IN THE HIGH COURT OF LESOTHO
COMMERCIAL DIVISION

HELD AT MASERU **CCA/0017/2022**

In the matter between:

PRINCIPAL SECRETARY MINISTRY OF AGRICULTURE AND FOOD SECURITY
MINISTER OF AGRICULTURE AND FOOD SECURITY **1st APPLICANT**

MINISTER OF AGRICULTURE AND FOOD SECURITY **2nd APPLICANT**

ATTORNEY GENERAL **3RD APPLICANT**

AND

SAFEGUARD SECURITY CASH MANAGEMENT SERVICES (PTY) LTD **1ST RESPONDENT**

Neutral Citation: P.S Ministry of Agriculture and Food Security and Others v Safeguard Security Cash Management Services (Pty) Ltd [2022] LSHC 68 Com (12 MAY 2022)

CORAM: **MOKHESI J**

DATE OF HEARING: **16 MARCH 2022**

DATE OF JUDGMENT: **12 MAY 2022**

SUMMARY

CIVIL PRACTICE: *Arbitration- application for stay of proceedings pending arbitration in terms of Arbitration Act of 1980- The applicant having raised court's lack of jurisdiction as a preliminary point- whether such constituted the taking of a further step in terms of section 7 of the Arbitration Act- Held, such a move does not amount to taking a step in the proceedings so as to deny the applicant an opportunity to apply for a stay of proceedings pending arbitration- Consequently, arbitrable issues referred to arbitration and the question of the review of the decision to award the work to the 3rd respondent in the main application, left aside to be tried before the court.*

ANNOTATIONS

Statutes:

Arbitration Act 1980

Cases:

Director of Public Prosecutions v Ramoepana (C of A (CIV) 49/2020 [2021] LSCA 25 (14 May 2021

SOUTH AFRICA

Universiteit Van Stellenbosch v J A Louw (Edms) Bpk 1983 (4) SA (AD) 321

Capital Trust Investment Ltd v Radio Design AB & Others [2002] EWCA Civ 135 (15 February 2002)

Compton Street Motors CC t/a Nallers Garage Service Station v Bright Idea Projects 66 (Pty) Ltd t/a All Fuels 2022(1) SA 317 (CC)

Zhongji Development Construction Engineering Limited v Kamoto Copper Company Sari 2015 (1) SA 345 (SCA): [2014] 4 ALL SA 617 (SCA) (1 October 2014)

Aveng (Africa) Ltd formerly Grinaker LTA t/a Grinaker – LTA Building East v Midros Investments (Pty) Ltd (3187/05) [2011] ZADZD HC 14; 2011 (3) SA 631 (KZD); [2011] 3 ALL SA 204 (KZD) 08 March 2011)

Valkin v Valkin 1953 (4) SA 510 (W.L.D) Transvaal Alloys v Polysius 1983 (2) 630

UNITED KINGDOM

Bilta (UK) Ltd (In Liquidation) v Nazir & Ors [2010] EWHC 1086 (ch) (17 May 2010)

Fiona Trust & Holding Corporation and Others v Privalor and Others [2007] 4 ALLER 951 (HL):

JUDGMENT

[1] **Introduction and background**

On the 24 February 2022 Safeguard Security Cash Management Services (Pty) Ltd (applicant in the main case) lodged on urgent application for review of the decision by the Principal Secretary for the Ministry of Agriculture and Food Security (the 1st respondent in the main) and others, to terminate a contract between the Ministry of Agriculture and the applicant in the main, and to award it to the 3rd respondent in the main (Top Flight Security (Pty) Ltd.). The contract was for provision of security services for different departments within the Ministry of Agriculture. Mr Ndebele appeared for the applicant and Mr Thakalekoala for the 1st, 2nd and 4th respondent (Attorney General). The matter served before Mathaba J., and as Mr Thakalekoala was raising preliminary points from the bar that the matter was not urgent as had been classified by the applicant, and that this court did not have jurisdiction in view of the presence of the arbitral clause in the contract between the applicant and the Ministry of Agriculture. Mathaba J., postponed the matter to the 28 February 2022 for counsel to prepare written submission on the issues raised.

