

**IN THE COURT OF APPEAL OF LESOTHO
HELD AT MASERU**

C of A (CIV) 28/2022

CCA/483/2013

In the matter between:

**PHOMOLONG INVESTMENT (PTY) LTD
APPELLANT**

AND

**KEL PROPERTY COMPANY (PTY) LTD
RESPONDENT**

CORAM: P. T DAMASEB, AJA
J.W VAN WESTHUIZEN, AJA
N.T MTSHIYA, AJA

HEARD: 12 OCTOBER 2022

DELIVERED: 11 NOVEMBER 2022

SUMMARY

Arbitration -dispute resolution regulated by arbitration agreement- courts should respect sanctity of contracts- stay of arbitration proceedings not only remedy available to respondent to stop court proceedings- court has duty to consider special plea and any other reasons proffered for the court to decline jurisdiction- appeal upheld.

JUDGMENT

MTSHIYA, AJA

Introduction

[1] The appeal herein is against the whole judgment granted on 09 June 2022 by Mokhesi, J in the Commercial Court. The main issue in contention is whether or not the High Court has jurisdiction in the face of a valid and binding arbitration agreement.

[2] The appellant raised a special plea in the court *a quo* arguing that the matter should be referred to arbitration in terms of the arbitration clause in the sub-lease agreement. The court *a quo* dismissed the special plea and held that the appellant ought to have made an application for stay of the court proceedings. The court said in the absence of a successful application for stay, it had jurisdiction

[3] Aggrieved by the ruling, the appellant (respondent in the court *a quo*) lodged this appeal.

Background

[4] The respondent in this matter is the owner of a certain property, being plot 13283-509, situated at Cathedral Area, Maseru Urban Area. The said property was sub-leased to the appellant under a sub-lease agreement concluded in April 1989. In terms of the agreement, the appellant had the mandate to develop the said property by erecting a shopping centre. Further, the appellant had the obligation to ensure that the premises are maintained in line with the regulations of the Maseru Urban Council.

[5] A dispute developed between the parties over the interpretation of Clause 4 (ii) (a) of the sublease agreement relating to the payment of rentals.

[6] The respondent also alleges that the appellant breached clause 12 of the sub-lease agreement in that it failed to repair and maintain the property in question.

[7] With respect to rental payments, the entire and the relevant clause in the sublease agreement, provides as follows:

“(4)

i. RENTAL PAYABLE DURING INITIAL PERIOD:

- a) *The commencing monthly rental shall be ONE LOTI (Ml. 00) per square metre of ground space in the Premises actually*

sublet to the tenants (being approximately TWO THOUSAND TWO HUNDRED AND TWENTY-FIVE (225) square metres.

- b) As from 1st April, 1989, the monthly rental payable by the Sublessee shall be calculated exactly as herein-before described, save that the rate thereof shall be increased to ONE LOTI FIFTEEN CENTS (1, 15) per square metre.*
- c) The rental shall escalate at SEVEN POINT FIVE PER CENT (7.5%) per annum compounded, with effect from the anniversary of the sublease.*
- d) The rental shall be payable monthly in advance either to the Sublessor personally at its place of business, or to such other person or persons and at such other place or places as the Sublessor may from time to time specify in writing.*

(ii). RENTAL PAYABLE DURING OPTION PERIODS: -

- a) At the expiration of the initial period, and thereafter at the expiration of the first TWO (2) option periods, the rental shall be subject to review and shall be determined by mutual agreement of the contracting parties.*
- b) In the event that the contracting parties should fail to arrive at a mutual agreement regarding the rental to be paid during any specified option period, the determination of the rental for that period shall be submitted to arbitration in accordance with the provisions of the Arbitration Act No. 12 of*

1980 (and any amendment or replacements thereof)". (My own underlining)

It will be noted that clause 4 (ii) (b), underlined above, constitutes the arbitration agreement within the sublease.

