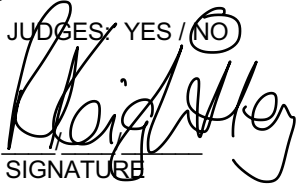


REPUBLIC OF SOUTH AFRICA



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

CASE NO:11079/2021

(1) REPORTABLE: YES / <u>NO</u>	
(2) OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>	
(3) REVISED	
<u>4/11/2021</u>	<u>SIGNATURE</u>

In the matter between:

TMS GROUP INDUSTRIAL SERVICES (PTY) LIMITED

First Applicant

TEST MONETARY SYSTEMS (PTY) LTD

Second Applicant

and

HYDRA ARC (PTY) LTD

First respondent

A R GAUTSCHI N.O

Second respondent

Application in terms of ss 3(2)(b) & (c) of Arbitration Act, 42 of 1965 for orders that arbitration cease and that further dispute shall not be referred to arbitration – whether good cause established – good cause not established on the facts – arbitration directed to proceed

J U D G M E N T

KEIGHTLEY, J:

INTRODUCTION

1. This is an application under s 3(2)(b) and (c) of the Arbitration Act, 42 of 1965 (the Act). Section 3 reads in full:

“Binding effect of arbitration agreement and power of court in relation thereto

- (1) Unless the agreement otherwise provides, an arbitration agreement shall not be capable of being terminated except by consent of all the parties thereto.
- (2) The court may at any time on the application of any party to an arbitration agreement, on good cause shown-
 - (a) set aside the arbitration agreement; or
 - (b) order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or
 - (c) order that the arbitration agreement shall cease to have effect with reference to any dispute referred.”

2. The first and second applicants form part of a group of companies. There are pending arbitration proceedings between the first applicant, TMS Group Industrial Services (Pty) Ltd (TMS) and the first respondent, Hydra Arc (Pty) Ltd (Hydra). In the arbitration proceedings TMS seeks payment from Hydra for services allegedly rendered under a written contract, which I will refer to as the 2015 subcontract. Hydra opposes that relief and has raised a point *in limine* in which it avers that TMS does not have *locus standi* under the 2015 subcontract. The second applicant, Test Monetary Systems (Pty) Ltd (Test Systems), is not a party to the arbitration, the arbitrator having previously ruled against its joinder.
3. The second respondent before me is the arbitrator. No relief is sought against him, and he is not an active participant in this application.

4. While the arbitration proceedings were pending, in November 2020, TMS and Test Systems instituted an action in the Mpumalanga High Court (the High Court action). In the High Court action, TMS seeks the same contractual relief against Hydra as it does in the arbitration. In the alternative, and in the event of TMS being found by the court not to have *locus standi*, Test Systems seeks relief against Hydra under the 2015 subcontract. In the further alternative, TMS seeks to enforce an oral, as opposed to a written contract against Hydra, albeit for the same services allegedly rendered.
5. In the application before me, the applicants want the following main relief:
 - 5.1. An order that the arbitration agreement concluded between TMS and Hydra on 13 February 2019 shall cease to have effect with reference to the dispute referred to arbitration before Mr Gautschi.
 - 5.2. An order that Test Systems' dispute with Hydra, as set out in the particulars of claim in the High Court action, shall not be referred to arbitration in terms of clause 20.1 of the 2015 subcontract concluded between Test Systems and Hydra in 2015.
6. In essence, then, the applicants want the existing arbitration proceedings to be terminated, with permanent effect. In addition, they want an order prohibiting the alternative dispute between Test Systems and Hydra from ever being referred to arbitration.
7. The matter comes before me after the arbitrator issued an interim award ordering a temporary stay of the arbitration proceedings until the final outcome of this application.

