

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 29662/2021

REPORTABLE: YES
OF INTEREST TO OTHERS JUDGES: YES
REVISED
16 AUGUST 2022

In the matter between:

REMO VENTURES (PTY) LTD

FIRST APPLICANT

SEGOALE SUPPLIES (PTY) LTD

SECOND APPLICANT

NTHABISENG SEGOALE

THIRD APPLICANT

and

THE HONOURABLE JUSTICE NEELS CLAASSEN FIRST RESPONDENT

CECILE VAN ZYL

SECOND RESPONDENT

SUSAN LEONORA MEINTJES

THIRD RESPONDENT

SUCECO PARTNERSHIP

FOURTH RESPONDENT

JUDGMENT

MOLEFE J

[1] This is an application for a declaratory relief that an arbitration contract purportedly entered into between parties, the purported appointment of an arbitrator in terms thereof, and the resultant arbitration proceedings including the arbitration award are nullities in law, alternatively that the award by the arbitrator dated 10 May 2021 be reviewed and set aside.

Background

[2] The facts in this matter are largely common cause as set out in the applicants' founding affidavit.

[3] The first applicant is Remo Ventures(Pty) Ltd, a private for profit company, duly incorporated and registered in terms of the company laws of the Republic of South Africa, with registered number 2014/0495/07, and registered address situated at 9 Park 24 Estate, Lyndore Avenue, Kyalami, Gauteng.

[4] The second applicant is Ekuzeni Supplies (Pty) Ltd, a private for profit company (previously Segoale Supplies (Pty) Ltd), duly incorporated and registered in terms of the company laws of the Republic of South Africa, with registered number 2017/11792/07, and registered address situated at 22 Lazar Avenue, Randfontein, Gauteng.

[5] The third applicant is Nthabiseng Segoale an adult businessman and director of the first and second applicants.

[6] The first respondent is the late Honourable Justice Neels Claassen who resided at Unit [...] A[...], [...] Avenue, [...] F[...], Johannesburg.

[7] The second respondent is Cecile Van Zyl, an adult female entrepreneur.

[8] The third respondent is Susan Leonora Meintjies, an adult female entrepreneur.

[9] The fourth respondent is Suceco Partnerships of which the second and third respondent are the partners.

[10] On 3 April 2017, the applicants and the second and third respondents concluded a written sale of shares contract (shares agreement). Clause 3.1 of the shares agreement was subject to a number of conditions precedent which included that the third applicant was to cede a life insurance policy on his life to the sellers (the second and third respondents) to the value of R15 million (fifteen million rand) on or before the effective date being 21 June 2017. Clause 3.4 of the shares agreement provided that if any conditions precedent is not timeously fulfilled for any reason whatsoever, and is not waived in terms in terms of clause 3.3, then the whole share agreement shall be of no force or effect. Clause 22 contained a dispute resolution/arbitration clause which made provision for an Arbitration Foundation of South Africa ('AFSA') arbitration under the AFSA rules and for the arbitrator to be appointed by AFSA.

[11] Due to failure of the suspensive condition by 21 June 2017, the shares agreement became of no force or effect. Notwithstanding the above non-fulfilment, the parties acted under the belief that the shares agreement was still in force and valid and continued to implement it.

[12] During 2018/2019, various disputes regarding performance obligations of the contracting parties in terms of the shares agreement arose, which the contracting parties believed was still in force. However, as a result of the non-fulfilment of a suspensive condition, the shares agreement had already fallen away and not in existence. On 20 February 2019, the applicants, the second and third respondents concluded an arbitration contract which was predicated and dependent upon the existence and validity of the shares agreement and purported to:

12.1 Amend clause 22 of the shares agreement but substituting such clause in its entirety with the provisions of the arbitration contract; and

12.2 Refer the disputes that had arisen aforesaid to the arbitration in terms of clause 22 as purportedly amended in terms of which the arbitrator, retired Justice Claassen ('the first respondent'), was by agreement between the parties appointed to conduct arbitration in accordance with a different procedure than the AFSA rules. In essence, the parties entered into privately conducted and administered arbitration proceedings and appointed the first respondent as their own arbitrator.

[13] The main application is premised on the contention that since the parties are in common cause that the shares agreement is a nullity due to failure to fulfil the suspensive conditions, it follows that the arbitration agreement is also a nullity, and therefore the award delivered by the first respondent is also a nullity and must be declared as such, alternatively the first respondent did not have the power to issue the award, and the award therefore falls to be reviewed and set aside in terms of section 33 of the Arbitration Act¹.

[14] The main issue between the parties is whether the February 2019 arbitration agreement is a nullity as a result of the shares agreement being a nullity. The second and third respondents' defence is that the arbitration agreement was a self-standing agreement extraneous to the shares agreement and therefore survives the shares agreement.

