

IN THE HIGH COURT OF LESOTHO
(Commercial Court Division)

HELD AT MASERU

CCA/0018/2023

In the matter between:

**GOLDEN REWARDS CIVILS & CONSTRUCTION
CONSTRUCTOR (PTY) LTD**

APPLICANT

And

**PRINCIPAL SECRETARY MINISTRY OF
LOCAL GOVERNMENT**

1ST RESPONDENT

**MINISTRY OF LOCAL GOVERNMENT &
CHIEFTIANSHIP**

2ND RESPONDENT

THE ATTORNEY GENERAL

3RD RESPONDENT

Neutral citation: Golden Rewards Civils & Construction Constructor (Pty) Ltd
v PS Ministry of Local Government & 2 Others (No.1 [2023] LSHC 62 COM
(27th March 2023)

CORAM: MATHABA J
Heard On: 16th March 2023
Delivered On: 27th March 2023

SUMMARY

Arbitration – Parties agreeing to have their dispute resolved by arbitration – Once a party signs for arbitration, it cannot invoke jurisdiction of High Court when arbitration agreement is extant and its enforcement is not against public policy – Agreements freely entered into must be honoured.

ANNOTATIONS:

Statutes

Constitution of Lesotho 1993

High Court Rules 1980

Public Procurement Regulations 2007 (as amended)

Cited Cases

Lesotho

Batuang Chabeli Construction (Pty) Ltd v. Road Fund (C of A (CIV) 34/2020) [2021] LSCA 17 (14 May 2021)

Felleng ‘Mamakeka Makeka v. Africa Media Holdings C/O Lesotho Times and 2 others CCA/0085/2021 [2021] LSHC 8 COM (9th February, 2022)

Kompi and Others v Government of the Kingdom of Lesotho and Others C of A (CIV) 43B/2021 (10 March 2022)

Phomolong Investment (Pty) Ltd v. KEL Property Company (Pty) Ltd (C of A (CIV) 28/2022)

Principal Secretary of Labour and Employment and Others v Russel (C of A (CIV) 27/2021 LSCA 12 (20 October 2021)

Shale v. Shale and Others (C of A (CIV) No 35/2019) [2019] LSCA 45 (01

November 2019)

The Ministry of Trade and Industry and Others v. Mohato Seleke C of A (CIV)
No. 41/2021 (16 August 2021)

South Africa

Graaff-Reinet Municipality v. Van Ryneveld's Pass Irrigation Board 1950 (2)
SA 420 (A)

RULING

INTRODUCTION:

[1] The applicant is seeking an order reviewing and setting aside the decision of the 1st respondent to temporarily stop the commencement of periodic maintenance of pave road at Hlotse Urban under contract No: 7 of 2022/2023, (*“Hlotse contract”*), and rehabilitation of gravel road at Ha Molapo – Liphofung (Leribe) under contract No: 05 of 2022/2023, (*“Liphofung contract”*), as well as an order compelling and directing the 1st and 2nd respondent to authorise the applicant to commence with the periodic maintenance and rehabilitation.

[2] The application was instituted on 28th February 2023 and set down to be moved on 3rd March 2023 for purposes of obtaining an order facilitating

hearing of the matter on an expedited basis. However, by the time the matter was called the respondents had filed intention to oppose and a notice to raise a point of law in terms of rule 8(10)(c)¹ amongst others challenging jurisdiction of this Court to hear the matter.

BACKGROUND:

[3] On 24th November 2022 the applicant and the 1st respondent signed Liphofung contract and on 3rd December 2022 the same parties signed Hlotse contract. This was following procurement process under Procurement Regulations of 2007. The descriptions of the contracts appear in paragraph 1 of this ruling.

