IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: 18624 / 2022

In the matter between:

KIDROGEN RF (PTY) LTD	Applicant
And	
ANDRE JACOBUS ERASMUS	First Respondent
BIG BOY NCUBE	Second Respondent
LIONEL MURRAY SCHWORMSTEDT & LOUW INC	Third Respondent
ADV R.D. MCCLARTY SC	Fourth Respondent

Coram: Wille, J
Heard: 31 May 2023
Delivered: 13 June 2023

JUDGMENT

WILLE, J:

Introduction:

[1] This is an opposed application about extending a time barring period at the instance of the applicant. The fourth respondent upheld a special plea filed by the first and second respondents (the 'respondents') in response to a statement of claim in the arbitration pursued by the applicant.

[2] In summary, the fourth respondent held that the applicant had failed to comply with a time bar period by failing to pursue the arbitration within thirty days of the signature of the specific share sale agreements.[1] This failure contained a guillotine deeming provision that resulted in a determination in favour of the respondents.

[3] The third and fourth respondents take no part in these proceedings. This is because the third respondent is merely a stakeholder of funds, and the fourth respondent has made his determination on this issue. The applicant now applies for an order seeking to extend the time-bar clause of the thirty-day period by six months, in terms of the Arbitration Act.[2] This application is based primarily on the grounds of '*undue hardship'* to the applicant should the time period not be extended by an order of the court.

Overview:

[4] The respondents contend that the application is fundamentally misconceived for three reasons, any of which alone is a sufficient basis for the dismissal of the application. Firstly, the respondents argue that the relevant legislative intervention relied upon by the applicant finds no application because the parties never concluded an arbitration agreement to refer any *future disputes* to arbitration. Secondly, the fourth respondent upheld the respondents' special plea, and the arbitration was accordingly finalised.

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[1] The arbitration clauses were included in the provisions of two share sale agreements between the parties.

[2] Section 8 of the Arbitration Act, 42 of 1965 (the 'Act').

[5] Finally, the circumstances are such that the applicant has suffered no *undue hardship*, and there is no basis for this court to exercise its discretion to grant an extension in favour of the applicant.

Context:

[6] The respondents each acquired twenty and twelve shares (respectively) in the applicant about a decade ago. Subsequently, disputes arose between the parties concerning four of the first respondent's shares and eight of the second respondent's shares and loan accounts in the applicant. Some time passed, and the parties agreed to resolve their disputes through joint arbitration. This they did because what featured in the two share sale agreements (in almost identical terms) were clauses that regulated three discrete matters, namely; (a) the applicant agreed to buy back the undisputed shareholding shares from the first and second respondents; (b) the applicant agreed to repay the loan accounts of the respondents and, (c) the parties agreed to a definition of their ongoing disputes concerning the disputed shares and agreed that these defined disputes would be determined by way of arbitration.

[7] It is common cause that none of the agreements referenced any *future disputes* to arbitration, and only the two existing disputes were referred to arbitration in the sale share agreements between the parties. The sale share agreements both contained similar time-bar clauses in the following terms:

> *'…Should [the applicant] fail to pursue the arbitration within 30 (thirty) days of signature, the failure shall be deemed to be a determination in favour of the Seller [the respondents]…'*

[8] Further, it is not the subject of any dispute that the time-bar obligation imposed upon the applicant was not onerous as it would have been relatively easily cured by the delivery of a statement of claim, or by taking steps to advance the arbitration, such as the proposing of an arbitrator or the calling of a pre-arbitration

meeting. In addition, the time-bar clause was inserted at the instance of the respondents because the applicant had dragged its feet in attempting to resolve these disputes. The respondents aver that they acquired the disputed shares lawfully and believed they had been victimised and targeted by the applicant for many years.

[9] It is contended that this is precisely why they insisted that the arbitration be pursued promptly with the inclusion of the guillotine clause. The sale share agreements were signed on 13 February 2020, and the deadline set by the time bar was 15 March 2020. The applicant failed to pursue the arbitration until 18 August 2020, when its newly-appointed attorneys sent an email proposing three potential arbitrators. This was more than five months late.

[10] The applicant filed its statement of claim on 18 November 2020 and a further substantially amended statement of claim on 15 December 2020. A statement of defence was delivered on 25 January 2021, including a special plea that the applicant had failed to pursue the arbitration in terms of the time-barring period set out in the sale share agreements.