[2] On the 28 February 2022 both counsel appeared before me to argue the preliminary points raised. Mr. Thakalekoala was alerted to the existence of the provisions of Section 7 of Arbitration Act 1980 (hereinafter 'the Act') which he seemed totally oblivious to. He was not aware that what he should have applied for was a stay of the proceedings in the main pending arbitration. His attention having been drawn to this provision, Mr

Thakalekoala readily conceded that this court has jurisdiction, (see: **Universiteit Van Stellenbosch v J A Louw (Edms) Bpk 1983 (4) SA (AD) 321** at 333G – 334B). I consequently dismissed the point, and on the spot Mr Thakalekoala intimated to this court that he will invoke the provisions of section 7 of the Act by filing an application for stay of action pending arbitration. The current is such an application brought in terms of the said provisions of the Act. This application is opposed.

[3] **Respective Parties' Arguments**

The Applicants:

Principal Secretary of the Ministry of Agriculture, Mr 'Mole Khumalo deposed to a founding affidavit in which he averred that in terms of clause 8 of the agreement between the parties, the applicant was obliged to have their disputes referred to arbitration. He averred that the applicants are ready and willing to have this dispute resolved in this manner. The applicants argued that they did not take further step by raising the point of jurisdiction as argued by the respondent.

[4] **The respondent:**

The respondent advanced a number of reasons why this court should not stay the proceedings pending arbitration, namely:

(i) The applicants have no right to seek the relief of stay because they have taken a further step in the proceedings when they raised two points of law, *viz*, jurisdiction and lack of urgency which were dismissed by this court. It should, however, be stated that it is not accurate for the respondent to say that the issue of urgency was dealt

with by this court. Only the issue jurisdiction was dealt with and dismissed. In short, the respondent is saying, by raising the dismissed jurisdictional point, the respondents have lost their right to have the proceedings stayed pending the determination of arbitration.

(ii) One of the reliefs sought are directed at the third party (3rd respondent, Top Flight Security (Pty) Ltd) who is not a party to the arbitration agreement. It is only this court which has the power to resolve the issue involving the third respondent, not the arbitrator and that it is cheap to solve this dispute in court, and further that the applicant had rejected a request for referral to arbitration.

(iii) That the agreement between the parties has been terminated and therefore, neither party is bound by its arbitration clause.

[5] **Issues for determination**

(i) Whether applicants took a further step by raising the point of jurisdiction; and

(ii) Whether this application should succeed.

[6] **Discussion and the law**

Taking a further step in the proceedings.

As already stated, the issue to be determined is whether raising a preliminary point of jurisdiction constitute taking of further step within the meaning of the provisions of section 7 of the Act. The said section provides that:

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

(1) If any party to an arbitration agreement commences any legal proceedings in any (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."

[7] Essentially, Section 7(1) provides a time within which an application of this nature should be made. It should be made only after a party will have entered appearance to defend, relevant for the instant matter, after he will have filed Notice of Intention to oppose the main matter. Section 7(1) goes on to say that an application for stay should be lodged before delivery of any pleadings or taking any other steps in the proceedings. The present matter concerns the latter aspect. Should the applicant's counsel's raising of the issue regarding jurisdiction of this court to entertain the main matter be regarded as "taking steps in the proceedings." This phrase has not been defined in the Act. In my reading of the section, the taking of step should manifest the party's intention to submit to the court's jurisdiction to determine the matter to finality. This view is supported by persuasive English authorities as it is demonstrated below.

[8] Section 7(1) of the Act, is framed in similar terms as section 9(3) of the English Arbitration Act of 1996, section 1(1) of the English Arbitration Act 1975 and section 4 of the English Arbitration Act 1950. In **Capital Trust Investment Ltd v Radio Design AB & Others [2002] EWCA Civ 135 (15 February 2002)** said the following regarding the taking of step in the proceedings:

> *"56. In **Yuval** case, in a passage which was subsequently followed in the **Kuwait Airways** case, Lord Denning MR put the underlying principle in this way (at p.361):*
>
> > *'On those authorities, it seems to me that in order to deprive a defendant of his recourse to arbitration a 'step in the proceedings' must be one which impliedly affirms the correctness of the proceedings and the willingness of the defendant to go along with the determination by the courts of law instead of arbitration.'*
>
> *57. More recently, this Court considered section 9(3) of the 1996 Act in **Patel v Patel.** Lord Woolf MR said (at p. 555G) that the old law was conveniently summarized in **Mustill & Boyd, Commercial Arbitration,** 2nd edition (1989) p. 472, where the editors said:*
>
> > *'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.'*

