IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE DIVISION, CAPE TOWN]

REPORTABLE

Case No: 18310/18

In the matter between:

SEABEACH PROPERTY INVESTMENT NO 28 (PTY) LTD **Applicant**

and

CANDICE LAUREN NUNN **Respondent**

JUDGMENT DATED: 22 FEBRUARY 2019

LE GRANGE, J:

[1] In this matter, the Applicant seeks an order that the dispute between the parties had properly and validly been referred to arbitration, alternatively that the dispute is arbitrable and should accordingly be referred to arbitration by the Court.

[2] The Respondent has a different view and insists that only a Court can resolve the dispute. According to the Respondent, the purported written agreement entered into between the parties is void *ab initio* due to a fundamental mistake on her part that was brought about by the Applicant's estate agents which renders the whole agreement, including the arbitration clause, null and void.

[3] The underlying dispute between the parties can be summarised as follows: On 28 February 2018 in Cape Town, the Applicant and the Respondent concluded a written agreement of sale, in terms of which the Applicant sold and the Respondent purchased a flat situated at […] B Road, Sea Point, which included two parking bays and a roof terrace as exclusive use areas, for a purchase price of R32 million. The property apart from the parking bays, consists of two levels a downstairs area of 318m^2 and a roof terrace area of 298m^2 which amount in total to 616m^2 in area. The agreement also contained an arbitration clause, (Clause 13).

[4] According to the Respondent at the time of signing the sale agreement she was led to believe by the Applicant's estate agents that the property was 616m^2 in size and that she would acquire 'full' ownership of both the lower and upper levels thereof. According to the Respondent, she only became aware afterwards that the roof terrace was part of the common property and therefore could not obtain full ownership of the 298m^2 roof terrace. The Respondent accepts that the first and or cover page of the agreement

contains a table which sets out the exclusive use area and that she initialed next to it (to indicate she read and understood the contents thereof). However, the Respondent stated in her papers that had she read it she would not have understood the meaning thereof.

[5] The Respondent is adamant that when signing the offer to purchase she verily believed - by virtue of the misrepresentations of the estate agents – that she was buying, and would become the owner of, the rooftop terrace. According to the Respondent the estate agents' misrepresentation was made with the intention of inducing the contract, but she fell short of alleging any fraud on the part of the estate agents.

[6] The estate agents deny the alleged misrepresentation. Furthermore, they deny the allegation that the sale agreement is void in view of the correspondence that was exchanged between the parties.

[7] The approach adopted by our Courts in deciding whether a dispute comes within the provision(s) of an arbitration clause in a contract, was discussed by the Supreme Court of Appeal, in North East Finance (Pty) Ltd v Standard Bank of South Africa LTD[1], which dealt in particular with the effect fraud has on an arbitration clause in general.

[1] **2013 (5) SA 1 (SCA)**

[8] The parties, in North East, entered into a settlement agreement which contained an arbitration clause. The two issues considered on appeal were firstly, whether the arbitration clause could be construed so as to compel submission to arbitration on whether the bank was induced by North East's fraud to conclude the settlement agreement and secondly, if so, whether the allegations were wholly unfounded.[2] The arbitration clause provided specifically that *'any dispute . . . including any question as to the enforceability of this contract'* would be referred to arbitration.

[9] Lewis JA, speaking on behalf of the Court in North East, stated in paras 15 and 16,the following:

> *"[15]…[It] is not, however, necessary (indeed it is not possible, given the disputes of fact in respect of the alleged fraud) for this court to determine whether the settlement agreement was void from inception or voidable until the bank had elected to resile. I consider that the term 'enforceability' refers to both a void and a voidable contract: if the parties had intended that the question whether fraud inducing the contract should be determined by an arbitrator, then he or she would determine whether the contract was valid and enforceable, or voidable or void."*
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> *[16] 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. That is suggested in Heyman v Darwin's Ltd[3]. Lord Porter said:*
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> > *'I think it essential to remember that the question whether a given dispute comes within the provisions of an arbitration clause*

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[2] North East *supra*, at p5 par.11
[3] [1942] ALL ER 337 (HL) at 334; 357 B-D.

or not primarily depends upon the terms of the clause itself. If two parties purport to enter into a contract and a dispute arises as to whether they have done so or not, or as to whether the alleged contract is binding upon them, I see no reason why they should not submit that dispute to arbitration. Equally, I see no reason why, if at the time when they purport to make the contract they foresee the possibility of such a dispute arising, they should not provide in the contract itself for the submission to arbitration of a dispute as to whether the contract ever bound them or continues to do so. They might, for instance, stipulate that, if a dispute should arise as to whether there had been such a fraud, misrepresentation or concealment in the negotiations between them as to make a purported contract voidable, that dispute should be submitted to arbitration. It may require very clear language to effect this result, and it may be true to say that such a contract is really collateral to the agreement supposed to have been made, but I do not see why it should not be done."