[11] The applicant belatedly delivered a replication which included a list of allegations resisting the special plea without any reference to section 8 of the Act. The applicant raised this shield for the first time ten months later. This was almost a year after the delivery of the special plea and by way of a notice to amend its replication dated 6 January 2022.[3]

[12] This notwithstanding, the applicant after that did not pursue any application regarding section 8 of the Act. The applicant instead progressed to the arbitration hearing, which took place on 24 and 25 October 2022. On 26 October 2022, the arbitrator upheld the respondents' special plea. The applicant launched these proceedings on 3 November 2022.

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[3] During the hearing of the application upon my request the applicant undertook to deliver the essential pleadings in the arbitration to my chambers. This has since not been done.

Consideration:

[13] The respondents contend that more than eight years have elapsed since these disputes arose between the applicant and the respondents. Further, it is argued that the applicant breached the time-bar clause by more than five months in that the deadline was 15 March 2020 and the applicant only proposed the arbitrators on 18 August 2020.

[14] The core contention by the respondents is that the applicant was acutely aware that the respondents intended to rely on the time-bar clause when they filed their special plea on 25 January 2021. The point is made that the application now before the court was only launched some twenty-one months later, on 3 November 2022.

[15] Further, the respondents argue that section 8 of the Act is aimed at circumstances different from those that pertain to this matter. They say this because section 8 applies to a clause in an agreement that imposes a time limit to initiate arbitration proceedings concerning possible future disputes that have not yet arisen, and then such a dispute subsequently arises. Put another way, section 8 does not apply to existing specifically defined disputes as defined in the sale share agreements.

[16] The applicant's argument on this score is that the position taken by the respondents lacks context by denying that there is any good reason to distinguish agreements that refer to *future disputes* in the arbitration process from other arbitration agreements. Further, an argument is raised by the applicant that the court is invited to invoke the constitutional right of access to court as an interpretative aid. In addition, the applicant asserts that the interpretation contended for by the respondents is absurd and anomalous.

[17] At least there is no dispute between the parties as to the proper approach to contractual interpretation, namely: (a) which is a question of looking at the language used ; (b) understanding it in its context and (c) having regard to the purpose of the provision in question. Further, it is a matter of common cause that plain and unambiguous language is used in section 8 of the Act.

[18] Regarding context, it is helpful to have regard to the definition of an arbitration agreement as defined in section 1 of the Act as follows:

> *'….means a written agreement providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement….'*

[19] By contrast, section 8 refers only to an arbitration agreement to refer future disputes to arbitration. Thus, it is argued that section 8 applies only to a sub-set of arbitration agreements as defined and only if and when a dispute arises.

[20] By elaboration, it is contended that the share sale agreements refer specifically to existing disputes to arbitration and thus were intended to, and do, fall outside the scope of section 8. Further, it is argued by the respondents that the above interpretation is supported, both contextually and purposively, by the history of section 8 of the Act.

[21] Rogers, AJA (as he then was) observed that section 8 was modelled on section 27 of the repealed English Arbitration Act, 1950, which in turn re-enacted section 16(6) of the English Arbitration Act, 1934.[4] Both section 27 of the English 1950 Act and, before it, section 16(6) of the English 1934 Act mirror section 8 by referring only to future disputes.[5]

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[4] *Samancor Holdings (Pty) Ltd and Others v Samancor Chrome Holdings (Pty) Ltd and Another* 2021 (6) SA 380 (SCA) para 31.

[5] Section 27 of the English Arbitration Act 1950 provided: '…*Where the terms of an agreement to refer future disputes to arbitration provide that any claims to which the agreement applies shall be*

[22] The argument is that this was for good reason because the originating purpose of section 16(6) of the English 1934 Act and section 27 of the English 1950 Act was to protect against unconscionable provisions in common contract forms, including those in printed forms. This purpose was relevant only to consumer and commercial contracts incorporating arbitration agreements imposing time bars about future disputes that may arise. Such standard-form contracts, or contracts of adhesion, are well-known and are referred to in our jurisprudence. The respondents contend that there is no justification for protecting the applicant who agreed with the respondents, at arms-length and with equal bargaining power, to refer two pre-existing disputes to arbitration. The applicant also agreed to take steps to pursue such arbitration within the agreed thirty-day period.

[23] As a matter of pure logic this must be distinguishable from general 'vanilla' commercial contracts which include arbitration clauses imposing short time-frames within which to initiate arbitration proceedings foisted on parties who are unrepresented and who are not possessed of equal bargaining power. It follows section 8 draws a principled and entirely justified distinction.[6] The jurisprudence

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barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the High Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may, on such terms, if any, as the justice of the case may require, but without prejudice to the provisions of any enactment limiting the time for the commencement of arbitration proceedings, extend the time for such period as it thinks proper….'