[8] Upon failure to agree on the interpretation of the rental clause, the respondent (applicant in the court a quo), approached the High Court on a notice of motion seeking the following reliefs:

1. It is declared that the respondent is in breach of the terms of the sub-lease agreement between the parties dated 4 April 1989 and registered in the Deeds Registry in failing to comply with the provisions of clause 12 of the agreement by failing to repair the premises and therefore that the applicant was entitled to terminate the agreement once the respondent failed to rectify its breach and the termination is hereby confirmed;

2. It is declared that upon termination of the agreement the applicant was entitled to demand payment of rentals directly from the tenants of the subleased premises.

3. It is declared that clause 4 (ii) of the sublease agreement requires the parties at the expiration of twenty-five (25) years contemplated in clause 3 of the agreement, to review and determine by mutual agreement the rentals payable in relation to the subleased premises and thereafter to review and determine the rentals payable by mutual agreement at the expiration of the period of twenty (20) years following the initial period;

4.*It is declared that the parties were obliged by the provisions of clause 4 (ii) of the sublease agreement to review and determine rentals by mutual agreement at the expiration of the initial period as envisaged in clause 3 of the sublease agreement as requested by the applicant.*

5.*It is declared that the respondent acted unreasonably in refusing, failing and/or neglecting to comply with the demands and requests of the applicant that the parties were obliged to review and determine the rentals set out in the agreement after the expiration of the initial period of twenty-five (25) years and thereafter after the expiration of twenty (20) years following the renewal of the sublease agreement between the parties;*

6.*It is declared that if the parties did not reach mutual agreement regarding the rentals to be paid, the parties were obliged to submit their dispute for determination by way of arbitration as contemplated by the provisions of the Arbitration Act of 1980 in Lesotho and therefore that it was unreasonable for the respondent to refuse to submit to arbitration in Lesotho;*

7.*Alternatively, in the event that the honourable court finds that the parties are obliged to refer their dispute on review and determination of rentals for arbitration as contemplated in Clause 4 (ii) (b), it is ordered that both the applicant and respondent are obliged to submit to an arbitrator appointed by the Law Society of Lesotho from one of its members who shall be a senior advocate or attorney of not less than ten (10) years practical experience within ten (10) days after such appointment;*

8.*That the applicant be granted costs of this application including costs consequent upon the employment of counsel..."*

[9] In response to the above Notice of Motion, the appellant raised a preliminary issue relating to the court's jurisdiction in the matter. I must admit though, that the special plea was not elegantly raised in the sense that it should have formed the

main import of the appellant's answering affidavit. Standing as its main challenge to the court's jurisdiction, the special plea should have been spelt out in a much clearer manner in the answering affidavit than was done. 9. However, notwithstanding the issue of elegance, the appellant, in its answering affidavit, actually invoked clause 4(ii)(b) of the lease agreement. That clause constitutes the arbitration agreement which enjoins the parties to refer a dispute on rental to arbitration. I have quoted and underlined the said clause under paragraph 7 of this judgment.

[10] Of the reliefs sought by the respondent, the court a quo granted prayers 3-7 and dismissed prayers 1 and 2.

The court's short order reads as follows:

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

(i) Prayers 1 and 2 of the Notice of Motion are dismissed.

(ii) The application is granted as prayed in terms of prayers 3,4,5,6 and 7 of the Notice of Motion.

(iii) The applicant is awarded the costs of suit."

[11] In approaching this court on appeal, the appellant has raised the following grounds of appeal:

"1.

The Court a quo erred and misdirected itself by refusing to decline jurisdiction regard being had to the presence of an arbitration clause that ousts the jurisdiction of the Court a quo.

2.

The Court a quo erred and misdirected itself by holding as it did that the Appellant ought to have lodged an Application for stay of the proceedings pending the arbitration.

3.

The Court a quo erred and misdirected itself by not following the decision of the Apex Court in Bataung Chabeli Construction (Pty) Ltd Road Fund (Pty) Ltd and Others C of A (CIV) N034/2021. The Court a quo is bound by the decision of the Court of Appeal.

4.

The Court a quo erred and misdirected itself by dealing with the merits of the case without affording the Appellant an opportunity to be heard on the merits. The only issue that was placed before the Court a quo was the issue of jurisdiction.

5.

The Appellant reserves its right to file further grounds of appeal before hearing date.”

