IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 4286/2020

In the matter between:-

NOVARE INVESTMENTS (PTY) LTD	**First Applicant**
NOVARE ACTUARIES AND CONSULTANTS (PTY) LTD	**Second Applicant**
and	
DES HEUER CC	**First Respondent**
THE FINANCIAL SECTOR CONDUCT AUTHORITY	**Second Respondent**
ADV C M ELOFF SC N.O.	**Third Respondent**

CORAM: **Wille, J**

DATE OF HEARING: **4th of May 2020**

DATE OF JUDGMENT: **Delivered via email on the 15th of May 2020**

JUDGMENT

WILLE, J:

INTRODUCTION

[1] This is an 'urgent' application[1] to stay certain arbitration proceedings[2], currently pending between the applicants and the first respondent. The application is for two declaratory orders, albeit, in the alternative. Firstly, the relief sought is that the arbitration agreements entered into between the first respondent and the applicants shall cease to have effect in relation to any dispute arising from these agreements. Secondly, and alternatively, an order is sought to the effect that the arbitration agreements shall cease to have effect in relation to all disputes in the pending review[3] and the action[4] proceedings.

[2] The arbitration proceedings are pending before the third respondent, as the duly appointed arbitrator. The first respondent is the claimant and the applicants are the respondents in this pending arbitration.

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[1] Held via the 'Zoom' platform for video and audio conferencing
[2] The second arbitration
[3] The first respondent reviewed the - causation findings - made by the appeal tribunal
[4] The applicants issued out an action after the commencement of the second arbitration

[3] The first respondent is claiming the payment of monies due by the applicants in connection with certain investment mandates and intermediary agreements.[5] The first respondent was initially registered as a financial service provider in terms of FAIS[6], but later, and during 2017, the aforesaid registration lapsed and was terminated. Once the applicants were made aware of the said termination, they in turn, resisted making any further payments to the first respondent, in terms of the agreements.

[4] The agreements between the parties contained clauses which grant to the first respondent a contractual right to submit the applicants to arbitration in connection with all disputes between them. The agreements, provide, inter alia, as follows;

> *'Any dispute arising from this agreement shall be settled by arbitration between the parties…'*[7]

> *'The parties record that it is their intention that the arbitration will be held and completed as soon as possible'*[8]

[5] In terms of the agreements, the first respondent was contractually obliged to render, inter alia, the following services to the applicants;

> *'The intermediary undertakes to introduce clients from time to time to Novare. The purpose of these introductions is to enable Novare to make contact with a client who may ultimately conclude a mandate with Novare'*[9]

[5] The agreements
[6] Financial Advisory and Intermediary Services Act, 37 of 2002
[7] Paragraph 9 of the agreement.
[8] Paragraph 9.1.5 of the agreement
[9] Paragraph 2.1.2 of the agreement

[6] Arbitration proceedings followed[10], and the arbitrator found, inter alia, that the first respondent was not required to be registered under FAIS to be entitled to receive the agreed payments from the applicants in terms of the agreements concluded.[11]

[7] Aggrieved by these findings, the applicants proceeded to take the arbitrators decision in connection with the first arbitration to an Appeal Tribunal. The applicants' appeal was ultimately unsuccessful[12], and they accordingly made payment to the first respondent strictly in accordance with the arbitration award. No further payments were made to the first respondent going forward, other than those covered up to the stage of the award in terms of the initial arbitration proceedings.

[8] This prompted the first respondent to pursue a second arbitration against the applicants in order to attempt to secure the further payments due to the first respondent under the agreements with the applicants. The applicants opposed the claims asserted by the first respondent on the same grounds as before[13] and thereafter instituted action proceedings against the first respondent, in which, inter alia, they sought a number of further wide-ranging declaratory orders against the first respondent.

[9] In the action proceedings, the applicants seek, inter alia, relief to the effect that, upon a correct interpretation and application of sections 7(1) and 7(3) of FAIS, the first respondent stands prohibited in law from claiming the payments it is seeking, unless and until, the first respondent is licensed under FAIS. The main point is that, in the event that a court ultimately grants to the applicants the relief they seek in the action proceedings, then in that event, the

[10] The first arbitration
[11] The 'legality issue'
[12] The applicants were successful in disputing certain mandates, the 'causation issue'
[13] The issue of the non-registration under FAIS

second arbitration will be rendered nugatory. Needless to say, the first respondent is not prepared to stay the arbitration proceedings, pending the outcome of the action proceedings.

THE APPLICANTS' CASE

[10] The applicants are licensed as FSP's in terms of FAIS for the provision, inter alia, of financial products, financial advice and financial services. It is contended that section 7(3) of FAIS prohibits the applicants from conducting any - *financial services related business* - with any person rendering financial services unless that person also holds the appropriate license under FAIS. This is the 'legality' issue.

