NOT REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO. 5430/2009

In the matter between:

TRANSNET RETIREMENT FUND **Applicant**

and

JEREMY ALAN SMITH **First Respondent**
WENDY HEATHER SMITH **Second Respondent**
ADV. JEAN MARAIS SC N.O. **Third Respondent**

JUDGMENT

GORVEN J

[1] The applicant launched an application seeking the following relief:

1. Directing that the dispute between the applicant and the first respondent not be a dispute as contemplated in rule 15 of the applicant's rules, alternatively that the arbitrator does not have jurisdiction in respect of such dispute.

2. Alternatively to 1. above:

2.1 That the arbitration agreement as between the applicant and the first respondent in rule 15 of the applicant's rules, be hereby set aside;

2.2 alternatively to 2.1 above, that the dispute between the applicant and the first respondent not be referred to arbitration;

2.3 further alternatively to 2.1 and 2.2 above, that the arbitration agreement as between the applicant and the first respondent in rule 15 of the applicant's rules shall cease to have effect with reference to the dispute between the applicant and the first respondent;

3. That the first respondent be ordered to pay the costs of this application.

[2] The background to the application is somewhat convoluted, but mostly common cause. The applicant is a fund established in terms of s 14(A) of the Transnet Pension Fund Act, 1990. The rules of the applicant, promulgated under the Act, bind beneficiaries of the fund. One Walther Percival Smith ("the deceased") died on 25 February 2007. He was a member of the applicant. The first respondent was his son and only descendant. The second respondent had been involved in an intimate relationship with the deceased but the extent of this relationship is disputed. Under the rules of the Fund the deceased nominated the first respondent as the sole beneficiary of his death benefit in the Fund. The first respondent, who is a 23 year old student in the United States of America, has appointed his present attorneys of record, by way of a general power of attorney, to represent him in all matters relating to the death benefit.

[3] The first respondent wrote to the applicant on 7 August 2007 through his attorneys to notify it that he would dispute any claim by any person claiming to be the "common law wife" of the deceased and wished to make representations if any such claim was made. An affidavit to similar effect

was submitted to the applicant on 4 September 2007 by the first respondent's aunt who had been nominated in the deceased's will as the first respondent's guardian, requesting details of any claim by any person contending to be the common law wife of the deceased. A claim dated 2 September 2007 was submitted by the second respondent claiming death benefits as the "partner/common law wife" of the deceased. Pursuant to that claim, and allegedly without affording the first respondent or his representatives an opportunity to deal with this claim, the administration committee of the applicant, on 10 September 2007, awarded and immediately paid the sum of R6 515 238.74 to the second respondent out of a total death benefit of R10 370 867.79. A dispute accordingly arose between the first respondent and the applicant whether the applicant had been entitled to make this payment. In a letter dated 12 December 2007, the first respondent advised that he proposed to refer the dispute for arbitration in terms of rule 15 of the applicant's rules. The applicant agreed to go to arbitration but indicated that it desired the second respondent to be a party to the arbitration. The third respondent was appointed as arbitrator and a pre-arbitration meeting held with him. No agreement could be reached at this meeting.

[4] The second respondent thereafter launched an application ("the first application") in terms of which she sought, in the first place, a declaration that the disputes relating to her entitlement to receive an award from the applicant and the amount of such award are not disputes contemplated in rule 15 of the rules of the applicant. In the alternative, she sought a

declaration that, if the dispute between the applicant and the first respondent was to be determined by arbitration in terms of the said rule 15, she would not be bound by any award the arbitrator may make. The first respondent opposed that application whilst the applicant elected to abide the decision of the court but put up an affidavit and appeared at the hearing of the matter. An order was granted by Luthuli AJ on 12 December 2008 for the alternative relief mentioned above. This means, of course, that if the Applicant fails in this application, the second respondent will not be bound by the Arbitrator's award.