[4] Implementation of both contracts was to commence before the end of the financial year to avoid the allocated funds being returned to the funder at the end of the financial. Accordingly, on 30th November 2022 and on 2nd January 2023 the 2nd respondent gave the applicant notices to commence implementation of Liphofung and Hlotse contracts, respectively. As a consequence, the applicant mobilized and delivered to the sites machinery that was going to be used in the projects.

¹ High Court Rules of 1980 (As amended)

[5] On 25th January 2023 the 1st respondent issued a letter informing the applicant of the 2nd respondent 's resolution to temporarily stop the projects as it assesses its ability to meet its contractual obligations. The applicant contends that the decision is unlawful in that the respondents acted *ultra vires* their powers in reaching it and that they violated *audi alteram partem*. Therefore, it seeks the decision to be reviewed and set aside and a consequential order for the respondents to authorize it to commence with the projects.

NOTICE IN TERMS OF RULE 8(10)(C):

[6] The respondents' contend, firstly that this Court lacks jurisdiction over the matter as the parties committed to arbitration as a dispute resolution mechanism in terms of clause 20.2 read with clause 20.4 of the contracts, secondly that the nature of the relief sought does not fall within the jurisdiction of this Court and thirdly that clause 8 of the parties contracts provides the applicant with remedies in the event of delays not attributed to it, thus this application is abuse of court process.

Lack of jurisdiction

[7] Jurisdiction is defined as "the power or competence of a Court to hear and determine an issue between the parties, and limitation may be put upon

such power in relation to territory, subject matter, amount in dispute, parties etc.” See: **Graaff-Reinet Municipality v. Van Ryneveld’s Pass Irrigation Board** 1950 (2) SA 420 (A) at 424. Once a jurisdictional challenge is raised, “the court must dispose of it first before entering upon any further questions that are in the case.” See: **Shale v. Shale and Others** (C of A (CIV) No 35/2019) [2019] LSCA 45 (01 November 2019), para 8. As a result, I am obliged to first determine if this Court has jurisdiction to entertain this matter.

[8] During argument, the respondents conceded that the dispute between the parties arose from a commercial or business relationship between them as result of which it falls within the purview of this Court. Therefore, as far as jurisdiction is concerned, the only issue that remains a bone of contention is whether the dispute is arbitrable.

[9] Counsel for applicant veraciously argued that the reliefs sought in the notice of motion fall within this Court’s review powers. He placed reliance on section 119 (3) of the Constitution in support of the contention that this Court has jurisdiction over the matter. Counsel argued that the 1st respondent exercised public power and not contractual right in temporarily stopping commencement of the contracts. He invoked the decision of the Court of Appeal in **The Ministry of Trade and Industry and Others v. Mohato Seleke** C of A (CIV) No. 41/2021 in support of the proposition that where a dispute

concerns exercise of public power, it is justiciable before this Court. He contended that the dispute is not arbitrable under clause 20.2 read with clause 20.4.

[10] Conversely, Counsel for respondents argued that in terms of clause 20.2 read with clause 20.4 the parties agreed to refer any dispute whatsoever in relation to the contracts to Dispute Arbitration Board for decision, thus ousting this Court's jurisdiction. He relied on the decision of the Court of Appeal in **Kompi and Others v Government of the Kingdom of Lesotho and Others** C of A (CIV) 35/2021² at para 76 for the proposition that arbitration agreement has the effect of ousting the jurisdiction of this Court.

[11] Counsel further sourced support from the decision of **Batuang Chabeli Construction (Pty) Ltd v. Road Fund** (C of A (CIV) 34/2020) [2021] LSCA 17 (14 May 2021). In particular, he the quoted the following passage in his heads of argument:

point “Clearly the principles of law enunciated in the above cases emphasize the point that where arbitration agreements exist, courts should not be quick to intervene unless the agreements offend public policy. To that end courts are obliged to respect the sanctity off contracts... The foregoing leads me to the final conclusion that, as long as arbitration remained the declared route of resolving disputes under the contract, it was not proper for the appellant to change course and follow the litigation route through the courts. To that end, the High court cannot be faulted for having declined jurisdiction.”