BACKGROUND

8. By way of explanation, it is important to have some understanding of the link between the two applicants and the contract on which the claim against Hydra is based. It is common cause between the parties that it was Hydra and Test Systems that entered into the 2015 subcontract. However, in the arbitration, TMS avers that under an exchange agreement annexed to its statement of claim Test Systems' rights under the 2015 subcontract were transferred to TMS. It is on this basis that TMS claims to have *locus standi* in the arbitration.
9. On the same basis TMS alleges it has *locus standi* in the High Court action. Hydra has consistently disputed that the exchange agreement had the effect of transferring Test Systems' rights under the 2015 subcontract to TMS, and for this reason has challenged the latter's *locus standi* in both the arbitration and the High Court action.
10. In the High Court action, TMS is the first plaintiff, founded on the cession of rights it contends was effected under the exchange agreement. However, in that action, and in the event that the court were to find that it did not have *locus standi*, then Test Systems, which is the second plaintiff, will step in as the fall-back plaintiff, and assert the same claim, based on the original 2015 subcontract entered into with Hydra.
11. The applicants adopted this course of action after TMS's bid to have Test Systems joined in the arbitration proceedings was unsuccessful. The joinder application was dismissed on 11 October 2019, and the dismissal upheld by the appeal tribunal on 24 April 2020. The High Court action was instituted some seven months later. This

was in an effort to ensure that the applicants were not found in want of a remedy, in the event that TMS could not establish *locus standi* in the arbitration proceedings.

12. TMS's *locus standi* has been in dispute from the commencement of the arbitration proceedings. It is not disputed that Hydra first disputed its *locus standi* at the first pre-arbitration meeting on 28 September 2018. It is also not disputed that in the arbitration agreement entered into by the parties, Hydra reserved its rights to dispute TMS' *locus standi*. This was in February 2019. It again denied Hydra's *locus standi* in its statement of defence, in its further particulars and in its amended statement of defence.
13. Significantly, for purposes of this application, on 24 June 2019, at a pre-arbitration meeting, the parties agreed to separate the issue of *locus standi* from the merits. It was agreed that this issue would be heard separately by the arbitrator, and prior to any hearing on the merits. The parties were also agreed that if the arbitrator found that TMS did not have *locus standi* to claim under the 2015 subcontract, that would be the end of the arbitration. It is important to appreciate, then, that what is pending before the arbitrator at present is only the separated issue of *locus standi*, and not the merits of the dispute. In fact, it may never be necessary for the arbitrator to rule on the merits in the event that he finds against TMS on the separated issue of *locus standi*.

APPLICABLE PRINCIPLES

14. Section 3(1) of the Act establishes the basic principle that absent agreement between the parties, an arbitration agreement cannot be terminated. Underlying this principle is that of *pacta sunt servanda*: contracts freely and voluntarily entered

should be honoured.¹ Section 3(2) of the Act provides an exception to this basic principle. It permits a court, in the absence of agreement between the parties, to terminate the enforcement of an arbitration agreement on good cause shown.

15. It is well established that the onus lies on an applicant under s 3(2) to establish good cause and that this onus is not easily met.² A court's discretion to set aside an existing arbitration agreement must be judicially exercised and only where a persuasive or "very strong case" has been made out.³ There should be compelling reasons for refusing to hold a party bound to their contract to have a dispute resolved by arbitration. It has been said that the cases in which the discretion against arbitration should be exercised are "few and exceptional".⁴
16. Although these authorities precede our constitutional era, the basic principles have been confirmed by the Constitutional Court.⁵ Mr Graves, for the applicants, suggested that the Constitutional Court may have introduced a more flexible and less onerous approach to good cause in *De Lange*. The passage relied on by him is the following:

"The Supreme Court of Appeal correctly ventured the view that the requirement of good cause in order to escape an arbitration agreement entails a consideration of the merits of each case in order to arrive at a just and equitable outcome in a specific set of circumstances. Put in another way: is it in the interests of justice to hold a party to an arbitration agreement that would result in a futile, unfair or unreasonable outcome or perhaps an unconscionable burden? The Act is of the pre-Constitution kind. Now our understanding of good cause must embrace an enquiry into whether the arbitration agreement, if implemented, would unjustifiably diminish or limit protections afforded by the Constitution. Absent infringement of constitutional norms, court will hesitate to set aside an arbitration agreement

¹ *Beadica 231 CC & Others v Trustees, Oregon Trust & Others* 2020 (5) SA 247 (CC) at 89

² *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) at 391E-F

³ *The Rhodesian Railways Ltd v Mackintosh* 1932 AD 359 at 375

⁴ *Metallurgical*, above at 391 citing the English authorities *Halifax Overseas Freighters, Ltd v Raso Export; Technoprominport and Polskie Linie Oceaniczne PPW (The "Pine Hill")* 1958 (2) Lloyd's List Law Reports 146, and *Russell v Russell* (1880) 14 Ch. D 411