[5] Paragraph 1 of the relief sought in the present application involves an almost identical declaration to that sought by the second respondent and not granted in the first application. The first respondent took the point that this issue was *res judicata* as between the parties alternatively that there had been issue estoppel. The applicant, in reply and in argument before me, indicated that no relief would be sought in terms of paragraph 1 and the applicant would confine itself to the relief sought in paragraphs 2 and 3. It is now accepted by the applicant that rule 15 applies to the dispute between the first respondent and it. It accordingly seeks relief under the ambit of s 3(2) of the Arbitration Act, No 42 of 1965 ("the Act").

[6] S 3(2) of the Act provides as follows:

> 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.

[7] It can therefore be seen that the three sub-paragraphs of paragraph 2 of the Notice of Motion mirror the three subsections of s 3(2) of the Act.

[8] In s 1 of the Act an arbitration agreement is defined as 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. S 40 of the Act provides that the Act shall apply to every arbitration under any law passed before or after the commencement of the Act, as if the arbitration were pursuant to an arbitration agreement and as if that other law were an arbitration agreement. This therefore applies to rule 15 of the applicant's rules. The proviso to that section does not apply to the present litigation.

[9] As regards arbitrations under the common law the point of departure was clearly set out by Dove-Wilson JP in *Walters v Allison* [1] as follows:

> I think I have cited sufficient authority to show that it is settled law in South Africa that an absolute agreement to refer matters in dispute to arbitration is a condition precedent to litigation in the Law Courts, and that either party to such an agreement may be compelled by the other to have resort to arbitration in the first instance.

[1] 1922 NPD 238 at 245

[10] This is why the courts, in approaching applications actions under s 3(2) of the Act, have almost all referred to the dictum of Colman J in *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* [2], where he referred to the test for what constitutes good cause under that section in the following terms:

> Such an *onus* is not easily discharged. There are certain advantages, such as finality, which a claimant in an arbitration enjoys over one who has to pursue his rights in Courts; and one who has contracted to allow his opponent those advantages will not readily be absolved from his undertaking. In *Rhodesian Railways* v *Mackintosh* 1932 AD 359, Wessels ACJ (as he then was), held that the discretion of the Court to refuse arbitration under a submission was to be exercised judicially, and only when a "very strong case" for its exercise had been made out (see 375). The Court was there acting under a different statute from the one before me. But the observation of Wessels ACJ is none the less apposite here, because it was based upon general principles.

[11] This means that the applicant bears an onus and, in discharging it, must make out a very strong case that the court should exercise its discretion under the section. I will return in due course to the case which the applicant has advanced and assess whether it passes muster. I shall initially deal in broad terms with those matters where the courts have exercised their discretion in favour of overriding arbitration agreements.

[12] Those cases which have succeeded are primarily ones where the arbitration forum would not be appropriate for resolving the particular dispute. One

[2] 1971 (2)SA 388 (W) at 391

such example upheld in numerous cases is where the person seeking to resolve the dispute in open court rather than arbitration has been accused of fraud. The courts have held in those instances that such a person should be entitled to a finding by a court of law since it is a public forum and there is a right of appeal.[3] Another example is found in the case of *Sera v de Wet*[4] where the court made an order in terms of s 3(2)(c). Here an architect had been appointed arbitrator pursuant to a clause in a building contract. The court held that, since serious allegations had been made against the architect involving honesty and integrity, and issues of credibility would need to be decided, a court of law was better equipped than was the architect. Further, the main issue between the parties was a predominantly legal one.

