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

CASE NO. 11690/11

In the matter between:

BDE CONSTRUCTION APPLICANT

and

BASFOUR 3581 (PTY) LIMITED RESPONDENT

JUDGMENT delivered on 31 August 2012

SWAIN, J

[1] In issue are the costs of these application proceedings, it being common cause between the parties that the merits of their dispute are to be resolved by arbitration, before a named arbitrator.

[2] The applicant seeks a stay of these proceedings, together with with an order that the costs of these proceedings be reserved for decision by the arbitrator. The respondent however, relying upon the decision of Wallis J (as he then was) in

Aveng Africa Ltd. (formerly Grinaker LTA Ltd.)
t/a Grinaker – LTA Building East
v
Midros Investments (Pty) Ltd.
2011 (3) SA 631 KZD

contends that such an order is not permissible. Mr. van Rooyen, who appeared for the respondent, in reliance upon this authority, submitted that the applicant was not entitled to keep the present litigation in place and proceed to arbitration. The applicant was accordingly obliged to abandon the present litigation, by withdrawing the application and tender payment of the respondent's costs.

[3] Mr. Voormolen, who appeared for the applicant, submitted that if Wallis J intended that a litigant may not stay the litigation proceedings (and must withdraw them) before he is allowed to go to arbitration, then that part of the Judgment was clearly wrong and should not be followed. He submitted that the proceedings could be stayed and did not have to be withdrawn, because a "stay of proceedings" was provided for in Section 6 of the Arbitration Act No. 42 of 1965 and is consistent with the principle that the jurisdiction of the Courts is not ousted by an arbitration agreement.

[4] Counsel were *ad idem* however, that the conclusion of Wallis J (at 639 H)

"……. that a party to an arbitration agreement who commences litigation instead of proceeding to arbitration does not, merely as a result of adopting that course, abandon its rights to have resort to arbitration under the agreement"

was correct. In Aveng, the defendant (Midros) had submitted that Aveng (the plaintiff) had elected to pursue its claim by litigation and was "precluded from retracing its steps". The argument advanced was

that Aveng had two alternative remedies, either to litigate or to go to arbitration, and it was precluded from "changing tack and seeking to arbitrate" (at paragraph 16).

[5] Wallis J in reaching the conclusion that he did, rejected this argument for the reasons and on the grounds set out in his Judgment with which I respectfully agree, and which do not require repetition

Aveng at paras 17 and 18

[6] However, the issue of whether Wallis J was wrong in concluding that a litigant in the position of Aveng (and the applicant in the present case) is precluded from staying the litigation proceedings and must withdraw them, before proceeding to arbitration requires a careful consideration of what Wallis J had to say in this regard, which is as follows

"In my view the commencement of litigation does not preclude Aveng from invoking the arbitration clause in the contract.

[20] That does not, however, mean that Aveng is entitled to seek a stay of this action. It does mean that it is free to abandon the litigation and proceed to arbitration, although conceivably it would face problems of prescription were it to do so. But that is not what it wishes to do. It wishes to keep the present litigation in place, but stayed, whilst it pursues its claim by way of arbitration. The problem is that it commenced this action in breach of a binding agreement to arbitrate. Midros has chosen not to contest this by seeking a stay, but Aveng's conduct remains a breach of its obligations under the arbitration clause. It does not

cease to be such merely because Midros, for its own reasons, does not seek to rely upon that breach.

[21] Aveng is in breach of its obligations under the arbitration agreement, but claims nonetheless to enforce that agreement against Midros. That is an untenable situation and contrary to basic principle. An arbitration agreement is a clear example of an agreement where the obligations of the parties are reciprocal in the sense that performance by the one party is conditional on performance by the other. Hitherto Aveng has ignored its contractual obligations under the arbitration clause and pursued its claims by way of litigation. Midros has chosen not to challenge this. Now Aveng, whilst keeping in place the litigation commenced in breach of its obligations, seeks to enforce against Midros the very contractual provision of which it is in breach. It is hardly surprising that Midros objects to this. While it has phrased that objection in the language of election, its character remains that it objects to having the arbitration clause enforced against it for so long as Aveng remains in breach of its obligation to arbitrate. It is not in my view an answer for Aveng to say that it is now willing to arbitrate and comply with its obligations. It seeks to do so while maintaining the present litigation that was commenced, and has been conducted in breach of the arbitration agreement. In other words it seeks to take advantage of its existing breach while trying to hold Midros to the terms of the agreement. That is not something that a court will countenance".

Aveng at pgs 640 – 641

[7] Although in Aveng, the applicant sought the stay of an action it had instituted against Midros, and in the present case the applicant seeks a stay of the application proceedings, in which payment of a sum of money is sought from the respondent, nothing turns upon this distinction.

[8] Although the argument advanced by Midros was, as pointed

out by Wallis J, phrased in the language of election, its objection was based upon Aveng seeking to enforce the arbitration agreement, whilst in breach of the arbitration agreement's terms. In the present dispute the respondent likewise contends that the dispute between the parties falls within the terms of the arbitration agreement and the applicant is accordingly in breach of its terms.

[9] It is clear that where a party to an arbitration agreement, institutes proceedings in breach of the arbitration agreement, the other party is faced with an election whether to enforce the arbitration agreement, by seeking a stay of the proceedings, or not. If the innocent party elects to enforce the arbitration agreement, this must be done either:

[9.1] By applying for a stay of the proceedings in terms of Section 6 of the Arbitration Act No. 42 of 1965, before the delivery of any pleadings, or the taking of any further step in the proceedings. Should the innocent party take a further step in the proceedings, without having applied for a stay, it thereby precludes itself from doing so.