[12] The respondent cross-appealed, citing the following grounds:

“1 The learned judge erred and misdirected himself in concluding as he did that the applicant failed to discharge the onus of proving that the respondent breached the provisions of the sub-lease agreement therefore warranting cancellation of the agreement.

2 The court a quo therefore should have granted prayers 1 and 2 of the notice of motion. The court a quo should have made a finding, on the balance of probabilities, that the respondent was in breach of clause 12 of the sub-lease agreement and that the applicant did not condone such breach”.

Respondent's case in the court a quo

[13] Mr Geoffrey Moekoa, the respondent's Chief Executive Officer, deposed to the founding affidavit. He confirmed that the main dispute between the parties was on the issue of rentals payable.

Under paragraphs 9,11,12 and 14 of his affidavit, he averred:

9. The dispute of the parties revolves around rentals payable during the option periods. The respondent takes the position that rentals would only be reviewed and determined after the lapse of the option periods. The position of the respondent is that rentals are not reviewed after the initial period but. would only be reviewed after two (2) first option periods. The applicant takes the position that rentals are the subject of review as contemplated in 3 occasions. The first occasion is when the initial period expires. The second occasion is after the expiry of two (2) option periods. in other words, the applicant's argument is that after the period of the first twenty-five (26) years since the agreement was concluded the parties were obliged to review and determine rentals by mutual agreement. The applicant further contended that thereafter rentals would be reviewed and determined by both parties after the expiry of forty-five (45) years following _____ from _____ the effective date of the agreement.

10.....

11.As a result of this the applicant suggested arbitration and requested that it be held in Lesotho in accordance with the laws of her jurisdiction, but the respondent declined insisting that the arbitration must take place in South Africa because it was uncomfortable that arbitration should take place in Lesotho.

12.The parties were further not agreed as regards the choice of an arbitrator. The applicant suggested senior

advocates practicing in Lesotho, some of whom have held and now hold high judicial positions. The respondent suggested advocates from South Africa and required the arbitration to take place in Johannesburg in the Republic South Africa. It is significant to point out that the parties have selected the law of Lesotho as the applicable law particularly the Arbitration Act. The choice of Lesotho laws means that the substantive principles of interpretation would apply in seeking to attain the intention of the parties as reflected in the agreement.

13.....

14. In addition to failing to agree to review of rentals, the respondent has not maintained the property to the satisfaction of the Maseru City Council with the result that as long ago as 2008 the applicant raised the issue with it. This resulted in the Maseru City Council threatening the rights of the applicant. The applicant by its letter dated 25 May 2008 requested the respondent to rectify its breaches. A copy of the letter is attached hereto and marked annexure "A2". The respondent failed to comply with the demands of the applicant with the result that a further letter dated 13 August 2008 was written to the respondent. In that letter the applicant once again raised the issue of poor state of repair of the premises and failure by the respondent to maintain the surrounding area. A copy of the letter is attached hereto and marked "A3"

[14] Further, on the issue of jurisdiction, Mr Moekoa, under paragraphs 14, 37 and 38, in part, replied as follows:

"14 In so far as the arbitration is concerned; I reiterate the contents of my founding affidavit.

37 The respondent refused and/or engaged in tactics that were intended to frustrate the process of arbitration. In such circumstances the applicant had no choice except to pursue legal action being one of the options available at its disposal.

38 *I reiterate that the applicant triggered the process of arbitration but its efforts were frustrated and scampered by the respondent.”*

[15] Paragraphs 37 and 38 above serve to confirm that, in its answering affidavit, the appellant indeed raised the issue of referral to arbitration. True, there were disagreements on procedural issues relating to the commencement of the arbitration process envisaged under the arbitration agreement. Despite the disagreements, there was never any suggestion that the parties had abandoned the agreed arbitration route of resolving their dispute. The respondent did not take any steps to move away from or set aside the arbitration agreement in terms of s.4 of the Act.

Appellant’s Case in the court a quo

[16] Mr Fazel Sayanvala, a director in the business of the appellant, deposed to the answering affidavit. He also confirmed that the dispute between the parties was centred on the issue of rentals payable. I need not go into the details of his averments on that, because the fact that the parties had a dispute on the issue of rentals payable is common cause.