[13] A number of cases have held that the fact that the main dispute primarily involves a legal issue does not in itself afford grounds for avoiding the arbitration agreement.[5] In addition, where the party wishing to override the arbitration agreement is the one alleging fraud, the courts have not come to their assistance.[6]

[14] In essence, the applicant bases its case on the averments contained in paragraph 20 of the founding affidavit and paragraph 28 of the applicant's affidavit in the first application. These are as follows:

---

[3] See, eg, *Metallurgical and Commercial v Metal Sales Company Ltd* 1971(2) SA 388 (W) at 393A - G, *Welihocky J & others v Advtech Ltd & others* 2003 (6) SA 737(W) & *Rawstorne & another v Hodgen & another* 2002 (3) SA 433(W)
[4] 1974 (2) SA 645 (T)
[5] See, for example, Elebelle (Pty) Ltd v Szynkarski 1966 (1) SA 592 (W)
East Rand Proprietary Mines Ltd v Cinderella Consolidated Gold Mining Co. Ltd 1922 WLD 122
[6] *Metallurgical & Commercial* case at 393A-G

1. If the dispute between the applicant and first respondent is decided in one forum and that between the applicant and the second respondent in another, this will result in an unnecessary duplication of issues, costs, evidence and a myriad of other potential difficulties. No detail was provided in this regard.
2. The dispute is essentially one between the first and second respondents.
3. The second respondent, in terms of the judgment, is not bound by any award made by the arbitrator in the arbitration. This may result in two different judgments, one in the arbitration and one in the court on the same issue.
4. The evidence of both the first and second respondents will be critical in both sets of proceedings. This will need to be presented and repeated resulting in a substantial duplication of costs.
5. The potential prejudice to the applicant far outweighs any possible prejudice or inconvenience to either the first or second respondents.
6. The interests of justice militate against the matter being referred to and decided by arbitration.
7. An arbitrator and the High Court may enjoy different powers/jurisdiction in respect of an appeal, a review and/or the applicability of the Promotion of Access to Justice Act, 2000.
8. It would be unsatisfactory if the issues of jurisdiction and the arbitrator's powers are, as between the applicant and the first respondent, left for determination in the arbitration.

[15] The contentions set out above flow from two premises. The first is that the essential dispute lies between the first and second respondents with the applicant, as it were, caught in the middle. The second is that unless all the disputes between the parties are dealt with in a single forum, the applicant may be prejudiced in various ways. Mr De Bruyn, who appeared for the applicant, conceded that a court case will take longer to complete than the envisaged arbitration (which, in terms of the rules, should be completed within 21 days and entitles the arbitrator to regulate the procedure). In an attempt to deal with this potential prejudice to the first respondent the applicant made a tender in the following terms:

> The applicant consents to, as between the applicant and the first respondent, that (sic) the High Court will have all the powers and jurisdiction that an arbitrator would have had in terms of rule 15 of the applicant's rules; in amplification, but without limiting the above, the High Court will have the jurisdiction and power to entertain and rule upon any claim that the first respondent could have advanced in terms of rule 15 in the same manner and with the same powers that the arbitrator would have had.

[16] The attitude of the first respondent was simple. He desired that the matter be dealt with expeditiously and submitted that the arbitration procedure is specifically geared towards this. It was also submitted by Mr Harcourt SC on his behalf that for the applicant to claim that the issues lay between the first and second respondents was a gross oversimplification. The issue as between the applicant and the first respondent is whether the committee of the applicant acted both procedurally and substantively correctly in making the award to the second respondent. The first respondent expressed himself

indifferent to the dilemma which the applicant would face in the event of the first respondent succeeding as to how to recover any overpayment to the second respondent. The first respondent in this latter regard submitted that the applicant had not indicated what legal right it would or could invoke in attempting to recover monies from the second respondent. No such right arose under the various *condictiones* which were tentatively mentioned by Mr de Bruyn as a cause of action. In addition it was submitted that the tender by the applicant was flawed. Since the second respondent would not be bound by this tender, it was difficult to conceive on what basis a court could act in accordance with the tender and come to a binding conclusion which would include the second respondent and thus avoid more than one hearing. In addition, the court machinery would not allow for the procedural advantages of arbitration, namely the swift resolution of the arbitration. This was conceded in argument by the applicant. This was so of the complaint by the first respondent against the applicant which is subject to arbitration but even more so of the applicant's proposed conditional counterclaim against the second respondent. Any such counterclaim could not, without the second respondent's concurrence, be dealt with in an expedited manner. It was pointed out that the judgment in the first application was handed down on 12 December 2008 and the present application, launched only at the end of August 2009, received a hearing on 21 October 2009. The first respondent's rights to a speedy resolution of the dispute by arbitration had already been compromised. Since the first respondent is a 23 year old student who has been orphaned by the suicide of the deceased, closure was necessary regardless of the financial situation and the fact that