[10] Lewis JA, also reiterated the principle that an arbitration clause embedded in a fraud-tainted agreement could not stand.[4] Having examined the ambit of the arbitration clause in that matter and what the parties intended by having regard to the purpose of their contract (the settlement agreement), it was held by the SCA that the parties intended that the arbitrator's role would only be to determine disputes in respect of accounting issues, and it was not intended that the validity or enforceability of the

[4] See North West Provincial Government and Another v Tswaing Consulting CC and Others 2007 (4) SA 452 (SCA) at para 13.

contract, which was allegedly induced by fraudulent misrepresentations and non-disclosures would be arbitrable.[5]

[11] *In casu*, it was contended by Applicant's counsel that the facts in the present instance are distinguishable from the cases discussed by the Supreme Court of Appeal[6] as in both those matters fraud was either common cause or proven by the aggrieved party who wanted to resile from the arbitration agreement. It was further argued that in the present instance, the parties agreed *inter alia*, that *"(A)ny dispute between the parties in connection with or arising out of ... the formation, implementation, validity, enforceability and rectification of the Agreement, shall be referred to and determined by Arbitration*."[7] Applicant contends that, on a proper reading of clause 13.7 the parties clearly intended that all disputes regarding the question whether the agreement was void or merely voidable, should be determined by the arbitrator. It was further contended in as much as it is trite that any agreement which is brought about or occasioned by misrepresentation or a mistake is either voidable or void and will in such event be invalid and unenforceable, any dispute in relation to any alleged misrepresentation or mistake should go to arbitration.

[12] Counsel for the Respondent argued that owing to the Respondent's fundamental mistake, the entire contract between the parties should be

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[5] Supra para 30.
[6] North West Provincial Government and Another v Tswaing Consulting CC and Others, *supra;* and North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd, *supra*
[7] Clause 13.1.6 of the purchase agreement

regarded as void *ab initio*, and all of its clauses, including the arbitration clause, must fall with it. For this proposition reliance was also placed on North East Finance[8] and North West Provincial Government and Another [9] supra. Reference was also made to Heyman v Darwins Ltd [10] where Viscount Simon LC, stated that:

> *'If the dispute is as to whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void ab initio...the arbitration clause cannot operate, for on this view the clause itself is also void.*

[13] Similarly, it was argued that the comments by the Court in Wayland v Everite Group Ltd[11] is apposite in this case where the following was held:

> *'It seems to me to be eminently reasonable that a clause of a contract must stand or fall with the whole body of the contract and not be declared excisable by the parties or that such declaration should have any validity merely on the ground that the parties having elected to say that the clause itself is severable from the contract....*[in cases where a contract is] *invalid and unenforceable....then the arbitration clause must in my view stand or fall with the validity of the main contract, notwithstanding any declaration by its signatories.... Nor can it be a matter simply for interpretation of the arbitration clause itself to determine whether it stands or falls with the invalidity or otherwise of the main contract... If therefore there is some*

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[8] Footnote 1
[9] Footnote 4
[10] [1942] 1 All ER 337 (HL) at 343F.
[11] 1993 (3) SA 946 WLD at 951H-952C.

> *justification for respondent's allegations of invalidity and unenforceability of the contract, then, the arbitration clause itself being in doubt and the consequent jurisdiction of the arbitrator to proceed under it doubtful, a reference to arbitration would in my view be an improper reference .'*

[14] Counsel for the Respondent also argued that in the context in which the offer to purchase was signed between the parties the current dispute was not foreseen and or foreseeable and could not have been in the contemplation of the parties.

[15] 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.

[16] 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[12].

[12] See North East, supra at paras 24 – 25 and the cases referred to therein.

[17] With regard to the effect of fraud that induces a contract, Lewis JA, in North East[13], stated *'..[I]n general, where fraud has been proven, the contract is regarded as voidable: the aggrieved party may elect whether to abide by the contract and claim damages (if it can prove loss) or to resile – to regard the contract as void from inception and to demand restitution of any performance it may have made, tendering return of the fraudulent party's performance*'.

[18] In the present instance, given the disputes of fact regarding the fundamental mistake the Respondent alleged she labored under when signing the offer to purchase, it is not possible nor was this Court called upon to determine on affidavit, whether the agreement is in fact void or voidable.

[19] The ultimate question for consideration is whether the parties intended that if a dispute arose, as in this instance, that dispute would be determined by an arbitrator, and if so, then he or she should determine whether the contract is valid and enforceable, or voidable or void.[14] In fact in North East, the term 'enforceability' was considered to refer to both a void and voidable contract[15].

