REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No

[redacted]

DATE SIGNATURE

Case No: A2023-029642

In the appeal between:

NI MFEKA TRANSPORT (PTY) LIMITED Appellant

and

DHL INTERNATIONAL (PTY) LIMITED t/a DHL EXPRESS Respondent

JUDGMENT

This judgment is deemed to be handed down upon uploading by the Registrar to the electronic court file.

Gilbert AJ:

1. The appellant appeals the magistrate's upholding of a special plea staying the appellant's magistrate's court action in terms of section 6(1) of the Arbitration Act, 1965 pending the outcome of an arbitration process.

2. The appellant instituted action in the magistrate's court against the respondent for payment of contractual damages in an amount of R174 000.00. The appellant in its particulars of claim pleaded the conclusion of a written agreement between the parties, that the respondent repudiated the agreement, that the appellant elected to cancel the agreement consequent upon the respondent's repudiation and that this resulted in contractual damages by way of lost profit of R174 000.00.

3. The respondent raised by way of special plea that the action was to be stayed pending the resolution of the dispute between the parties in terms of the dispute resolution mechanism provided for in the agreement by way of arbitration.

4. The appellant did not replicate to the special plea.

5. Neither was any evidence led for purposes of the special plea.

6. The parties consequently argued the special plea before the magistrate based on the pleadings alone, being the particulars of claim and special plea.

7. The magistrate in her reasons of a page for upholding the special plea found that the parties were bound by the arbitration clause, and so upheld

the special plea, staying the action pending the outcome of an arbitration process.

8. The basis of the appeal is relatively narrow, and that is that the magistrate erred in the exercise of her discretion.

9. The appellant does not dispute that the arbitration clause is binding or otherwise not enforceable. The appellant accepts that the dispute falls within the ambit of the arbitration clause. There is no dispute as to the interpretation of the arbitration clause.

10. The appellant asserts that that the magistrate erred in the exercise of her discretion when granting the stay, either because she did not exercise her discretion at all, or if she did, she did so with reference to the binding effect of the arbitration clause and to the exclusion of factors put forward by the appellant during argument before the magistrate why the stay should not be granted.

11. As was emphasised by the appellant's counsel during argument, the appellant is particularly aggrieved that the factors put forward during its argument before the magistrate as to why the stay should not be granted do not feature in the magistrate's one page of reasons. This is allegedly indicative that the magistrate did not exercise her discretion judicially.

12. As the magistrate allegedly did not exercise her discretion judicially, the appellant seeks that the appeal court interfere in the magistrate's decision and that the appeal court decide whether the stay is to be granted.

13. As stated and as confirmed by Mr Voyi for the appellant, during the hearing of the appeal, the appellant did not replicate to the special plea and did not lead any evidence in opposition to a stay of proceedings. Rather, such factors relied upon by the appellant were raised before the magistrate by way of argument by the appellant's attorney, and which are stated in the notice of appeal. These are that effectively that:

13.1. arbitration proceedings would be prohibitively expensive as contrasted to the instituted magistrate's court action;

13.2. the costs of the arbitration proceedings would exceed the appellant's claim of only R174 000.00;

13.3. to require of the appellant to proceed by way of arbitration would effectively preclude it from having its claim determined because it as a 'small company struggling financially' could not afford arbitration proceedings;

13.4. in the circumstances a referral to arbitration would implicate its constitutional right of access to court in terms of section 34 of the Constitution as it would then not be able to have its claim determined and that it was not 'in the interests of justice' to refer the dispute to arbitration.

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14. The respondent's counsel, Mr Berlowitz makes the point in his heads of argument on appeal that no evidence was adduced by the appellant before the magistrate in support of what are factual assertions, such as that arbitration proceedings would be prohibitively expensive and that the appellant could not afford arbitration proceedings. The respondent argues that reliance cannot be placed by the court (whether before the magistrate or on appeal) on the appellant's 'unsubstantiated allegations from the side bar' and 'the appellant's *attorney's ipse dixit'*.