any award would potentially command a higher rate of interest from an earlier date if the matter was dealt with in the court.

[17] Under rule 15 of the applicant's rules, the arbitrator has very wide powers. If these powers were exercised by a court in terms of the tender by the applicant, the second respondent would be perfectly at liberty to indicate that the court hearing was, in essence, a continuation of the arbitration and decline to be bound by it. This would then require, in any event, a full hearing of any issues that might arise between the applicant and the second respondent after the court had dealt with the issues between the applicant and the first respondent. The tender is unwieldy and unclear on a number of issues such as this. The applicant's own contentions referred to in points 7 and 8 in paragraph [14] above seem to contradict the proposed approach. There has already been prejudice to the first respondent caused by the delay in the arbitration proceedings occasioned by the two applications. This delay would be exacerbated if a court were to deal with the matter, even on the basis of preference being allocated to it, which in itself could only take place once the pleadings in any conditional claim against the second respondent had closed. The appeal provisions of the court could not be ousted by agreement since the second respondent would doubtless refuse to be bound. This would, accordingly, mean that another advantage of the finality of the arbitration would be lost by the first respondent. In addition, if the court's powers were on a par with the arbitrator, there would be no appeal against the first respondent's claim but there would be a right of appeal in respect of the claim against the second respondent. The same

problem of different judgments which the applicant seeks to avoid could therefore arise. Even if the outcome of an appeal had some bearing on the first respondent's claim, there would be an even further delay and lack of finality.

[18] Apart from the above considerations, it has been the stance of the applicant that it declined to deal with the merits of the dispute at all. There is nothing on the papers as to the nature of the cause of action it may pursue against the second respondent. It is not possible to make any finding on the assertion that the dispute is basically between the first and second respondents and as to the likelihood of duplication of evidence or costs absent any such indication. If the first respondent succeeds against the applicant, there is no indication that, if the matter was heard in court, the applicant would be entitled to be indemnified by the second respondent. It is not clear how the applicant would be able to launch a conditional action against the second respondent and consolidate this with that between the first respondent and the applicant. The applicant would therefore presumably need to make out a case that it would be entitled to use Rule 13(1)(b) and join the second respondent as a third party in the action. If this is the intention of the applicant, it was necessary to set out a proper basis to show that a question or issue in its conditional claim is substantially the same as any question or issue in the dispute between it and the first respondent and should properly be determined in the same action. The only mention of this nature was that the second respondent claimed to be a dependent of the deceased and the first respondent denied that this was the

case, citing, amongst other things, two supposedly conflicting affidavits made by her. As stated, there is a paucity of information as to what the applicant sees as the issues between it and the two respondents. Instead of giving any detail, it has satisfied itself by making broad assertions.

[19] In the light of all the above considerations, I am of the view that the applicant has not discharged the onus of persuading me that there is good cause and thus that I should exercise my discretion in its favour and grant it relief under s 3(2) of the Act.

In the event the application is dismissed with costs.

Date of Application	:	21 October 2009
Date of Judgment	:	11 November 2009
Counsel for the Applicant	:	Adv W J De Bruyn
		Instructed by Werksmans Incorporated
		c/o Johnston & Partners
Counsel for the Respondent	:	Adv A W M Harcourt SC
		Instructed by JH Nicolson Stiller & Geshen