[11] The first respondent was a licensed FSP until the 16th of May 2017 and, thereafter its license lapsed and was terminated. It is the applicants' case that since the termination of the license, first respondent was prohibited from rendering financial advisory services or intermediary services and accordingly, could not act as a representative for the applicants. The applicants accordingly ceased making payments to the first respondent under the agreements between them. The applicants also argue that a *regular feature* of the first respondent's business is that they furnished advice to clients, rendered intermediary services to clients and performed introductions on behalf of clients and were product suppliers.[14]

[12] At the commencement of the pre-arbitration process in connection with the second arbitration, the applicants' asserted their rights to seek relief from the court in terms of

[14] All these services as 'defined' in FAIS

section 3(2)(c) of the Act[15]. In addition, the applicants' sought other procedural relief from the arbitrator, but were largely unsuccessful in these endeavours.

THE FIRST RESPONDENT'S CASE

[13] The first respondent takes the position that as matters currently stand, the legality issue raised by the applicants is *res iudicata*, or at least, a matter of *issue estoppel*. Further, that it is both legal and permissible for the first respondent to receive all payments that are due and that the applicants are obliged to make payment to the first respondent in terms of the agreements.

[14] It is submitted that the findings made in the first arbitration together with the findings made by the Appeal Tribunal[16], are final and definitive as between the applicants and the first respondent as far as the payment under the agreements is concerned.[17] The first respondent fortifies this argument by asserting that the monies that were due by the applicants to the first respondent, were paid into an attorney's trust account to be retained therein as a stakeholder. As soon as the first respondent was successful in the first arbitration, these monies held in trust, fell to be paid over to the first respondent and there is accordingly no reason whatsoever why the applicants should refuse to continue to make payment to the first respondent under the various agreements,

THE POSITION OF THE SECOND AND THE THIRD RESPONDENT

[15] The Arbitration Act of 1965
[16] In connection with the 'legality issue' as opposed to the 'causation issue'
[17] This, aside from the 'causation issue' in connection with certain mandates

[15] The second respondent is an uninterested party in that it has not actively supported the view adopted by the applicants' compliance officer to the effect that any payments to the first respondent remain impermissible whilst the latter does not hold a licence under FAIS.

[16] The third respondent takes no active role in these proceedings, as the first respondent advances that the legality argument has been squarely raised as an issue in the second arbitration. Further, if the applicants are successful on this point it will be the end of the first respondent's claims against the applicants.

DISCUSSION

[17] It is trite that a court should not enforce an arbitration award for payment that would contravene a statutory prohibition against that payment.[18] Further, in terms of the common law, the court is enjoined to act to prevent an arbitration that will give rise to an unenforceable award.[19]

[18] In the *Airports* matter[20], the court emphasized the following when considering an application to stay court review proceedings in favour of an arbitration, namely:

> *'It makes little, if any, sense to stay the Rule 53 application in order to allow the parties to have the same issue decided at arbitration, only to find that the outcome of the arbitration is susceptible to being declared a nullity'*

[19] This application is however entirely different, as same has been squarely brought under section 3(2)(c) of the Act. The applicants harbour a belief that if it implements the

[18] Hubbard v Cool Ideas 1186 (580/12) [2013] ZASCA 71 (28 May 2013)
[19] Intercontinental Finance and Leasing Corporation v Stands 56 and 57 Industrial (1979 (3) SA 740 (W)
[20] Airports Company South Africa v ISO Leisure OR Tambo 2011 (4) SA 642 (GSJ)

agreements and makes payment to the first respondent, these actions would constitute a contravention of section 7(3) of FAIS, by the applicants and, would also be a contravention of section 7(1) of FAIS, by the first respondent. Further, should the arbitrator find against the applicants and order them to pay the first respondent in terms of the agreements, these findings and any award made as a consequence thereof, would not be enforceable of the basis of an illegality, alternatively, be contrary to public policy.

[20] The first respondent contends that the arguments advanced on behalf of the applicants do not fall under the rubric of section 3(2)(c) of the Act. This section provides that a court may on good cause shown;

> *'order that the arbitration agreement shall cease to have any effect with reference to any dispute referred'*

[21] It cannot be disputed that the court has no common law power to refuse to enforce an arbitration agreement. This is so because, whatever the true disputes between the parties to an arbitration may be, they are bound by the clauses submitting the disputes to arbitration.[21] The power of the court in this connection is triggered by a party to an arbitration agreement exhibiting good cause for the relief to be granted. The good cause contended for by the applicants is founded largely on the grounds that they have instituted an action against the first respondent for essentially the same relief and for even wider and more far reaching relief. This, after the second arbitration had commenced.

[22] It is in this context that the court is called upon to examine whether good cause exists and accordingly to exercise its discretion to determine if the agreement to arbitrate, as

[21] Silpert v Seymour 1932 TPD 329 at page 334

between the parties, falls to be set aside or not to be enforced. In my view, in the circumstances of this case, the *legality issue,* is an issue upon which, inter alia, the parties agreed to arbitrate. This must be so, because it is clear that the parties intended to have all their disputes under the agreements to be determined by arbitration. If the parties intended otherwise, it would have been easy enough for them to have done so.[22]

[23] The applicants rely, inter alia, on *Intercontinental*[23] as authority that the pending arbitration proceedings would result in an illegality. Again, in my view, this case is distinguishable as this matter involved an application for an order preventing allegedly futile proceedings, before they commenced. In contrast to this, in the current matter, the arbitrator in the first arbitration and the arbitrators in the Appeal Tribunal held in favour of the first respondent on the core issue of legality.

