicant to allege and prove the jurisdictional facts on which its application is based.

[20] The grant of the stay of proceedings is a matter of discretion. It is not something that can be decided as a matter of law.

[21] The agreement that the respondent relies on regarding the prepaid electricity meter has not been reduced to writing and signed by or on behalf of the parties, which is a requirement of clause 27 of the lease agreement. Any variation of the terms of the agreement is not binding unless it is reduced to a written agreement.

[22] The respondent contends that there is no arbitration agreement or that there is an arbitrable issue. The right to arbitrate arises by reason of clause 25 of the lease agreement. The ADR clause is based upon consensus between the parties and its provisions must be interpreted in accordance with the interpretation applied to contracts.

[23] Clause 25, inter alia, states that “. . . it being the intention of the parties that any dispute . . .” (my emphasis). The parties had the common intention of referring any dispute arising out of the agreement to an adjudicator (for all intensive purposes, an arbitrator).

[24] The dispute referred to arises or has its origins in the exercising of the sole discretion of the respondent (landlord) (clause 7.5) to install a prepaid electricity meter in respect of the leased premises. Any disagreement arising therefrom cannot be treated in isolation or separately in order to avoid the ambit of clause 25.

[25] By agreement between the parties and to preserve the sanctity of an agreement, the ADR clause contains the mechanism by which disputes or disagreements must be dealt with and must be adhered to.

[26] The applicant wishes to invoke the ADR clause and has the option of applying for a stay of these proceedings which it has done in the present case. The applicant has adopted the correct procedure in launching the application for stay of the proceedings. Therefore no further comment regarding the procedure adopted is required.

[27] Its common cause that the application must clearly spell out the dispute required to be referred to arbitration. The respondent contends that the dispute has not been clearly identified and demarcated. From the reading of the Main Application it is clear that the respondent, on its own version placed before the court, defines and identifies the origin of the dispute, namely, the exercising of the sole discretion of the landlord to install a prepaid electricity meter.

[28] I agree with the applicant that the correspondence attached to the founding affidavit clearly illustrates the dispute between the parties. This is further illustrated in the founding affidavit in the Stay Application, in particular, para 23 and 24.

[29] In para 23, the applicant points out that the respondent herself contends in the Main Application that there is a dispute between the parties and suggests that such dispute is capable of resolution by the installation of the prepaid electricity meter.

[30] In para 24, the applicant clearly disputes the contentions raised by the applicants respondent in the Main Application and states that such dispute is evidenced by the correspondence attached thereto.

[31] The discretion of the court to refuse arbitration must be exercised judicially and only when a very strong case has been made out.

CONCLUSION

[32] The applicant has satisfied the jurisdictional requirements for relying on the ADR clause in the lease agreement and has discharged the onus of proof placed upon it in that the ADR clause exists, that a dispute exists between the parties which falls within the ambit of the ADR clause and that the dispute is identifiable from a reading of both the Main and Stay Applications, including the annexures thereto.

[33] The respondent has failed to discharge the onus in making a strong case for being absolved from referring the matter to adjudication.

[34] The applicant has achieved success in this matter and is therefore entitled to a cost order in its favour. The respondent has unsuccessfully sought to resist referring the dispute between the parties to adjudication.

[35] I do not intend to depart from the general rule in exercising the court's discretion regarding the awarding of costs. The court is satisfied that the respondent was not actuated in any way by improper motives in launching the Main Application and in resisting the Stay Application.

[36] In the result, it is ordered that:

- (a) The Application for Stay of the Proceedings is granted;
- (b) The application instituted by the respondent under case no. 24014/2013 be stayed pending the determination of the dispute between the parties by an adjudicator as provided for in clause 25 of the lease agreement;
- (c) The costs of the Application for Stay of the Proceedings be paid by the respondent on a party and party scale.

A Y BHAYAT

ACTING JUDGE OF THE SOUTH GAUTENG HIGH COURT

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***ADV M M SEGAL
VELOS & ASSOCIATES***

DATE OF HEARING

11 FEBRUARY 2014

DATE OF JUDGMENT

17 FEBRUARY 2014