[15] The applicants had referred to the well-known relevant case law in regard to the interpretation of contract and the applicable well-settled legal principles. The Constitutional Court and the Supreme Court of Appeal have recently added a gloss to the well-known *Endumeni*² and *KPMG*³ cases.⁴

¹ Act 42 of 1965

² *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593- (SCA).

³ *KPMG Chartered Accountants (SA) v Securefin Limited & Another* 2009 (4) SA 399 (SCA).

⁴ See also *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13 and *Capitec Bank Holdings Limited v Coral Lagoon Investments 194 (Pty) Ltd* 2021 JDR 1484 (SCA).

[16] The simple (although complex) question in this matter is whether it follows that since the shares agreement and consequently clause 22 thereof is void, that means that the parties did not have a valid arbitration agreement binding upon them in relation to the disputes arising in relation to the shares agreement.

[17] Clause 4.2 of the arbitration agreement provides:

‘The parties, to the extent that it is necessary, and for the purposes of the current arbitration proceedings, substitute the provisions of this Arbitration Agreement for clause 14 of the Sale of Business Agreement, and clause 22 of the Sale of Shares Agreement, and all the arbitration clauses contained in any other ancillary agreement entered into between the parties, which will form part of the Disputes to be adjudicated by the Arbitrator.’

[18] It is clear on a proper interpretation of the arbitration agreement that it was entered into intended to survive the voidness of the share agreement since it was intended to cover various agreements, which agreements remain valid and binding despite the fact that the shares agreement may be void. An example is the sale of a business agreement which remains alive despite the death of the shares agreement. The arbitration agreement cannot therefore lapse merely because the shares agreement has lapsed due to non-fulfilment of the conditions in that agreement.

[19] Clause 22.1 of the shares agreement provides that if the parties are unable to reach an acceptable settlement of any dispute... concerning any provision, any party may submit the dispute to the AFSA for mediation in accordance with the terms set by the secretariat of AFSA.

[20] Counsel for the respondents argued that whether a suspensive condition had been fulfilled or not would be a dispute envisaged by clause 22 of the shares agreement. If the applicants’ contention holds true, it would mean that a dispute whether the suspensive condition has been met or not can be heard by an arbitrator, but once he makes the finding that it had not been met, the shares agreement fails and thereby the arbitration clause and, as a logical conclusion, the arbitrator’s ability to make the very finding which was made.

[21] A court is to apply a commercial, business-like and sensible construction to agreements.⁵ The parties *in casu* agreed in the arbitration agreement to refer all disputes as formulated in the pleadings to arbitration before the first respondent. Therefore, if there is a dispute raised on the pleadings as to whether the shares agreement was invalid, the arbitrator was entitled to determine such dispute. I agree that the applicants' contention would lead to an absurd and untenable result and one which the parties would never have intended.

[22] Clause 2.3 of the arbitration agreement defined 'the arbitration proceedings' as the private commercial arbitration proceedings between the parties in the terms agreed to in 'this arbitration agreement'. On proper interpretation, it was not therefore a referral to arbitration in terms of the provisions of clause 22 of the shares agreement but a new referral to arbitration which superseded the original referral to arbitration in terms of clause 22. The only reasonable interpretation is that in so far as there is a dispute concerning the shares agreement, the arbitration agreement will 'substitute' for clause 22 of the shares agreement.⁶

[23] Since it was only substituted 'to the extent necessary', it is irrelevant if the shares agreement was invalid and could not be amended, since the arbitration agreement remained valid and the parties could continue to arbitrate any disputes raised in the pleadings in relation to the agreements therein referred, which would include the validity of the said agreements if such became an issue.

[24] This interpretation is further reinforced by the fact that the self-standing arbitration agreement did not only regulate any disputes in relation to the shares agreement but also all the other ancillary and related agreements. In my view it could never have been the intention of the parties that should the shares agreement be invalid, then the arbitration agreement would not remain in order to regulate arbitration in terms of the other agreements.

[25] I agree with the respondents' submission that the use of the words '*to the extent necessary*' in clause 4.2 of the arbitration agreement was merely to prevent

⁵ *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2010 (2) SA 498 (SCA) para 13.

⁶ Clause 4.2 of the arbitration agreement.

any disparity or contradiction between the provisions of the arbitration agreement and clause 22 of the shares agreement, and to the extent that there was such, the provisions of the arbitration agreement substituted or replaced the provisions of clause 22 of the shares agreement.

[26] Despite the fact that the shares agreement could not be amended as it was void *ab initio* does not result in the arbitration agreement also being void *ab initio*. The arbitration agreement remains alive and the parties were entitled to refer to arbitration any dispute which was raised in the pleadings, including a dispute as to the validity of the shares agreement.