[17] However, in addition to confirming the dispute on rent, he also alluded to the issue of arbitration. He averred, in part, as follows:

“14.13.

I deny that Respondent insisted that the arbitration take place in South Africa. Annexure A28 hereto is a letter dated 31st July 2014. In this letter Respondent proposed a solution- As appears from annexure A28, Respondent suggested: -

A solution to this impasse will lie with the appointment of two arbitrators, one chosen by your client and the other chosen by our client. The "two arbitrators" proposal will be an inter alia very expensive exercise.
29.3.

In addition to the foregoing state: -

i)The jurisdiction of this Honourable Court is restricted by the provisions of clause (4)(ii)(b), page 4 of annexure A26 hereto. The clause provides:

In the event that the contracting parties should fail to arrive at a mutual agreement regarding the rental to be paid during any specified option period, the determination of the rental for that period shall be submitted to arbitration in accordance with the provisions of the Arbitration Act 12 of 1980.

29.4.

Had Applicant genuinely disputed the amount of rent paid to it by the Respondent then in that event Applicant could have sought an order to have the issue of the amount of rent that Respondent must pay to it dealt with in accordance with the provisions of the Arbitration Act 12 of 1980, as amended. Despite expiry of more than four (4)/five (5) years, Applicant has failed to have triggered the provisions of the Arbitration Act 12 of 1980 — as amended”.

[18] Given the above averments, it cannot be denied that the appellant raised the special plea of jurisdiction in its answering affidavit. That position, as argued by the respondent in its submissions, cannot be correct. Admittedly,

as I have already stated under paragraph 9 of this judgment, the special plea was not formulated in as well as it should have been but that does not mean it was not raised.

Issues for determination

[19] An examination of the grounds of appeal, listed under paragraph 11 herein, calls upon this court to determine: **whether or not the court a quo was correct in not declining jurisdiction in the face of the arbitration agreement in the sublease in line with decided cases of this court.**

[20] If this court finds that the court a quo should have declined jurisdiction due to the arbitration agreement, then there will be no point in addressing the cross appeal.

The law

[21] There is in the Kingdom of Lesotho legislation which provides for arbitration. The preamble to the Arbitration Act NO. 12 of 1980 (the Act) reads as follows:

“To provide for the settlement of disputes by arbitration tribunals in terms of written arbitration agreements and for the enforcement of the awards of such arbitration tribunals, and for connected matters.”

For our purposes, s.2 of the Act provides the following important definition:

“Arbitration agreement” 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, whether an arbitrator is named or designated therein or not;

[22] The sublease agreement under which the dispute herein arose has an arbitration agreement which fits into the above definition.

In order to give force and effect to the alternative method of dispute resolution (arbitration), the legislature deemed it necessary to make the following provision under s. 4 of the Act:

“Effect of arbitration agreements

4. Binding effect of arbitration agreement and power of court in relation thereto —

(1) Unless the agreement otherwise provides, an arbitration agreement shall not be capable of being terminated except by consent of all the parties thereto.

(2) The court may at any time on the application of any party to an arbitration agreement, on good cause shown — (a) set aside the arbitration agreement; or

(b) order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or

(c) order that the arbitration agreement shall cease to have effect with reference to any dispute referred”.

[23] In refusing to decline jurisdiction, the court *a quo* relied on s. 7(i) of the Act. The said s. provides as follows:

7. Stay of legal proceedings where there is an arbitration agreement.

(1) If any party to an arbitration agreement commences any legal proceedings in any court (including any inferior court) against any other party to the agreement in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time after entering appearance but before delivering any pleadings or taking any other steps in the proceedings, apply to that court for a stay of such proceedings.

(2) If on any such application the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement,

the court may make an order staying such proceedings subject to such terms and conditions as it may consider just".