[12] The respondents also argued that the applicant has not exhausted

² The correct case number is C of A (CIV) 43B/2021

local remedies available to it. They relied on the decision of the Court of Appeal in the **Principal Secretary of Labour and Employment and Others v Russel** C of A (CIV) 27/2021 LSCA 12 (20 October 2021) in support of the view that where there is avenue for dispute resolution, the aggrieved party must first exhaust it before approaching a court of law.

[13] In my view, **Seleke** is distinguishable. In that case the parties had not chosen arbitration as a form of dispute resolution mechanism hence the debate whether the matter fell within the exclusive jurisdiction of the Labour Courts and/or Labour tribunals or the High Court. Having found that the decision by the Minister to renew or not to renew Seleke's contract of employment involved the exercise of public power, both the High Court and the Court of Appeal held that the Minister's conduct was reviewable under the broad review powers of the High Court as it amounted to an administrative act.

[14] In *casu* jurisdiction of this Court is resisted on ground that the dispute is arbitrable. The applicant has not filed of record the entire contracts. Similarly, the respondent's notice in terms of rule 8(10)(c) covers the import of clause 20.4 without necessarily quoting it. By consent of parties, the respondents subsequently filed an extract which amongst others covers clauses 20.2 and 20.4. I discovered that the extract only relates to Liphofung contract as I was preparing the ruling. Out of abundance of caution my Judge's Clerk

contacted Counsel for the parties about the missing extract. Consequently, the respondents Counsel filed an extract in respect of Hlotse contract. The clauses in both contracts are identical and read as follows:

- | | |
|--|--|
| “20.2 Appointment of the Dispute Arbitration Board | Disputes shall be referred to a DAB for decision in accordance with Sub-Clause 20.4 [Obtaining Dispute Arbitration Board’s Decision]. The Parties shall appoint a DB by the date stated in the Contract Data. |
| 20.4 Obtaining Dispute | If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either Party may refer the dispute in writing to the DAB for its decision, with copies to the other Party and the Engineer. Such reference shall state that it is given under this Sub-Clause.” |

[15] The applicant ‘s contention is that the 1st respondent exercised public power in issuing the letter temporarily stopping commencement of the projects. However, this has not been alleged in the founding papers. Be that as it may, the arbitration clause in both contracts covers a dispute of any kind whatsoever arising between the parties in connection with or arising out of the contracts or the execution of works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the engineer.

[16] Undoubtedly, clause 20.4 is a catch-all phrase covering all disputes arising between the parties in connection with the contracts or their

implementation. Therefore, it is inconsequential that a source of a dispute is the exercise of public power or contractual rights. Once it is a dispute arising out of or in connection with the contracts or their implementation, it is arbitrable under clause 20.4. Though the pleadings were carefully crafted to support invocation of public law remedies, this does not detract from the fact the dispute between the parties relates to or is in connection with the contract or its implementation.

[17] The proposition that the relief which the applicant seeks is a decisive factor in determining whether this Court has jurisdiction over the matter or not is a non – starter. In **kompi**, *supra*, the High Court upheld the objection to its jurisdiction and dismissed the application for want of jurisdiction on the ground that the arbitration agreement was broad enough to cover the dispute between the parties. In confirming the decision of the High Court, the Court of Appeal interrogated the Arbitration Act No. 12 of 1980, in particular section 4 which is to the following effect:

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

[18] It then continued to say the following in emphasising the

importance of the parties sticking to their arbitration agreement:

“[76] The discretion granted to the court in s 4(2) of Lesotho’s Arbitration Act 1980 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.

[77] 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 1980.

[78] 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 were 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 1980, which suggest that a party to an arbitration agreement may only resist recourse to court in breach of section 4 by relying on the remedy of stay.”