⁵ *De Lange v Methodist Church and Another* 2016 (2) SA 1 (CC) at para 36

untrained by misconduct or irregularity unless a truly compelling reason exists. As this court itself stated-

'the values of our Constitution will not necessarily best be served by ... enhanc[ing] the power of courts to set aside private arbitration awards ... If courts are too quick to find fault with the manner in which an arbitration has been conducted ... the goals of private arbitration may well be defeated.'⁶ (my underlining)

17. Mr Graves relied on the underlined portion of this dictum to support his submission. In my view the submission is without merit. It is evident not only from the remainder of the passage, but also from the authorities cited in it, and in the passage in the judgment preceding this one, that the Constitutional Court was not intent on introducing a new and less onerous approach to the good cause element of s 3(2).
18. That onus remains onerous. There are no set principles that apply. As the Court noted, citing the SCA, good cause must be considered with reference to the merits and specific circumstances of each case. What the court looks for, in this context, is a just and equitable outcome. However, justice and equity are not considered only from the standpoint of the applicant, but from that of both parties. A critical component of the inquiry into justice and equity would be the fundamental principle that both parties to the agreement should be held bound by it. That is what justice demands, unless there are very compelling reasons to depart from this.
19. As the applicants point out, in exercising their discretion, courts have previously taken into account factors such as the need to avoid a multiplicity of actions; whether or not third parties are involved who are not parties to the arbitration agreement; the risk of conflicting decisions on the same set of facts and the law; and whether time, expenses and costs could be saved to a substantial degree. Of course, one must bear in mind that the exercise of the discretion is always case-specific, and the

⁶ *De Lange*, above at para 37, citing *South African Forestry Co Ltd v York Timbers Ltd* 2003 (1) SA 331 (SCA) para 14; *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews & Another* 2009 (4) SA 529 (CC) at paras 235-6

existence of one or more of these factors will not necessarily mean that good cause has been established. A court will have to consider the issue within the context of the full spectrum of existing circumstances. It may be necessary to consider the cumulative effect of various factors in order to determine whether good cause has been established to deny the other party its right to arbitration.⁷

THE APPLICANTS' CASE FOR RELIEF UNDER S 3

20. In their founding affidavit, the applicants say that it is necessary for all the issues between the parties to be determined in one single legal process in a single forum with all relevant parties being joined. Their reasons for contending that this is necessary are: in the first place, if this is not done, the applicants will face the risk of conflicting findings being made by different adjudicative bodies if multiple proceedings are held; and in the second place, the relief sought in the different forums will depend on the determination of substantially the same questions of law and fact and will require substantially the same evidence.
21. As for TMS's position, the applicants say that if the arbitration proceeds, it runs the risk that the arbitrator will find that TMS does not have *locus* and its claim in the arbitration will be dismissed. This will leave Test Systems as the party to pursue the claim under the 2015 subcontract. However, Test Systems can never be a party to the pending arbitration in view of the award refusing its joinder. In other words, the point is that if Test Systems wants to press a claim against Hydra, it will have to be done either in the High Court action, or in separate arbitration proceedings.
22. The applicants submit that in High Court proceedings, Test Systems arguably will be met with a special plea that the parties are bound by clause 20.1 the 2015

⁷ *Metallurgical*, above, 393-4

subcontract, which is an arbitration clause, and for this reason, Test Systems will face difficulties pursuing its claim in the High Court. It should be remembered that it is common cause that Test Systems and Hydra were the signatories to the 2015 subcontract. In principle, then, it is not disputed that the arbitration clause applies between them. However, as I explain later, Hydra disputes the applicants' contention that this fact raises the prospect of a special plea.

23. It is also contended by the applicants that if Test Systems has to wait for the outcome of the arbitration proceedings before it can press its potential claim against Hydra, it runs the risk that that claim will have prescribed. Alternatively, if Test Systems were to proceed to institute arbitral proceedings now against Hydra, under clause 201 of the 2015 subcontract, it will be met with a special plea of *lis pendens*.
24. In any event, the applicants say that whatever possible permutations are considered, there is a prospect of potentially contradictory and inconsistent findings on the same questions of law and fact.
25. More or less the same line was adopted by the applicants in their written heads of argument. In his oral submissions, Mr Graves, for the applicants, expressly laid less emphasis on the potential for conflicting decisions as a basis for establishing good cause. Instead, he laid more emphasis on efficiency as the determining factor to establish good cause. Mr Graves identified the following as the key question to be determined: when is it no longer cost and time effective for parties to continue with arbitration proceedings, rather than proceeding by way of a consolidated action in the High Court?
26. The applicants submit that the determination of the *locus standi* issue will not bring an end to the broader disputes between the parties. If a finding on *locus standi* goes against TMS, it will only close the door to TMS's claim against Hydra based on the