Conress & Another v Gallic Construction
1981 (3) SA 73 (W) at 76 A – B

[9.2] Alternatively, the innocent party may file a special plea in the nature of a dilatory plea, for the stay of the proceedings until the dispute has been determined by arbitration.

Yorigami Maritime Construction Co. Ltd. v Nissho-Iwai Co. Ltd.
1977 (4) SA 682 (c) at 692 H

[10] In the present case, as in Aveng, the respondent did not contest the entitlement of the applicant to institute these proceedings, by seeking their stay. It is therefore clear that the respondent, when faced with what it contends was a breach of the arbitration agreement, elected not to seek its enforcement. It is trite that having made such an election, the respondent is bound by it and thereby waived any reliance upon and thereby condoned, the applicant's alleged breach of the arbitration agreement. As stated in the oft quoted *dictum* of Watermeyer A J in

Segal v Mazzur
1920 (CPD) 634 at 645

"Now, when an event occurs which entitles one party to a contract to refuse to carry out his part of the contract, that party has the choice of two courses. He can either elect to take advantage of the event or he can elect not to do so. He is entitled to a reasonable time in which to make up his mind, but once he has made his election he is bound by that election and cannot afterwards change his mind. Whether he has made an election one way or the other is a question of fact to be decided by the evidence. If, with knowledge of the breach, he does an unequivocal act which necessarily implies that he has made his election one way, he will be held to have made his election that way; this is, however, not a rule of law, but a necessary inference of fact from his conduct : see *Croft* v. *Lumley* (6 H.L.C., at p. 705) *per* BRAMWELL, B.; *Angehrn & Piel* v. *Federal Cold Storage Co., Ltd*. (1908, T.S., at p. 786) *per* BRISTOW, J. As already

stated, the question whether a party has elected not to take advantage of a breach is a question of fact to be decided on the evidence, but it may be that he has done an act which, though not necessarily conclusive proof that he has elected to overlook the breach, is of such a character as to lead the other party to believe that he has elected to condone the breach, and the other party may have acted on such belief. In such a case an estoppel by conduct arises and the party entitled to elect is not allowed to say that he did not condone the breach".

Christie, referring to this quote says the following

"This passage makes clear the true nature of the doctrine of election. It is not a mechanical rule of law but a combination of waiver and estoppel – the *onus* is on the defendant to prove that, as a question of fact, the plaintiff has waived the relief he claims, or failing such proof, that he is estopped from claiming it ….."

Christie – The Law of Contract 6th Edition pg 563

[11] I accordingly respectfully disagree with the conclusion of Wallis J that a breach of the arbitration agreement, caused by the failure of one party to refer a dispute to arbitration and institute legal proceedings, does not cease to be such, where the other party elects not to rely upon the breach and stay the proceedings. The consequence of having made an election not to rely upon the breach is to waive reliance upon it and thereby condone it. That the arbitration agreement imposes reciprocal obligations upon the parties, such that performance by the one party is conditional upon performance by the other, and the applicant may have ignored its contractual obligations under the arbitration agreement and proceeded with the present application, which the respondent has not

challenged, does not alter the fact that the respondent in electing not to challenge the present proceedings, made an election not to enforce the arbitration agreement by which it is bound, which has as a consequence condonation of the applicant's breach of the arbitration agreement.

[12] I accordingly respectfully disagree with and conclude that Wallis J was wrong in concluding that where a party to an arbitration agreement, commences litigation in breach of the arbitration agreement, to which the other party to the arbitration agreement, elects not to seek a stay of such proceedings, the party instituting such proceedings is precluded from seeking a stay of those proceedings and must abandon them, before being able to refer the dispute to arbitration, in terms of the arbitration agreement.

[13] The applicant is accordingly entitled to seek a stay of the present proceedings and is not obliged to withdraw them, before referring the parties' dispute to arbitration.

[14] This conclusion renders it unnecessary for me to decide whether the present proceedings were instituted in breach of the arbitration agreement. In other words, whether a "dispute" or "disagreement" had arisen between the parties, within the meaning of those terms as contained in the arbitration agreement, at the time the present proceedings were instituted. However, the reasonableness of the applicant in seeking payment of its claim, by way of application

proceedings, is an issue that the arbitrator will be in a much better position to assess, having heard evidence of the details and history of the dispute between the parties. It is therefore appropriate to reserve the costs of the application for decision by the arbitrator.

I accordingly grant an order in the following terms:

1. The application is stayed pending the outcome of the arbitration proceedings referred to below.

2. The dispute between the applicant and the respondent is to be determined by arbitration by Advocate Troskie S C ("the arbitrator") at a time and place agreed upon by the applicant and the respondent and the arbitrator, and in a manner agreed upon by them, or as determined by the arbitrator.

3. The costs of this application are to be determined by the arbitrator.

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Swain J ***Appearances/...***

Appearances ../

For the Applicant **:** Mr. V. Voormolen

Instructed by	:	Cox Yeats Attorneys C/o Stowell & Co. Pietermaritzburg
For the Respondent	:	Mr. R. Van Rooyen
Instructed by	:	Venn Nemeth & Hart Pietermaritzburg
Date of Hearing	:	13 August 2012
Date of Filing of Judgment	:	31 August 2012