The law on arbitrations

[27] Although I find the arbitration agreement to be valid, I find it necessary to discuss the well-settled legal principles on arbitration. The mere fact that an agreement is invalid does not necessarily mean that any arbitration clause contained therein is similarly invalid. It all depends on the parties' intention which is to be derived from a proper interpretation of the various agreements and the context in which they were concluded. This relates particularly to the applicants' contention that the arbitration agreement does not survive the voidness of the shares agreement.

[28] In *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd*, the SCA confirmed that the question is decided by determining the intention of the parties through interpreting the relevant provisions in the agreement and held as follows:

*"It is in principle possible for the parties to agree that the question of the validity of their agreement may be determined by arbitration even though the reference to arbitration is part of the agreement being questioned."*⁷

[29] This approach was also applied in *Seabeach Property Investment No 28 v Nunn*, where it was held:

⁷ *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) SA 1 (SCA) para 16.

“The argument advanced by the respondent that if a contract is void from the outset, all clauses including an arbitration clause will be void from inception, is in my view misguided.

The principles regarding the interpretation of contracts are well settled in our law and it is unnecessary to recite them again. The same approach applies in considering the ambit of an arbitration agreement. A court must ascertain what the parties intended by having regard to the purpose of their agreement, and interpret it contextually so as to give it a commercially sensible meaning.”⁸

[30] In *Premium Nafta Products Limited v Fili Shipping Company Limited*, the United Kingdom House of Lords held as follows:

“The principle of separability enacted in section 7 means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a ‘distinct agreement’ and can be void or voidable only on grounds which relate directly to the arbitration agreement. Of course there may be cases in which the ground upon which the main agreement is invalid is identical with the ground upon which the arbitration agreement is invalid. For example, if the main agreement and the arbitration agreement are contained in the same document and one of the parties claims that he never agreed to anything in the document and that his signature was forged., that will be an attack on the validity of the arbitration agreement. But the ground of attack is not that the main agreement was invalid. It is that the signature to the arbitration agreement as a “distinct agreement” was forged...”⁹

[31] This must be contrasted with the facts in the present matter, where the parties then concluded a separate and distinct arbitration agreement which was intended to replace and override the provisions of clause 22 of the shares agreement. Whilst the legislature has not promulgated a section in the South African Arbitration Act similar

⁸ *Seabeach Property Investment No 28 v Nunn* (18310/18) [2019] ZAW CHC 9 para 15-16.

⁹ *Premium Nafta Products Limited v Fili Shipping Company Limited* [2007] UKHL 40 para 17.

to section 7 of the English Arbitration Act, the approach by the English courts has been adopted by the South African courts.

[32] In *Zhongji Development Constructuin Engeenering Co Ltd v Kamoto Copper Co*, the SCA approved the approach taken in the leading English Cases on this issue:

“In Fiona Trust & Holding Corp and others v Privalov and Others Lord Hoffman, delivering the speech with which their lordships concurred, said:

*'In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.'”*¹⁰

[33] In *Total Support Management (Pty) Ltd v Diversified Health Systems SA (Pty) Ltd*, Smalberger AJP said that the hallmark of arbitration is that if it is an adjudication flowing from consent of the parties to the arbitration agreement, who define the powers of adjudication, and are equally free to modify or withdraw that power at any time by way of further agreement, whether or not such a separate arbitration agreement was subsequently concluded is a question of fact.¹¹ *Total*, in this matter relates to the conclusion of the arbitration agreement to replace the arbitration clause in paragraph 22 of the shares agreement.

[34] *In casu*, it is common cause that such separate agreement was concluded. There can be no doubt that the separate arbitration agreement was clearly intended to apply as a one-stop shop to determine all disputes arising between the parties in relation to all the agreements. It would never have been intended that if one of the

¹⁰ *Zhongji Development Constructuin Engeenering Co Ltd v Kamoto Copper Co SARL* 2015 (1) SA 345 (SCA) para 31.

¹¹ *Total Support Management (Pty) Ltd v Diversified Health Systems SA (Pty) Ltd* 2002 (4) 661 (SCA) para 25.

agreements is null and void, that would mean that all-embracing separate arbitration agreements should fall away, even though the other agreements which it also regulates in relation to disputes, remain valid.

[35] The indicators of the intention of the parties to conclude a separate and distinct arbitration agreement which would replace the arbitration provisions in all other agreements between the parties are the following:

35.1 It involves parties that are not parties to the shares agreement, such as Kalfieland CC;

35.2 It is no longer an arbitration in terms of the AFSA rules as envisaged in the shares agreement;

35.3 The disputes are those that the parties frame in the pleadings;

35.4 The parties record that to the extent that it is necessary and for the purposes of the current arbitration proceedings, substitute the provisions of the arbitration agreement for clause 14 of the sale of business agreement and clause 22 of the shares agreement and all arbitration clauses contained in the ancillary agreements. This clause clearly means that all disputes between the parties relating to any or all of the agreements between them are referred to the arbitration in terms of this arbitration agreement, and the arbitration agreement therefore replaces the provisions of clause 22 of the shares agreement. It is therefore a new and self-standing agreement to that contained in clause 22 of the shares agreement, and must therefore survive the invalidity of the shares agreement and clause 22 thereof.