15. The respondent argues that in any event these do not constitute adequate grounds for a stay of the arbitration proceedings and that the magistrate did not err in the exercise of her discretion in granting the stay.

16. There is no dispute between the parties that a court exercises a discretion when deciding whether to stay proceedings pursuant to an arbitration clause, and that the discretion must be exercised judicially. It is in the exercise of that discretion, and on the basis of the material that the magistrate had before her when exercising the discretion, that the parties part ways.

17. Both parties referred to *Parekh v Shah Jehan Cinemas (Pty) Limited and others* 1980 (1) SA 301 (D), where Didcott J said at 305G/H "*[t]he Court has a discretion whether to call a halt for arbitration or to tackle the dispute itself*" and at 306A that the remedy is "*discretionary. Its grant depends on a variety of circumstances. At the stage of an exception the Court knows but a few of these. It is insufficiently equipped to use its discretion*".

18. Didcott J in *Parekh* continued at 306B as follows in explaining why an exception is not an appropriate manner to seek a stay:

> "*Instead of an exception in the situation like the present, the party bent on arbitration must therefore lodge either a substantive application under the Arbitration Act 42 of 1965 for the requisite stay, or a plea in the action asking for one. Each side then has the opportunity to furnish by affidavit or to plead the material thought to have a bearing on the exercise of the court's discretion, together with information intending to show, whenever such controversies have arisen, whether the arbitration agreement in any event fits the case and may freely be invoked by the party relying on it.*"

19. This is instructive in the present instance as although the stay of the action was raised by way of a special plea, the parties did not led any evidence that may have a bearing on the exercise of the court's discretion in relation to the special plea. This is particularly so in respect of the appellant who seeks to rely on factually laden assertions of the kind as set out above, such as that the costs of an arbitration would be prohibitively expensive. This is in contrast to the position of the respondent, who relies squarely on a valid arbitration clause in an agreement,[1] which is common cause on the pleadings and so in respect of which no evidence is needed.

20. It may be that the present appeal can be disposed of and refused on the narrow basis that as the appellant did not adduce any evidence in support

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[1] This is not to say that the court's jurisdiction is ousted by the arbitration clause, which is something emphasised by the appellant's attorney during argument. The appellant did not seek to challenge the validity of the arbitration clause, such as that the clause, or its application in the present instance, was *contra bonos mores*.

of what are effectively factual assertions, the magistrate cannot be faulted for granting the stay on the basis of the legally cognisable material before her, which is the binding effect of valid arbitration clause and without any countervailing evidence before her. Nonetheless I will consider whether the magistrate erred, on an assumption in favour of the appellant that some factual credence can be given to the factors relied upon by the appellant in argument.

21. As the magistrate's decision was one of an exercise of discretion, the scope for an appeal court to interfere in the exercise of that discretion depends on the nature of the discretion that was exercised. Although there is not always uniformity in the nomenclature used to label the kinds of discretion at play, the two kinds of discretion are usefully explained by Brand JA in *MTN Service Provider (Pty) Ltd v Afrocall (Pty) Ltd* 2007 (6) SA 620 (SCA) at 623C-H:

> *"[9] In accordance with the well-settled principles of our law, courts of appeal are reluctant to interfere with the exercise of a discretion by the court of first instance. For reasons that are equally well settled, the appellate Court will not substitute its own discretion for that of the trial court simply because it would have preferred a different result. It will only do so if the court of first instance had failed, through misdirection or otherwise, to exercise its discretion properly (see eg Benson v SA Mutual Life Assurance Society 1986 (1) SA 776 (A) at 781G - J; S v Basson 2007 (3) SA 582 (CC) (2007 (1) SACR 566; 2005 (12) BCLR 1192) in para [110]).*
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> *[10] But, in Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor') 1992 (4) SA791*