[19] Likewise in **Bataung Chabeli**, *supra*, the applicant sought a review and declarator relief. In confirming the decision of the High Court declining jurisdiction the Court of Appeal said the following:

“[20] Guided by the parties’ own agreement, the Act and the persuasive case authorities cited above, I have no hesitation in concluding that by opting for arbitration, as is the case in *casu*, the parties voluntarily selected a dispute resolution mechanism as an alternative to litigation

through the conventional courts. That choice ought to be respected by the courts. Indeed if a party wishes to abandon an arbitration agreement, it is at liberty to do so as provided for under section 4 (2) of the Act quoted above. That is not the case in *casu*. The parties are still bound by the arbitration agreement in as far as any disputes arising under the contract are concerned. Admittedly in *casu* no dispute was ever declared. However, it goes without saying that a matter can only be referred to arbitration upon a declaration of a dispute. It is only after the declaration of a dispute that the arbitration processes will then be triggered. The 1st respondent as already stated wanted the process to be done procedurally.

[21] The foregoing leads me to the final conclusion that, as long as arbitration remained the declared route of resolving disputes under the contract, it was not proper for the appellant to change course and follow the litigation route through the courts. To that end, the High Court cannot be faulted for having declined jurisdiction. As already pointed out in paragraph 12 and 13 of this judgment, without jurisdiction, this court cannot consider the merits of the appeal. The High Court, in my view, correctly respected the contractual arrangement between the parties.

[22] This appeal cannot therefore succeed and should be dismissed with cost.”

[20] In emphasising that the election to resolve disputes through arbitration must be respected and enforced the Court of Appeal said the following in **Phomolong Investment (Pty) ltd v. KEL Property Company (Pty) Ltd** C of A (CIV) 28/2022:

“[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 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*.”

[21] The lessons learned from the decisions of the Court of Appeal, which are binding on this Court is that, where parties have entered into arbitration agreement and it is still extant, courts should not be quick to

intervene unless arbitration agreement offends public policy. Public Policy demands that agreements freely entered into must be honoured. It is only when an agreement or its enforcement is so unfair, unreasonable or unjust that it is contrary to public policy that a court must disregard it and refuse to enforce it. In *casu*, the parties chose arbitration as their dispute resolution mechanism *vis a vis* conventional litigation through courts of law. They have not abandoned their choice, neither have they been excused from the dictates of the agreement by a court of law. Therefore, they are still bound by the arbitration agreement and must honour it. This Court accordingly declines jurisdiction over this matter.

Costs:

[22] Counsel for respondent argued that the applicant must be mulcted with costs at a higher scale of attorney and client. In **Felleng ‘Mamakeka Makeka v. Africa Media Holdings C/O Lesotho Times and 2 others** CCA/0085/2021 [2021] LSHC 8 COM (9th February, 2022), para 28 – 49 I extensively dealt with the circumstances under which special costs may be awarded. No such circumstances have been pointed out to me in this case. The applicant has not conducted itself in an objectional manner, neither has it abused court process. Rather, I commend the applicant’s Counsel for not having taken advantage of the respondents’ omission to file the extracts on which their defence was anchored.

[23] Even as I decline to grant special costs in this case, I must caution that in the not-too-distant future, it may be appealing to mulct litigants who invoke jurisdiction of this Court in circumstances where arbitration agreement has not been abandoned and they are not even seeking to resile from it. This is one issue where the Court of Appeal has been categorically clear and consistent on. As a result, inviting the court to rehash the same principles in respect of the same legislation in subsequent proceedings that are grounded on more or the less the same facts or legal principles, maybe considered not only a waste of judicial resources, but an abuse of court process as well, thus warranting the special costs.

Order:

[24] It is for the above reasons that I make the following order:

24.1 The application is dismissed with costs on a party and party scale.

A.R. MATHABA J
Judge of the High Court

For the Applicant: Adv. R. D. Setlojoane

For the Respondents: Adv. M. J. Nku