[24] In ***Tsokolo Franz Kompfi and 12 others vs Government of the Kingdom of Lesotho and 7 others, C OF A (CIV) 43B/2021***, where the provisions of both ss 4 and 7 of the Act were considered, this court, reasoned, in part, as follows:

[1] *The discretion granted to the court in s 4(2) of Lesotho's Arbitration Act is in respect of a contracting party who wishes not to be bound by an arbitration agreement. The section recognises the binding nature of an arbitration agreement and sets out exceptions under which a party may resile from it. It makes plain that a contracting party must give effect to an arbitration agreement unless a court orders otherwise. He or she may only be excused by a court and only for good cause.*

[2] *It goes against the letter and spirit of s 4, as counsel for the applicants effectively does in the supplementary heads of argument, to seek to make arbitration an optional remedy which a party that has agreed to refer a dispute to arbitration may ignore in favour of seeking redress in the High Court - and casting the onus on the other party to seek the remedy of stay in terms of s 7(2) of the Arbitration Act.*

[3] *The GoL had not consented to the termination of the arbitration agreement. The agreement therefore remains binding. When dragged to court it relied on clause 13 and therefore making clear its resolve to proceed to arbitration. It pleaded that the applicants are not entitled to approach court because of clause 13. It did not acquiesce to the applicants approaching court. The fact that it could have asked for a stay of the High Court proceedings which, it bears mention, were brought on an urgent basis, did not denude the GoL the right to object in the manner it did. I see nothing in the language of ss 4 and 7, or indeed the scheme of the Arbitration Act, which suggests that a party to an arbitration agreement may only resist recourse to court in breach of s. 4 by relying on the remedy of stay.*

21. Considering that, in assuming jurisdiction, the court a quo relied on s. 7 of the Act, the above decision of this court is of crucial importance in the determination of this appeal.

Arguments and Disposal

[25] In the main, the appellant, for its case, relies on ***Bataung Chabeli Construction v Road Fund Pty Ltd C of A (CIV) 34/2021*** wherein this Court held that in the presence of an

arbitration clause, the High Court has no jurisdiction. I agree with the appellant's submissions that *Chabeli* supra is not distinguishable from this case. This is so because the only difference between this case and *Chabeli* is that in the latter parties had not yet formally declared a dispute. However, that notwithstanding and as is the case in casu, the parties were engaged in procedural issues relating to arbitration process. In both cases the parties had not abandoned their arbitration agreements.

[26] The respondent is of a different view and argues that the High Court had to determine whether the respondent was entitled to the declaratory orders sought. It argued that the reliefs sought fell outside the ambit of the arbitration clause. To that end the respondent was of the view that it was only the High Court that could determine the reliefs it sought. The respondent also disagreed with the broad application of the finding in *Chabeli*. Having taken that stance, the respondent is in full agreement with the judgment of the court a quo.

[27] I must, however, at this stage, hasten to state that in *Chabeli*, supra, the court went further to point out that, where there is an arbitration agreement between parties, "courts should not be quick to intervene unless the agreements offend public policy. To that end courts should respect the sanctity of contracts." Courts should only assume jurisdiction where it is

clear that the parties have indeed abandoned or set aside their arbitration agreement in terms of s. 4 of the Act.

[28] In its grounds of appeal, particularly ground 3, the appellant avers that the court *a quo* “erred and misdirected itself” by not following the *Chabeli* judgment.

[29] The appellant argued that the arbitration clause focused on the resolution of rental disputes. That being the case, it was argued, prayers 3-7 in the Notice of Motion all related to the issue of rent. A dispute on rent should therefore have been referred to arbitration in terms of clause 4 (ii) (b) of the lease agreement. I agree.

[30] There was never, in casu, any suggestion to the effect that, by agreeing to resolve their disputes under a mechanism provided for under the laws of the Kingdom, the parties were ousting the jurisdiction of the court. The parties simply elected to resolve their disputes through arbitration. That election, which is protected under s. 4 of the Act, ought to be respected. That is what happened in *Chabeli*.

[31] It is important to note that the court *a quo* did not at any time dispute the existence of the arbitration agreement in the sublease. Further, the court did not rule that the matters placed before it could not be arbitrated upon. All the court did was to hastily accept the invocation of s. 7 (i) of the Act. In the face of

the special plea, the court should not have readily accepted the respondent's case on the issue of stay. Instead, the court should have placed the burden on the respondent to justify why it was before the court when there is an arbitration clause in the sublease agreement.