(A) at 796H - I and 800E - G, E M Grosskopf JA arrived at the conclusion that, in the present context, the term 'discretion' has more than one meaning. On a proper analysis of earlier cases, he said, the restraint on the appellate Court's powers of interference only applies to a discretion in the strict or narrow sense and not to a 'discretion' in the broad sense, also described as a 'discretion loosely so called'. A discretion in the strict sense, Grosskopf JA explained, involves a choice between different but equally admissible alternatives, while a 'discretion' in the broad sense - or loosely so called - means no more than a mandate to have regard to a number of disparate and incommensurable features in arriving at a conclusion. When used in the broad sense, Grosskopf JA found, there is no reason why the appellate court should not exercise its own discretion by deciding the matter according to its own view of the merits. It is only with regard to discretion in the strict sense that the appellate court's powers of interference are to be circumscribed (see also eg Knox D'Arcy Ltd and Others v Jamieson and Others 1996 (4) SA 358 (A) at 361G - I; Bezuidenhout v Bezuidenhout 2005 (2) SA 187 (SCA) [2004] 4 All SA 487) in para [17]).

22. Where the discretion is in the strict or narrow sense, the scope of the appeal court to interfere in the exercise of that discretion by the lower court is limited to what has been described as those "*well-known limited grounds*", that is where the court *a quo* has exercised its discretion capriciously or upon a wrong principle or where it has not brought its unbiased judgment to bear on the question or has not acted for substantial reasons.[2]

[2] See, for example, *ex parte Neethling and others* 1951 (4) SA 331 (A) at 335E.

23. The appellant accepts that the discretion exercised by a court when deciding whether to stay court proceedings pending resolution of a dispute by arbitration is a discretion in the strict or narrow sense, and so the grounds upon which the appeal court can interfere are limited. This is evident from the appellant's notice of appeal and heads of argument that the magistrate failed to exercise her discretion at all, or, assuming that she had, she failed to take into account the factors advanced by the appellant why a stay was to be refused. The appellant's grievance that the magistrate appeared not to have any regard for the appellant's reasons advanced during argument why the stay should be refused and that this, to use a phase used by the appellant's attorney during argument, affected the 'due process' of the proceedings before the magistrate is also the tenor of that used to challenge an exercise of a narrow discretion.[3]

24. That the discretion is a narrow one is supported by authority.

25. In the early decision of *The Rhodesian Railways Limited v Mackintosh* 1932 AD 359 counsel for the respondent argued, with reference to early English authority, that the decision whether proceedings should be stayed is in the discretion of the court of first instance and that an appeal court should not disturb a decision arrived at in the exercise of such discretion. One of those early English decisions is *Clough v County Live Stock Insurance Association* [1916] 85 L.J.K.D. 1185 where the appeal court stated that the court *a quo* 'must proceed judicially'. Wessels ACJ

[3] Notably the appellant has sought to address its grievance of the magistrates' court proceedings by way of an appeal, rather than by way of review proceedings in terms of section 22(1) of the Superior Courts Act, 2013.

speaking for the Appellate Division in *Rhodesian Railways* at 375 went on to find that "*the court, therefore, has a discretion, but the discretion must be judicially exercised and a very strong case for the exercise must be made*".

26. Subsequently, Galgut AJA, writing for the Appellate Division in the oft-cited *Universiteit van Stellenbosch v JA Louw (Edms) Bpk* 1983 (4) SA 321 (A), after referring *inter alia* to *Rhodesian Railways,* held at 334A that:

> "*It is not possible to define, and certainly it is undesirable for any court to attempt to define with any degree of precision, what circumstances would constitute a 'very strong case.'*"

27. Galgut AJA referred with approval at 334A to *Metallurgical and Commercial Consultants (Pty) Limited v Metal Sales Co (Pty) Limited* 1971 (2) SA 388 (W) where Colman J at 391H, after referring to English authority, said that:

> "*There should be 'compelling reasons' for refusing to hold a party to his contract to have a dispute resolved by arbitration.*"

28. Perhaps the decision dealing most clearly with the nature of the discretion is that of Slomowitz AJ in the court *a quo,* followed by the appeal before the Full Bench in *Polysius (Pty) Ltd v Transvaal Alloys (Pty) Ltd and another; Transvaal Alloys (Pty) Ltd v Polysius (Pty) Ltd* 1983 (2) 630 (W).[4]

[4] The appeal judgment commences at page 653 of the law report, after the decision of the court *a quo*.