cession of rights under the 2015 subcontract. However, it will not do away with Test System's claim, or with TMS's alternative claim based on an alleged oral agreement with Hydra, both of which claims will remain pending in the High Court action. The applicants' point here is that efficiency will be better served by putting a stop to arbitral proceedings as the forum through which all of these disputes are channeled. In other words, efficiency is served by channeling the disputes through the High Court action, in which all the disputes are consolidated. The alternative, they say, is for piecemeal resolution of all the issues in "some convoluted sequence" in different *fora*. This, the applicants contend, is what s 3(2) is designed to avoid.

27. In further support of this basic proposition, the applicants say that the separated *locus standi* issue will require oral evidence, including oral evidence on the background to the exchange agreement, and the conduct of the parties thereafter. They say that it will be difficult to avoid going into the merits of the matter, even when the arbitrator is faced only with an interpretation of the exchange agreement for purposes of determining whether it had the effect of transferring Test System's rights under the 2015 subcontract to TMS. The applicants' view is that the matter will run for three to four days before the arbitrator on the separated issue. The applicants contend that this is neither cost nor time efficient, bearing in mind that all that will come out of the wash at the end of that hearing will be a determination on the issue of TMS's *locus standi*.

28. The applicants made much of an amendment effected by Hydra to its statement of defence in the arbitration proceedings. I need not go into too much detail on the amendments themselves. The applicants say that whereas Hydra had previously admitted in its statement of claim that the goods and services had been provided by TMS, it later amended this to reflect a denial. There was also an amendment in respect of the invoices submitted and their correctness. Hydra disputes that the

latter amendment effected any material change to its case. Be that as it may, I do not have to pursue the amendment issue much further. From their oral submissions, it appears the applicants raise the amendments in order to support their averment that the separated *locus standi* issue will require a substantial amount of evidence to be led. This is disputed by Hydra. Its stance is that the *locus standi* issue largely rests on an interpretation of the exchange agreement. In other words, it suggests that the applicants are exaggerating the extent of evidence that the arbitrator will admit and consider in determining whether TMS has *locus standi*.

HAVE APPLICANTS ESTABLISHED GOOD CAUSE?

29. As I indicated earlier, the applicants do not lay much store on their previously asserted position that there is a risk of conflicting decisions if the arbitration continues. In my view, they are correct in changing their stance in this regard. Both TMS and Hydra will be bound by the finality of the arbitrator's decision on *locus standi*. Section 28 of the Act expressly enjoins each party to an arbitration agreement to abide by and to comply with an award of the arbitrator. For this reason, it would not be open for either party to depart from that outcome in the High Court action and to plead something different.
30. If the arbitrator finds that TMS does not have *locus standi*, then the arbitration will be at an end. The High Court will become the forum to determine the remainder of the dispute. Test Systems will be able to proceed as the primary plaintiff in the High Court action. The *locus standi* of Test Systems is not an issue on the pleadings in the High Court action, and it is common cause that the 2015 subcontract was entered into between Hydra and Test Systems. TMS may retain its alternative claim in the High Court action based on an oral agreement. However, that is not an issue that is before the arbitrator for determination, as the arbitration is premised on a

written agreement. In these circumstances, there is no real prospect of conflicting decisions by the arbitrator and the High Court.