[6] The same distinction is retained in section 12 of the current English Arbitration Act 1996, which applies only to *'an arbitration agreement to refer future disputes to arbitration'*, but further limits the judicial power to one of two situations, namely, where the court is satisfied *'(a) that the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question, and that it would be just to extend the time, or (b) that the conduct of one party makes it*

relied upon by the applicant is all concerned with agreements to refer future disputes to arbitration, and the authorities cited by the applicant do not deal with the position of agreed existing identified disputes.

[24] Thus, the references to the defined issues and the agreed arbitration in the share sale agreements fall outside the scope of any refuge in section 8 of the Act. Also, this interpretation is not inconsistent with the right of access to the court. I say this because the applicant has not confronted the validity of the time-bar clause on grounds of public policy or otherwise, has acted freely and was fully advised during the conclusion of the share sale agreements.

[25] Even if I am wrong in my interpretation as set out above, the arbitration was finally concluded and disposed of in terms of section 28 of the Act. It was, therefore, no longer open to the applicant to pursue any relief under section 8 of the Act. I say this because the arbitrator upheld the special plea on 26 October 2022 and granted his award, which was dispositive of the arbitration.

[26] Section 28 indicates, among other things, that:

> *'…Unless the arbitration agreement provides otherwise, an award shall, subject to the provisions of this Act, be final and not subject to appeal, and each party to the reference shall abide by and comply with the award in compliance with its terms...'*

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unjust to hold the other party to the strict terms of the provision in question'. These provisions make the principled distinction even clearer. As in this case, because Kidrogen agreed to the time-bar as part of bespoke and negotiated agreements (rather than a standard-form contract), the circumstances could never have been outside its reasonable contemplation. Moreover, there was no conduct of Erasmus and Ncube prior to the passing of the deadline on 15 March 2020 that justified not holding Kidrogen to the terms of the time-bar provision.

[27] Accordingly, I am in wholesale agreement with the findings and the legal reasoning adopted in *Genet Mineral Processing (Pty) Ltd v Van der Merwe and Others*.[7] This matter concerned a time-bar clause in a business rescue plan adopted by the creditors. A creditor attempted to exercise a right to a review by an arbitrator of the business rescue practitioner's rejection of its claim but failed to give the requisite notice instituting the arbitration proceedings before the deadline imposed by the time bar. Analogous to this matter, the arbitrator found that the creditor did not institute its arbitration timeously and thus was time-barred from doing so. The creditor then applied to court seeking an extension following section 8 of the Act.

[28] It was held that in such circumstances (which are indistinguishable from the present matter), as the arbitration was finalized in terms of section 28 of the Act, it was no longer open to the claimant to pursue any relief under section 8 of the Act. Thus, the question of undue hardship did not even arise. These findings were primarily based on a proper interpretation of sections 28 and 8 of the Act considering the common law principle that arbitral awards are final. Thus, the legislature is presumed to know the law.

[29] No doubt that although section 28 was subject to the provisions of the Act, the provisions there referred to were those detracting from the fundamental principle of the finality of arbitral awards, namely sections 30, 32 and 33 of the Act. The core finding was that section 8 dealt with arbitration agreements, not arbitral awards. If this were not the case it would give to the court the power to interfere with, and reverse, an award upholding a time-bar shield. This would be in direct conflict with the injunction for caution as set out in *Lufuno*.[8]

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[7] *Genet Mineral Processing (Pty) Ltd v Van der Merwe N.O. and Others* (24202/21) [2021] ZAGPJHC 760 (2 December 2021).

[8] *Lufuno Mphaphuli & Associates v Andrews and another* 2009 (4) SA 529 (CC) para 235.

[30] The applicant also seeks some refuge in the reasoning adopted in *Samancor.*[9] However was no final arbitral award in relation to the time-bar shield in that matter. The jurisprudence upon which the applicant relies is the judgment in *King Civil Contracts.*[10] The applicant advances that the judgment of *Genet* was wrongly decided.

[31] However, the judgment in *King Civil Contracts* does not explicitly overrule the core findings made in *Genet.* I say this because, in *King Civil Contracts,* the reasoning is that granting section 8 relief after a final arbitral award has been made would not result in changing or interfering with the arbitrator's award. This reasoning is complex for me to understand because the court would, as a matter of pure logic, be undermining the fundamental principle of finality of arbitral awards by effectively overriding the arbitrator's award by way of the application of section 8 after the arbitration has been completed.