29. Slomowitz AJ said at 639H – 640B in relation to the discretion:

> *"How then is this discretion to be exercised? Judicially of course, but, it seems to me, with the parties' bargain uppermost in one's mind. This is as it should be, not least because they have contractually so bound themselves but also because*
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> > *'there are certain advantages to arbitration such as finality, privacy, a judex of one's own choice and avoiding delays through having to wait one's turn on the roll of trial cases...'.*
> >
> > *Lancaster v Wallace NO 1975 (1) SA 844 (W) at 847A.*
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> *This approach has prompted various Courts, when speaking of the onus or case to be made out by the party resisting an application for a stay, to say that "such an onus is not easily discharged" (Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd 1971 (2) SA 388 (W) at 391E - H) or that a "very strong case" must be made out (The Rhodesian Railways Ltd v Mackintosh (supra at 375)), and that there must be "compelling reasons" for refusing to hold a party to the contract (The Pine Hill [1958] 2 Lloyd's Rep 146). Some Courts have gone further. The discretion to refuse a stay is one "which will very seldom be exercised": Schietekat v Naumov (1936) 1 PH A 26 (C). The instances in which the discretion should be exercised are "few and exceptional": Russel v Russel [1880] 14 Ch D 411; see too the Metallurgical and Commercial Consultants case supra at 391."*

30. The Full Bench confirmed this approach on appeal, at 655B/C, and that the discretion is narrow or strict, with limited grounds for the appeal court to interfere:

> *"[Section 6(2) of the Arbitration Act] invests the Court with a discretion, and this may be a limiting factor on appeal. Where the exercise by a court of a discretion in a matter of this kind, which is essentially procedural in character, is challenged on appeal, the initial inquiry must be whether the discretion has been judicially exercised by the Judge a quo. Unless it is shown not to have been judicially exercised an appellate Court will decline to exercise its own discretion."*

31. The appeal court went on to find at 656D that the court *a quo* had not misdirected itself, and that *"the learned Judge has in my view properly taken into account all matters which it was necessary to consider in exercising his discretion whether to grant or refuse a stay, and this Court must in consequence decline to intervene."*

32. Notably, the appeal court continued at 656D/E that even had the Court been required to exercise its own discretion afresh, the same conclusion would have been reached.

33. What is evident from the authorities, apart from the nature of the discretion to be exercised, is that the onus resisting on a person who seeks to avoid the contractual bargain struck that disputes are to be subjected to arbitration is not an easy onus to discharge. The appellant does not differ from this settled legal principle but argues that the onus has been discharged in the present instance,

34. As stated, the magistrate's reasons are sparse, consisting of no more than a page. It does not appear from these reasons whether the magistrate appreciated that she had a discretion or that she could go beyond

considering only the binding nature of the arbitration clause, and consider other factors. And so, the appellant argues, the magistrate misdirected herself and the appeal court is entitled to interfere even in what was the exercise by the magistrate of a discretion in a narrow sense.

35. The argument made by the respondent is that the magistrate did appreciate that various factors were to be taken into account because given the submissions that were made on behalf of the parties before her during argument, it could hardly have escaped her that she had a discretion and that various factors came into play. Some glimmer of this appears in the reasons in that the magistrate does refer to the appellant's right of access to court as well as the appellant mentioning the lack of funds with which to proceed with the arbitration. Rather, the respondent argues, those factors did not sufficiently weigh on the magistrate in the exercise of her discretion to persuade her to refuse the stay, and that in this the magistrate cannot be faulted.

36. Even if I were prepared to assume in favour of the appellant, for purposes of this appeal, that:

    36.1. the magistrate did materially misdirect herself in the manner argued by the appellant and so open it to this appeal court to exercise the discretion afresh;

    36.2. credence is to be given to the factual assertions made by the appellant during argument although there is no evidence to support those factual assertions,

the outcome would be the same.