[32] Given the facts of this case, I am satisfied that there was clear evidence that the parties had not abandoned or set aside the arbitration route. They both said so. That explains why, as already noted in its answer, the appellant, under paragraphs 14.3 and 29.3 raised the special plea of jurisdiction. The respondent under paragraphs 37 and 38 of its reply acknowledged that fact. All it did, in my view, was to bring to the fore the fact that the parties were not yet agreed on the modalities of the already triggered arbitration process they wanted to embark on. That position is also reflected under the respondent's prayers 6 and 7 in its Notice of Motion. Disagreement on arbitration modalities did not entitle the respondent to unilaterally move away from the arbitration agreement. If the respondent wanted to take that route, it should have, as a first step, started by proceeding in terms of s.4 (2) of the Act. Rather than dwell on the issue of stay provided for under s.7 (1) of the Act, the court should have called upon the respondent to give sufficient reason for abandoning the arbitration agreement.

[33] It is my finding that the court ignored the need to closely examine all the facts surrounding the case in order to establish

whether or not there was good cause on the part of the respondent to abandon the arbitration route. I am of the view that if the court had done so, it would have declined jurisdiction. Instead, as already stated, the court incorrectly proceeded to invoke the stay provision of the Act (i.e s. 7(i)) and in so doing the court then reasoned, in part, as follows:

[9] With all due respect to the apex court, the views expressed herein are unfortunate and do not tally with the law. Clearly the apex court felt that the presence of an arbitration clause ousts the jurisdiction of the court, this is not correct if schematic arrangement of the Act read with long line of decided cases in the Commonwealth jurisdictions dealing with similarly worded provisions.

In Universiteit Van Stellenbosch v J. A Louw 1983 (4) 321 (AD) at 333 G— H, stating a long-standing position of the law, said:

•'It has always been recognised that an arbitration agreement does not necessarily oust the jurisdiction of the Courts: See The Rhodesian Raibpays Ltd v Mackintosh 1932 AD 359 at 375. See also S. 3(2) of the Arbitration Act 42 of 1965. However that may be, when a party to an arbitration agreement commences legal proceedings, a defendant who was a party the agreement and who has entered appearance to defend and not delivered find pleadings is given the right by S. 6 of the Act to apply to the Court for a slay of the proceedings. The onus of satisfying the court that it should not, in the exercise of its discretion, refer the matter to arbitration is on the party Who instituted the legal proceedings "

[10] The provisions of s. 3(2) and 6 of the Arbitration Act 42 of 1965 relied upon in the above decision are worded — similarly as ss 4 and of the Act. Upon reading of ss 4 and 7 of the Act, one is left in no doubt that the court has jurisdiction in matters where the agreement in contention has an arbitration clause. What must

happen when a party to an arbitration clause institutes proceedings in the court, a defendant/respondent, acting in terms of s. 7 of the Act must apply for a stay of legal proceedings pending arbitration. The party who instituted the proceedings must satisfy the court that there is no sufficient reason to refer the dispute to arbitration in accordance with the agreement. But there is a catch. Before the defendant/respondent can apply for a stay of legal proceedings, two things must happen, namely, (i) the defendant/respondent must enter appearance to defend/notice of Intention to Oppose, and (ii) the application for stay must be lodged before "delivering any pleading or taking any other steps in the proceedings." Failure to comply with these requirements deprives the defendant/respondent of having a recourse to arbitration, and the court will comfortably be seized with the matter despite the presence of the arbitration agreement. By the taking of a further step it is meant that:

"[57] The reported cases are difficult to reconcile, and they give no clear guidance on the nature of the step in the proceedings. It appears, however, that two requirements must be satisfied. First, the conduct of the applicant must be such as to demonstrate an election to abandon his right to stay, in favour of allowing the action to proceed. Second, the act in question must have the effect of invoking the jurisdiction of the court. " (Capital Trust Investment Ltd v Radio Design AB & Others [2002] EWCA Civ 135 (15 February 2002) at para. 57. This decision was followed by this court in P. S Ministry of Agriculture and Food Security Cash Management Services (Pty) Ltd [2022] LSHC 68 Com (12 May 2022).