[20] The relevant parts of the arbitration clause provides as follows:

> "*13.* ***ARBITRATION***
>
> *13.1 Any dispute between the parties in connection with or arising out of:*
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> *13.1.2 this Agreement, or*

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[13] Para 14.
[14] North East, para 15.

13.1.3 the interpretation of this Agreement, or

13.1.4 their respective rights and obligations, or

13.1.5 any actual or purported termination or repudiation of this Agreement and any matters arising therefrom, or

13.1.6 the formation, implementation, validity, enforceability, rectification of this Agreement, or

13.1.7 the Agent's brokerage fee, shall be referred to and be determined by Arbitration in terms of this clause 13.

13.2 - 13.6….

13.7 The provisions of this clause-

13.7.1 constitute an irrevocable consent by the parties to any proceedings in terms hereof and no party shall be entitled to withdraw therefrom or claim at any such proceedings that he/she/it is not bound by such provisions.

13.7.2 are severable from the rest of this Agreement and remain in effect despite the termination of or invalidity for any reason of this Agreement of any part thereof."

[21] It needs to be mentioned that in *casu*, the factual matrix underpinning the dispute between the parties is distinguishable from the facts in the North West, and North East matters supra[16]. In both those matters the fraud relied

[16] **Footnotes;1 and 4.**

upon by the aggrieved party wishing to resile from the arbitration agreement was either proven or common cause.

[22] In *casu*, at the heart of the Respondent's complaint is that when signing the offer to purchase she verily believed – having been misled to by the misrepresentations of the estate agents – that she was buying, and would become the unfettered and exclusive owner of the rooftop terrace. According to the Respondent, she did not know that the Body Corporate owned the terrace and that she would only have use rights to it with all of the attendant consequences, namely, that if she wanted to alter the roof terrace she would need the unanimous consent of all of the members of the Body Corporate, a special resolution allowing her to extend her section and a special resolution to re-create an exclusive use area in respect of that part of the terrace which was not incorporated into her section. According to the Respondent the misrepresentation resulted in a fundamental mistake on her part which rendered the entire agreement including the arbitration agreement clause, void from the outset.

[23] In considering the arbitration agreement as recorded in clause 13, it is evident that the parties agreed, *inter alia*, that *"(A)ny dispute between the parties in connection with or arising out of ... the formation, implementation, validity, enforceability and rectification of the Agreement, shall be referred to and determined by Arbitration."*

[24] Furthermore, clause 13.7 also provides that:

> " *13.7 The provisions of clause:*
>
> *13.7.1 constitute an irrevocable consent by the parties to any proceedings in terms hereof and no party shall be entitled to withdraw therefrom or claim at any such proceedings that he/she/it is not bound by such proceedings;*
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> *13.7.2 are severable from the rest of the Agreement and remain in effect despite the termination of or invalidity for any reason of this Agreement of any part thereof."*

[25] Having regard to the abovementioned and the agreement as a whole, it is evident the parties envisaged and intended, at the time of concluding the agreement, that all their disputes regarding the Principal agreement whether void or voidable would be determined by arbitration. To view it differently would in my view give the agreement a commercially insensible meaning.
In fact, clause 13.7.2 makes it clear that 'despite the *termination of or invalidity for any reason of this Agreement of any part thereof'* the arbitration clause will remain in effect. The Arbitration clause in effect constituted a separate self-standing agreement to refer disputes such as the one that features in this matter to arbitration whatever the ultimate consequence or outcome thereof might be in relation to the remainder of the Principal agreement by providing that the provisions of the clause constitute an irrevocable agreement to go to arbitration, from which agreement the parties could not withdraw. The parties intended to isolate and ring-fence their agreement to go to arbitration. Thus, in my view even if the remaining part of the Principal agreement was to be found void or voidable, the parties intended and agreed that this would not affect the validity and enforceability of the arbitration clause. In the circumstances of this case the arbitration

clause renders it distinguishable from the arbitration clause in Wayland[17], and the clause is immunised from any fatal illness from which the Principal agreement may suffer, if any.

[26] For these stated reasons, it follows that the Applicant properly referred the matter to arbitration as the dispute is arbitrable in terms of the agreement.

[27] It follows that the Application must succeed. In respect of costs, it was contended by Counsel for the Applicant that the Court should consider a punitive costs order against the Respondent in view of the stance adopted by the Respondent in this matter. Having regard to the papers filed of record, I am not persuaded that a costs order should finally be decided on in the present instance. I am of the view that the costs should stand over for determination in the arbitration.

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

The Application succeeds. The costs of the application stand over for later determination in the arbitration.

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LE GRANGE, J

[17] **Footnote 11**