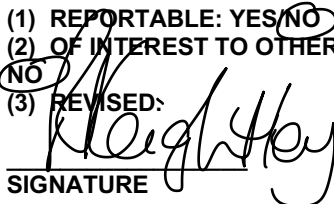


REPUBLIC OF SOUTH AFRICA



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

CASE NO: 5321/2020

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED:

SIGNATURE
05/05/2022
DATE

In the matter between:

**SORACO MINERALS (PTE) LTD**

Plaintiff

and

**DBG IMPORT AND EXPORT CC**

First defendant

**DORON BARUCH GOLAN**

Second defendant

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

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**KEIGHTLEY, J:**

1. This is an application for summary judgment. The plaintiff, Soraco Minerals (PTE) Limited (Soraco), seeks an order directing the defendants, jointly and severally to pay to it the sum of \$100 000. The first defendant is DBG Import and Export CC (DBG) and the second defendant is Doron Baruch Golan (Mr Golan). The plaintiff contends that it entered into a purchase and sale agreement with DGB, represented by Mr Golan, for the supply of cobalt. It made an advance payment to DBG under an addendum to the agreement of \$100 000. However, DBG failed to supply the minerals under the agreement and addendum.
2. The plaintiff contends further that although DBG undertook to refund the amount of \$100 000, it never did so. Soraco cancelled the contract and demanded repayment of the advance. However, in instituting the proceedings it discovered that DBG had been deregistered years before the agreement was entered into. It pleads that Mr Golan acted recklessly, with gross negligence or fraudulently with the intention of misleading Soraco in purporting to contract on behalf of an entity that was, in fact, reregistered. It seeks an order against Mr Golan under section 64 of the Companies Act.
3. Rather curiously, Mr Golan concedes that the purchase and sale agreement and the addendum was entered into, although he contends that he entered into the agreement rather than the first defendant. He also concedes that Soraco made the advance payment, and that no cobalt was delivered. Much of the plea is in the form of general denials. Mr Golan does not even attempt to explain in his plea why, if he was the seller of the cobalt, the agreement and addendum were in the name of DBG Import and Export (albeit without the addition of 'CC'). Nor does he explain why he signed the contracts as a representative of the seller if he indeed was the seller. Be that as it may, he advances one defence on the merits in his plea which is that under clause 4 of the addendum, any refund of the advance payment was to be in the form

of the delivery of cobalt, and not in monetary terms. For a variety of reasons, which I do not need to traverse, the *bona fides* of this defence are highly questionable. If this was the defendants' only defence, I would have been minded to consider granting summary judgment.

4. However, Mr Golan did not limit his opposition to this defence on the merits. In addition, he raised a special plea calling into play the arbitration clause in the purchase and sale agreement. It is common cause that clause 19 states that:

*'Any difference or dispute arising out of or in connection with this contract, but not having been resolved amicably between the SELLER and the BUYER, shall be settled by Arbitration in Johannesburg, RSA by a mutually appointed arbitrator.'*

5. In his special plea Mr Golan prayed that the action be stayed pending the outcome of arbitration proceedings.

6. Soraco submitted that the special plea was still born. First, because Mr Golan was not a party to the purchase and sale agreement and so cannot rely on the arbitration defence. And second because, contrary to s 6 of the Arbitration Act 42 of 1965, the application for a stay was made after the defendants had taken steps in the litigation. As to the latter point, it is trite that s 6 of the Act does not displace the common law which also permits an application for a stay pending the resolution of arbitration proceedings. As the SCA explained in *PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd* 2009 (4) SA 68 (SCA) at para 7:

'If a party institutes proceedings in a court despite ... an (arbitration) agreement, the other party has two options:

(i) It may apply for a stay in the proceedings in terms of s 6 of the Arbitration Act ...; or

(ii) it may in a special plea (which is in the nature of a dilatory plea) pray for a stay of the proceedings pending the final determination of the dispute by arbitration.

The definitive statement of the law in this regard is to be found in *Rhodesian Railways Ltd v Mackintosh* where Wessels ACJ said:

“All that sec 6(1) lays down is that you cannot adopt the cheaper and speedier procedure therein provided when once you have delivered pleadings or taken any other step in the proceedings. If you have taken any step in the proceedings, then you can no longer adopt the speedier and less costly procedure of applying to the Court to stay proceedings but you must file your pleadings in the ordinary way. In pleading, however, you can raise the defence that the case ought to be decided by arbitration; this can be done by a special preliminary plea.”

7. Consequently, as a matter of law, Mr Golan is procedurally entitled to raise the special plea of arbitration notwithstanding that he has taken steps in the proceedings. As to the first point made by Soraco, it is not for this court, at summary judgment stage, to determine whether Mr Golan was a party to the purchase and sale agreement and thus entitled to rely on the arbitration clause. For summary judgment purposes, it is only necessary for him to plead that he is entitled to do so. If he is able to satisfy the trial court that he, rather than the first defendant, entered into the agreement, then the arbitration plea will be squarely on the table before that court. I cannot find, at this stage, that the dilatory plea is still born.
8. I should add that the plaintiff is not without a remedy. It will be open to it, at trial, to attempt to persuade the court that there are exceptional circumstances warranting an order that the matter proceed in court rather than by arbitration. It is at that stage that issues such as the inability of the parties to agree on an arbitrator will be relevant.
9. For these reasons, I must grant the defendants leave to defend. I make the following order:
  1. The application for summary judgment is refused.
  2. The defendants are given leave to defend the action.
  3. The costs of the summary judgment application shall be costs in the cause.



**R M KEIGHTLEY**

**JUDGE OF THE HIGH COURT**

**GAUTENG DIVISION, JOHANNESBURG**

This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 11H00 on 5 May 2022.

Date Heard (Microsoft Teams): 03 March 2022

Date of Judgment: 05 May 2022

On behalf of the Applicant: Adv N Mahlangu

Instructed by: Thomson Wilkes Inc

On behalf of the First Respondent: Adv K Naidoo

Instructed by: C de Villiers Attorneys