[32] Genet emphasized that in *Samancor,* the arbitrator never ruled that the claimant was time-barred. Thus, Rogers AJA (as he then was) never dealt with the issue that is the core issue in this application. Permitting the applicant to rely on section 8 of the Act at this late stage would directly conflict with section 28, read together with the fundamental principle of the finality of arbitral awards.

[33] Again, even if I am wrong in my interpretation of the jurisprudence alluded to above, I disagree that, in this case, the applicant has suffered any undue hardship. There is no dispute between the parties regarding the applicable criteria to determine whether undue hardship has been suffered. These are helpfully summarised in *Samancor* as follows: (a) undue hardship means excessive, unreasonable or disproportionate hardship (going beyond the mere loss of a claim) and; (b) where the hardship is due to the claimant's fault, the hardship suffered is out of proportion to

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9 *Samancor Holdings (Pty) Ltd and Others v Samancor Chrome Holdings (Pty) Ltd and Another* 2021 (6) SA 380 (SCA)

10 *King Civil Contracts. (Pty) Ltd v Enviroserv Waste Management (Pty) Ltd and Another,* unreported GLD, Case Number 45747/2021.10 June 2022.

such fault. Thus, I am enjoined to consider the circumstances of the case and any circumstance rationally bearing down on the 'undue' question to be considered. Put another way, this power is not required to be exercised only in rare or exceptional cases. Relevant factors include the following: (a) the terms of the time-bar clause and the broader contractual setting; (b) the extent of the claimant's delay; (c) the explanation for the claimant's failure to bring the claim timeously; (d) the extent of the claimant's fault, if any, concerning the delay; (e) whether the defendant caused or contributed to the non-compliance and, if so, the extent of the defendant's fault in that regard; (f) the nature and importance of the claim, and (g) the extent of the prejudice, if any, suffered by the defendant in consequence of the delay.

[34] Further relevant factors include whether the circumstances were outside the reasonable contemplation of the parties when they agreed to the provision in question and whether the conduct of one party makes it unjust to hold the other party to the terms of the provision. Delay is not a threshold requirement but is instead another factor the court will take into account. The importance of the claim may outweigh an unreasonable delay, the absence of prejudice to the defendant and other relevant circumstances.

[35] Two kinds of delay are relevant: (a) the delay after the expiry of the time-bar period and; (b) the delay after the claimant becomes aware of the need to apply to the court. In this case, the time-bar clauses were inserted at the respondents' insistence because the applicant had dragged its feet since the disputes first arose nearly a decade ago. In addition, the circumstances arising in this matter were entirely within the reasonable contemplation of the applicant when it negotiated and agreed to the share sale agreements, including the time-bar clauses therein. The applicant was not taken by surprise.

[36] It is common cause that the applicant failed to take any steps to advance the arbitration according to the deadline set by the time-bar clause. The applicant has advanced no plausible explanation for its failure to do so. I say this because the applicant seemingly seeks to rely on communications after the deadline. These are

irrelevant in attempting to justify its failure to meet the deadline. The main reason advanced by the applicant in attempting to excuse its failure is by reference to the suspensive conditions contained in the share sale agreements. The arbitrator rightly dismissed this argument because the suspensive conditions were narrow in scope and suspended only the share buy-backs following the two agreements.

[37] Finally, it is difficult to understand the unexplained delay in instituting proceedings in this court for the extension sought for nearly twenty-two months after receiving the special plea invoking the time-bar as a shield in the arbitration proceedings.

[38] Thus, a finding of *'undue hardship'* in circumstances where the arbitrator has already upheld the special plea and made a final award would be unjust to the respondents because this would conflict with the fundamental principle of the finality of arbitral awards. Put another way, unlike in *Samancor,* a finding on the merits of the applicant's claims was not manifest, and the arbitration has already been finalised.

[39] In my view, on a proper consideration of the particular circumstances of this case, the applicant has not suffered any *'undue hardship'* that would justify an order extending the time period for commencing the arbitration proceedings.

[40] In all the circumstances, the following order is granted namely:

1. The application is dismissed.

2. The applicant shall be liable for the costs of and incidental to this application (including the fees of two counsel, where so employed) on the scale between party and party, as taxed or agreed.

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E.D. WILLE

Cape Town