As we read Lord Woolf's judgment, a similar approach should be adopted under the 1996 Act. In the same case (at p 558B) Otton LJ approved the following statement at paragraph 6.19 of ***Merkin, Arbitration Law:***

> *'The old authorities, which remain good law under the Act of 1996, established the following propositions … (e) An act which would otherwise be regarded as a step in the proceedings will not be treated as such if the applicant has specifically stated that he intends to seek a stay.'" (see also:* ***Bilta (UK) Ltd (In Liquidation) v Nazir & Ors [2010] EWHC 1086 (ch) (17 May 2010)*** *at paras. 28 – 29).*

[9] Jurisdiction is a threshold issue. It refers to the Court competency to hear and determine the matter (**Director of Public Prosecutions v Ramoepana (C of A (CIV) 49/2020 [2021] LSCA 25 (14 May 2021** at para. 42). Applying the principles stated above, can it be seriously be contended that by raising this court's lack of jurisdiction, the applicant was manifesting an intention to proceed with the main matter? The answer should be in the negative. If the applicant was querying this court's competency to determine the issues between the parties, that cannot be regarded as taking a step within the meaning of section 7(1) of the Act.

[10] The Court has a discretion whether to stay but will only exercise it in favour of staying the proceedings where there is "sufficient reasons" for adopting such an avenue (see: **Universiteit Van Stellenbosch** case (supra) at 339G – 334B). This is in line with recognition by the courts of law that arbitration process which has been chosen by the parties through a binding agreement must be respected unless sufficient reasons for not doing so are found to exist (see: **Zhongji Development Construction Engineering Limited v**

Kamoto Copper Company Sari 2015 (1) SA 345 (SCA): [2014] 4 ALL SA 617 (SCA) (1 October 2014) at para. 50). The onus of satisfying the court that there are sufficient reasons not to exercise its discretion in favour of referral to arbitration, rests on the party who instituted legal proceedings (**Universiteit Van Stellenbosch** case above at p. 333H). This discretion will only be exercised against referral of arbitration "when 'a strong case' had been made out (**Universiteit Van Stellenbosch** case **(**supra) at p. 334A).

[11] Sufficiency of reasons is a matter which is sensitive to the facts of every case. At was authoritatively stated in **Compton Street Motors CC t/a Nallers Garage Service Station v Bright Idea Projects 66 (Pty) Ltd t/a All Fuels 2022(1) SA 317 (CC)** at para. 48. While dealing with a similarly worded section 6(1) of the South African Arbitration Act 1965:

> *"…The types of reasons that must be given and considered are not specified in the Arbitration Act [even in our case]. To be satisfied or persuaded that sufficient reasons exist, a court can therefore have regard to several disparate and incommensurable factors when considering the reasons proffered by the parties for and against a stay, and these will invariably differ from case to case. While the reasons must be compelling to sway a court against a stay, any number of factors could influence a court to exercise its discretion in one way or the other."*

[12] Clause 8 of the Agreement between the parties regarding arbitration, provides that:

> *"8.1 Amicable settlement*

The Parties shall use their best efforts to settle amicable all disputes arising out of or in connection with this contract or its interpretation.

8.2 Dispute settlement
If any dispute arise between the Employer and the Service Provider in connection with, or arising out of, the contract or the provision of the services, whether during carrying out the services or after their completion, the matter shall be referred to arbitration within fourteen (14) day of the notification of disagreement of one party to the other.

The dispute shall be finally settled by a single arbitrator in accordance with the Arbitration Act 1980 of the Kingdom of Lesotho and amendments thereto.

Arbitration shall be conducted in Maseru Lesotho and (sic) accordance with the arbitration procedure agreed between the parties."

[13] Arbitration serves a commercial purpose of having dispute resolved through the channel of the parties' own choosing, for its efficiency and for avoidance of delay normally associated with courts of law. As Lord Hoffman stated in **Fiona Trust & Holding Corporation and Others v Privalor and Others [2007] 4 ALLER 951 (HL):**

"6. In approaching the question of construction, it is therefore necessary to inquire into the purpose of the particular clause. As to this, I think there can be no doubt. The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy the

availability of legal services at the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, particularly, in proceedings before a national jurisdiction.

7. If one accepts that this is the purpose of an arbitration clause, its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts…

8. A proper construction therefore requires the court to give effect, so far as the language used by the parties will permit, to the commercial purpose of the arbitration clause."