[11] In the present matter, contrary to s.7, the respondent delivered its pleadings, and to make matters worse, no application for stay of legal proceedings was lodged. The respondent merely contended itself dealing with issue of arbitration in its pleadings and the Heads of argument. BV delivering the pleadings the respondent deprived itself of the right to raise the issue of arbitration, and it should be stated,

perhaps at the risk of being repetitious, that, that issue should only be raised and dealt with in terms of the procedure provided by s. 7 of the Act.

[34] In the circumstances of this case, the position taken by the court a quo cannot be correct. The court was dealing with a permissive provision of the law where its discretion, in my view, should have been used in the interest of giving force to the agreement between the parties. Faced with the appellant's adamant stance that the arbitration agreement be honoured (i.e through the raising of its special plea), there was nothing to stop the court from ensuring that the arbitration agreement was adhered to. The court should have placed it upon the respondent to establish good cause for proceeding with the court process.

[35] In taking this position, I derive comfort from the position taken by this court in *Kompi*, supra. I have reproduced part of that position under paragraph 19 of this judgment. Consequently, and relying on that judgment, I also "see nothing in the language of ss 4 and 7, or indeed the scheme of the Arbitration Act, which suggests that a party to an arbitration agreement may only resist recourse to court in breach of s. 4 by relying on the remedy of stay". That conclusion destroys the foundation on which the decision of the court a quo stood in refusing to decline jurisdiction as had been prayed for by the appellant.

[36] The appellant's special plea was simply telling the court not to proceed because the parties were in a wrong forum.

[37] It is true that the stay provision implies that, if a party goes beyond the notice of appearance/notice to oppose, such a party would have appeared to be submitting to the jurisdiction of the court. However, *in-casu*, I reiterate that the appellant's special plea should not have been ignored on the false basis that the only way to oppose jurisdiction should have been through the filing of an application for stay. That cannot be correct. The stay application could not have been the only legal tool in the hands of the appellant to challenge the jurisdiction of the court. The respondent had, apparently, unilaterally set aside the arbitration agreement without regard to s.4 of the Act.

[38] The appellant's special plea should therefore have been seriously considered. The burden should have been placed on the respondent to justify why, instead of proceeding to arbitration in terms of the party's arbitration agreement, it had decided to approach the High Court. The respondent did that in total disregard of the law as provided for under s. 4 of the Act.

[39] In order not to burden the high Court with disputes that can legally be resolved through other processes provided for under the law, such conduct should be discouraged.

[40] Furthermore, In *Kompi*, supra, this court, in emphasizing the need to respect the sanctity of contracts, said:

“[53] Public policy encourages respect for adherence to agreements to submit disputes to arbitration instead of recourse to courts. Therefore, there must be a very cogent and weighty reason for a party to be allowed to resile from an agreement to submit a dispute to arbitration. The onus rests on the party wishing to do so. The onus of showing good cause is not easily discharged, and the party seeking to resile from arbitration must make out a very strong case.

[54] Contrary to the clear language of s 4 of the Arbitration Act 1980, in the present case there is no consent not to proceed to arbitration and the court has not been asked, on good cause shown, to set aside the arbitration agreement, to order that the dispute not be referred to arbitration or that the arbitration agreement cease to have effect in respect of the dispute that has arisen between the applicants and the GoL.”

[41] The above is an instructive position already taken by this court and I fully agree with it.

[42] In view of the foregoing, I think there is every reason to allow this appeal to succeed. With this appeal having succeeded, there will be no basis for considering the cross appeal.

Order

[43] In the result, it is ordered that;

- a. The appeal is upheld with costs;
- b. The order of the court *a quo* is set aside and substituted with the following:
 1. The application is dismissed for want of jurisdiction.
 2. The appellant shall pay costs of this application.



N.T MTSHIYA
ACTING JUSTICE OF APPEAL

I Agree:



P.T DAMASEB
ACTING JUSTICE OF APPEAL

I Agree:



J. VAN DER WESTHUIZEN
ACTING JUSTICE OF APPEAL

FOR APPELLANT: R. SETLOJOANE

FOR RESPONDENT: MR Q LETSIKA