[36] Reading the entire arbitration agreement and all its clauses in conjunction, the language thereof evidences an intention that the parties subjected themselves to arbitration in terms of the arbitration agreement concerning any disputes between them arising out of any of the suite of agreements between them, and not in terms of the individual dispute resolution clauses in each separate agreement.

[37] Courts should respect the parties' choice to have their disputes resolved expeditiously in *quasi* judicial proceedings that are outside formal court structures. If a court refuses to enforce an arbitration award, thereby rendering it largely ineffective because of a defence raised only after the arbitrator gave judgment, that self-evidently erodes the utility of arbitration as an expeditious, out of court means of finally resolving disputes.¹²

[38] In the circumstances, the first respondent was entitled and had the power to determine whether the shares agreement was valid, and his finding of invalidity did not invalidate the arbitration agreement or his award. The applicants are therefore not entitled to the declaratory relief sought nor to review and set aside the first respondent's award, and the application must be dismissed.

[39] Counsel for the respondents submitted that if the court finds that the first respondent had the power to issue the award, and since the applicants do not seek to review and set aside the award on any other basis other than that the first respondent did not have the power to issue the award, there is no reason why the respondents should not be entitled to an order of court in terms of section 31 of the Arbitration Act as sought in the notice of the counter-application.

[40] The applicants' counsel argued that there can be no good reason for the court to make the arbitration award an order of court when no enforcement thereof can arise, and where the respondents have failed to honour and implement awards by the same arbitrator.

[41] The court in *Kolber and Another v Sourcecom Solutions (Pty) Ltd and Others: Sourcecom Technology Solutions (Pty) Ltd v Kolber and Another*¹³ held that:

"The court heard two separate applications simultaneously. In the first application, an order was sought in terms of section 31 (1) of the Act to have the arbitrator's arbitration award made an order of court. In the second application, the unsuccessful party in the arbitral proceedings claimed an

¹² *Cool ideas 1186 CC v Hubbard and Another* [2014] ZACC 16.

¹³ *Kolber and Another v Sourcecom Solutions (Pty) Ltd and Others: Sourcecom Technology Solutions (Pty) Ltd v Kolber and Another* 2001 (2) SA 1097 (CPD) at para 44-68.

order for the award to be set aside in terms of section 33 (1) of the Act, alternatively for an order that certain matters be remitted to the arbitrator in terms of section 32 (2) of the Act.

The court considered the second application first. The order for setting aside or the remittal of the award in the second application was refused. The court found that the arbitrator did not exceed his powers, that he did not misconduct himself, and that no good cause was shown for remittal.”

[42] The question was whether the arbitrator’s award should be made an order of court in terms of section 31 (1) of the Act. It was argued that the function of the court was not simply to rubberstamp an arbitrator’s award. It was contended that the court has a discretion to refuse an application in terms of section 31 (1) if the court finds the award to be wrong. It was submitted that to do otherwise would be giving judicial recognition to what the court knows to be wrong.¹⁴ It was also held:

“that the unsuccessful party in the arbitration proceedings may wish to oppose the application to enforce the award. It would appear that the procedure that he should adopt would depend on the ground on which he wishes to contest the award. In this regard, it is necessary to distinguish between an award which is void from the outset and one which is voidable. In the former case, the unsuccessful party is contending that there never was a valid award. In the latter case there is a valid award which is enforceable until the award is set aside or remitted to the arbitrator by the court.”¹⁵

[43] Based on the fact that the arbitration award *in casu* was not wrong in fact or law but was challenged on the basis that the first respondent did not have the power to issue the award, there is no reason why this court should not exercise its discretion and make the arbitration award an order of court.

[44] In the premises the following order is made:

¹⁴ *Kolber* at para 70.

¹⁵ *Kolber* at para 71.

1. The application is dismissed with costs.
2. The arbitration award is hereby made an order of court.

D S MOLEFE
JUDGE OF THE HIGH COURT

This judgment by the Judge whose name is reflected herein, is delivered and submitted electronically to the parties/their legal representatives by e-mail. This judgment is further uploaded to the electronic file on this matter on Caselines by the Judge or his / her secretary. The date of the judgment deemed to be 16 August 2022.

APPEARANCES

Counsel for the Applicants:	Adv. M C Maritz SC
Instructed by:	Pierre Marais Attorneys
Counsel for the second to fourth Respondents:	Adv. G Kairinos SC
	Adv C E Thompson
Instructed by:	HJ Van Rensburg Inc
Date heard:	05 May 2022
Date of Judgment:	16 August 2022