[14] The argument by the respondent that proceeding with the current matter instead of going for arbitration is cheaper, cannot be correct. Arbitration is a cheaper and efficient method of business disputes resolution. In view of the commercial rationale for arbitration, the courts' natural inclination to be territorial and to stake a claim to jurisdiction over a matter which is serving before them, should give way to leaning towards respecting the parties' chosen method of dispute resolution (**Aveng (Africa) Ltd formerly Grinaker LTA t/a Grinaker – LTA Building East v Midros Investments (Pty) Ltd (3187/05) [2011] ZADZD HC 14; 2011 (3) SA 631 (KZD); [2011] 3 ALL SA 204 (KZD) 08 March 2011)** at para. 13 **).**

[15] Now reverting to the facts of this case, It is clear from the correspondence between the parties that there are counter-allegations of breach of contract,

and these allegations on the part of the applicants led to the termination of contract on the 28 January 2021, but, before this termination, the respondent had authored a letter on the 19 January 2022 protesting allegations of breach of contract and allegations of theft against it. In the same letter the respondent says it "lodges and declares a dispute against all allegations of theft meted out on it by the Ministry and requested that the matter be referred to arbitration in terms of clause 8 of the agreement." This invitation was not taken up by the applicants, who instead issued a termination letter alluded to above. It is this non-response to the respondent's declaration of dispute which the respondent classifies as disinterest of the part of the applicant to have their disputes arbitrated. I, however, do not see things that way, when one looks at the applicants' founding affidavit, it is put explicitly that the applicants are ready and willing to have their disputes arbitrated.

[16] As one of the reasons for resisting this application, the respondent contends that because the contract has been terminated there is nothing to be arbitrated. This contention does not seem to be mindful of the terms of clause 8 which says disputes which are to be referred to arbitration must be *"in connection with, or arising out of, the contract or the provision of the services whether during carrying out the services or after their completion,.."* If the clause refers to disputes which arise during the carrying out of the services or after completion, there is no reason, in my view, to construe it as excluding disputes which arise before the completion of services due to pre-mature termination of the contract. Pre-mature termination is in connection with or arise out the contract, because it is based on what the applicant regard as contract breaches by the respondent.

Therefore, the reason, that the proceedings should not be stayed because the contract has been terminated is not a sound one and is rejected.

[17] One of the main planks on which the respondent's resistance to staying the proceedings, is that some of the reliefs sought affect non-parties to the agreement, as there is a prayer for the review of the decision to award Top Flight Security Co. a contract for provision of security services after the 1st respondent was terminated. I do not think there is any merit in this contention because the determination of the issue whether the 1st applicant's decision to award the contract to the 3rd respondent (in the main application) after terminating the respondent's contract is reviewable is not intertwined with the issues which the parties have agreed that they be arbitrated. This relief falls within the review powers of this court. There is nothing in law which prohibits this court from staying only arbitrable issues and leaving the issue of review of the decision to award 3rd respondent a contract (in the main) to be tried in this forum. Support for this course is to be found in **Valkin v Valkin 1953 (4) SA 510 (W.L.D) Transvaal Alloys v Polysius 1983 (2) 630 at 653 B – E.** In **Valkin v Valkin** (above), the court quoted the learned author Russell on Arbitration 15th ed., at 514, where the learned author at p. 66 is quoted to have said:

> *"It may be desirable to stay proceedings as to part only, if only that part is appropriate to be decided by arbitration: as where only that part is within the agreement to refer; or the dispute involves in addition to that part a pure question of construction. The court's exercise of its discretion, however, will of course, depend upon whether it is convenient to try the different parts of the dispute separately. Thus a stay will normally be entirely refused where only a 'subordinate and trifling' part of the dispute*

is agreed to be referred; or where two claims one inside and one outside the agreement turn on substantially the same facts; or the arbitrator can only decide the amount of the claim and not the liability."

In light of the above principles I am inclined to separate issues by ordering that issues which are arbitrable be referred to arbitration while others should be determined by this court.

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

(a) The application for a stay succeeds in relation to Prayers 2.1, 2.3, 2.4 and 2.5 of the Notice of Motion.

(b) Prayer 2.2 should be tried before this court.

(c) The applicants are awarded the costs

MOKHESI J

For the Applicants: **Adv. Thakalekoala from Attorney General's Chambers**

For the Respondent: **Mr. K. Ndebele from K. Ndebele Attorneys**