[24] The first respondent argues that there is no authority for a court to stay or terminate arbitral proceedings in terms of section 3(2)(c) of the Act, in circumstances where the claimant, in arbitration proceedings, exercises its contractual right to arbitrate and the respondent, thereafter institutes parallel proceedings, by way of an action. The authorities relied upon by the applicants in support of good cause in connection with this issue, clearly make reference to cases where the party seeking a stay, is the very same party that issued out the parallel action proceedings. The matter before me is entirely different.

[25] The onus or burden of demonstrating good cause, in these circumstances, is at a high threshold and the provisions of section 3(2)(c), therefore logically fall to be interpreted

[22] Fiona Trust and Holding Corporation and Others v Privalov and Others [2007] 1 ALL ER (Comm) 891

[23] Intercontinental Finance and Leasing Corporation v Stands 56 and 57 Industrial (1979 (3) SA 740 (W)

narrowly as the applicants are attempting to avoid their contractual obligations to arbitrate.[24] Further, it seems to me that the orders sought by the applicants are not so much connected to any specific dispute that was referred to arbitration. Rather, the orders sought by the applicants, seem to identify matters and issues in *other proceedings*, upon which they seek to rely on to prevent the arbitration from proceeding. These proceedings, are the action proceedings, having been issued out by the applicants, after the first respondent had commenced the second arbitration.

[26] This in my view cannot constitute good cause in these circumstances as this could never have been the intention of the legislature when it enacted the provisions as set out in section 3(2)(c) of the Act. If it were so, applications under section 3(2)(c) of the Act, would readily be open to abuse by any party seeking to avoid an arbitration on flimsy grounds.

[27] Further, convenience[25] dictates that the arbitral process should continue as the applicants stand to suffer no prejudice should the third respondent find in favour of the first respondent on the legality issue. This is so because, if at the end of the day, the applicants were to be successful in their legality argument, the court then seized with the matter[26], will not enforce the award in terms of the Act.

[28] The findings in the *ACSA*[27] matter are most helpful in this connection. This matter essentially involved a *legality* review. In this matter, the applicants are in essence seeking an interdict to avoid, what they believe, would amount to an illegality. Accordingly, in my view, the applicants bear the burden of showing, at the very least, a *reasonable possibility* of the alleged illegality contended for, by them. I say this because, the applicants must show, on a balance of probabilities, that the findings sought be made by the third respondent have a

[24] Universiteit van Stellenbosch v J A Louw (Edms) Bpk 1983 (4) SA 321 (A) p 329 H
[25] Although 'balance of convenience' is not a factor as final relief is being sought
[26] To have the award made an order of court
[27] Airports Company South Africa v Tswelokgotso Trading Enterprises CC 2019 (1) SA 204

reasonable possibility of being rendered illegal, unenforceable or contrary to public policy. This after all, must constitute part of their good cause argument and must be one of the weighty factors that I must take into account, when exercising my judicial discretion.

[29] A further useful authority is *Tristar*[28]. In this matter, the court had to deal with the issue of what constituted - *intermediary services* - in a matter not dissimilar from the facts in the current matter. On this score, it was held, inter alia, as follows;

> '*In my view none of those constitutes 'intermediary services' on the ordinary meaning of the language of the definition. I can also see no reason – and none could be suggested – why the legislature would have thought it necessary for services of that kind to be regulated. In those circumstances TriStar was not required to be licensed to provide them, and the objection raised by the Fund ought to have been dismissed*'

[30] Accordingly, I am far from persuaded that a case for *good cause* has been made out by the applicants. In addition, the third respondent may rule in favour of the applicants on the legality issue, in the second arbitration.

[31] In my view, the institution of the action proceedings by the applicants, after the second arbitration had commenced, cannot come to their assistance so as to avoid their obligations as set out in the arbitration agreements. The applicants, under these circumstances, are bound by the arbitral process as set out in these agreements.

COSTS

[32] The applicants complain that the first respondent adopted an unreasonable attitude in connection with the proposed further conduct of the matter which was set down for hearing

[28] Tristar Investments v The Chemical Industries National Provident Fund [2013] ZASCA 59 (16 May 2013)

on the 20th of March 2020. An analysis of the correspondence between the parties indeed exhibits that the first respondent *could and should have* adopted a more conciliatory and co-operative approach in connection with the order that was destined to be granted on the 20th March 2020, as a racing certainty. I agree with the applicants' complaints on this limited issue.

ORDER

[33] In the result the following order is granted, namely;

1. That the application is dismissed.

2. That the costs of and incidental to this application including costs of two counsel, shall be paid by the applicants (jointly and severally, the one paying the other to be absolved), on the scale as between party and party, as taxed, or agreed.

3. That the wasted costs of and incidental to the proceedings on the 20th of March 2020 (including costs of senior counsel, if applicable), shall be paid by the first respondent on the scale as between party and party, as taxed, or agreed.

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WILLE, J