37. Assuming in favour of the appellant that the costs of arbitration would exceed the quantum of the claim, that the costs of the arbitration would be prohibitively expensive and that the appellant would be unable to afford arbitration, these factors do not in my judgment constitute adequate grounds why the arbitration clause should not be enforced and the stay granted.

38. As emphasised by the respondent, the appellant voluntarily entered into the agreement which contains the arbitration clause. That it subsequently transpires that the arbitration clause is financially disadvantageous for the appellant because it results in a form of dispute resolution that is too expensive is no different to any other clause that a party voluntarily agrees to and then turns out to be to its financial detriment. The parties voluntarily entered into the agreement in a commercial context where the appellant was engaged as an independent contractor carrying out courier services for the respondent.

39. The courts are overburdened. The now accepted approach of courts towards arbitration, especially over the last two decades, is to advance arbitration as an alternate forum for dispute resolution.[5] The point well-made by the respondent is that with a responsible approach within the context of the arbitration clause the parties should be able to agree to a

[5] See, for example, *Zhongji Development Construction Engineering Co Ltd v Kamato Copper Co Sarl* 2015 (1) SA 345 (SCA), at para 38: *"The process of arbitration must be respected."*

cost effective arbitration before an arbitrator who is suitably skilled yet cost effective.

40. The appellant has had no regard at all for the contractually agreed mechanism for resolving the dispute, and not only in respect of arbitration. The appellant's summons was not preceded by any demand, let alone any attempt at *bona fide* discussion and negotiation as required by clause 20.1 of the agreement.

41. I am hesitant to find that court proceedings should be pursued rather than the contractually agreed dispute resolution mechanisms to which the parties contractually agreed because of a party's subsequently contended for position in relation to the costs of those arbitration proceedings. What was argued for the appellant is that an exceptional circumstance to be taken into account in the exercise of the discretion by the court is that the costs of the arbitration would exceed the extent of the claim. But this can hardly be exceptional, or even unusual. Many claims must feature before the magistrates' courts on a daily basis based on agreements that contain arbitration clauses, and where those claims would be for amounts falling below the jurisdictional limit of the magistrates' courts. Claims will arise based on those agreements and which would fall within the jurisdiction of the magistrates' courts. Nonetheless the parties agreed to those agreements in which they chose a particular dispute resolution process such as by arbitration. That contractual bargain struck between the parties is to be respected, unless a strong case is made out why this should not be so in that particular instance.

42. Interestingly, the appeal court in the early English authority of *Clough*[6] did not find favour with an argument that an arbitration clause should not be enforced because it required of the plaintiff to pay half the costs of the arbitration whatever the outcome of the arbitration. The plaintiff sought to argue that this was unfair and oppressive and constituted a reason why the action should not be stayed for purposes of arbitration. The appeal court held that as the plaintiff must be taken to have agreed to those terms in the insurance policy that contained the arbitration clause, that that was not a good ground upon which a court could exercise its discretion in refusing the stay.

43. To return to the magistrate's reasons, her reliance on upholding the parties' contractually agreed choice of dispute resolution is understandable given the primacy of this factor in the authorities. So much so that a 'strong case' needs to be made out why the arbitration clause should not be enforced.

44. In the circumstances, even if I exercise the discretion afresh, I find that the appellant as the plaintiff has not made out a strong case as to why its action in the magistrate's court should not be stayed pending the outcome of the arbitration. It follows that the appeal is to be dismissed.

45. And when regard is had to the failure of the appellant to adduce evidence in support of its factual assertions, the factual veracity of which is by no

[6] Above.

means self-evident, more so the magistrate's conclusion in the upholding of the special plea cannot be faulted.

46. The issue on appeal was narrow and straightforward, and so costs of counsel could be on scale A for purposes of Uniform Rule 67A.

47. The appeal is accordingly dismissed, with the appellant to pay the respondent's costs, including the costs of counsel on Scale A.

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Gilbert AJ

I agree.

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Wright J

Date of hearing: 22 October 2024

Date of judgment: ____ October 2024

Representative for the appellant:	NP Voyi (Attorney)
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