31. The thrust of the applicants' case is that it is no longer efficient to continue with the arbitration proceedings when those proceedings will not resolve all the disputes between the parties. They point out that the *locus standi* dispute before the arbitrator is only one potential dispute between the three parties. In addition, there is Test System's alternative contractual claim, based on the 2015 subcontract, in the event that TMS does not have *locus standi* under that contract. There is also the further alternative claim that TMS has in the event that neither it nor Test Systems succeeds in establishing a claim under the 2015 subcontract, more specifically, TMS's claim based on an oral contract with Hydra. These latter two claims are only before the High Court: they can never be before the arbitrator. Thus, so the applicants' argument runs, it is patently more efficient, from both a time and cost point of view, for all of the disputed issues to be determined in one forum which, of necessity, is the High Court.
32. Mr Both, for Hydra, submitted that this approach to the issue of good cause was misdirected. He submitted that the question is not what is potentially before the High Court, but rather what is before the arbitrator at present. His submission has merit. The test for good cause is not met by the applicants showing that it would be more convenient to have all the disputes, as they have formulated them in their pleadings, determined in the High Court. The starting point of the exercise is that TMS must be held bound to its agreement to arbitrate, unless there are strong and compelling reasons why they should be excused from the bargain that they struck.
33. There is a further misdirection in the approach adopted by the applicants. This is that they overlook the significance of the common cause agreement to separate the

locus standi issue from the merits in the arbitration. What is before the arbitrator now is not the full gamut of the contractual dispute between TMS and Hydra: on the contrary, the parties have agreed that the *locus standi* issue must be heard first. This is important because it cannot be gainsaid that the outcome of the separated issue will have a material impact on the further direction of the litigation.

34. If TMS succeeds in establishing *locus standi*, then the merits of the matter can proceed before the arbitrator. It will be unnecessary for the High Court ever to have to consider its claim, or that of Test Systems under the 2015 subcontract. All that would remain, potentially, for the High Court to consider would be TMS's alternative claim under an alleged oral agreement. The outcome of the arbitration on the merits might well make it unnecessary for that claim ever to be dealt with further.
35. Obviously, if TMS does not succeed in establishing *locus standi* before Mr Gautschi, then the arbitration process will be at an end. The matter can then proceed in the High Court as the sole forum for the determination of the remainder of the disputes. The applicants suggested that Test Systems might face a special arbitration plea in the High Court proceedings, as clause 20.1 of the 2015 subcontract commits the parties to arbitration. However, it is common cause that Hydra has not raised this defence in the plea it has filed in the High Court action. Hydra is on record in the present application as stating that it has waived any reliance on the arbitration clause against Test Systems. Consequently, there is no real prospect that the dispute would again involve two forums.
36. For these reasons, the various permutations described by the applicants in an effort to establish good cause for depriving Hydra of its right to hold TMS to the arbitration agreement are not persuasive. The fact of the matter is that there is substantial


value for all parties in permitting the arbitrator to proceed to determine the separated issue of *locus standi*, and the merits, if this becomes necessary.

37. It will undoubtedly bring certainty to TMS's position and, consequently it will bring certainty for Test Systems too. The arbitration proceedings have advanced to the stage that it appears that the *locus standi* issue can be determined without undue delay. That this may involve oral evidence over a number of days, as the applicants suggest, is not a factor that, on its own, can tip the balance towards finding good cause. Considerable time and money has been spent already in the arbitration getting to that point. If the finalisation of the *locus standi* issue involves further time and costs, this will not be in vain. As I have indicated, the parties will both benefit from the certainty that will accompany the outcome.
38. In conclusion, I am not satisfied that the applicants have established good cause for terminating the arbitration proceedings. There is also no good cause established for an order that Test Systems' dispute with Hydra should not be referred to arbitration. Hydra has waived its right to rely on the arbitration clause binding it and Test Systems. Even if this were ever to be an issue in the future, it would be premature for this court to make such an order at this stage.
39. Finally, for purposes of clarity, Hydra submits that it would be appropriate to include a prayer in my order to the effect that the separated *locus standi* issue proceed to be determined by the arbitrator. This submission is well made. It properly reflects the parties' understanding of where matters now stand in the arbitration, while at the same time making it clear that my judgment and order do not deal with, nor bind the parties to, what should occur once the *locus standi* determination has been made.
40. I make the following order:

“1. The application is dismissed with costs, including the costs of Senior Counsel.

2. It is directed that the separated issue of the *locus standi* of the first applicant should proceed to be heard by the second respondent.”

This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 4 November 2021


R KEIGHTLEY
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION

Appearances:

Date of hearing: 5 October 2021

Date Judgment Delivered: 4 November 2021

For the Applicant: Advocate N Graves SC

Advocate M Nieuwoudt

Instructed by : Werksmans Attorneys

For the Respondent: Advocate J Both SC

Instructed by: Van Dyk Attorneys