

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE CASE NO. 2651/03

In the matter between:

A & B INVESTMENTS (PTY) LIMITED	APPLICANT
VERSUS	
V & M INVESTMENTS (PTY) LIMITED	RESPONDENT
CORAM	SHABANGU AJ
FOR APPLICANT	MR P. FLYNN
FOR RESPONDENT	MR L.R. MAMBA

Ruling on Application to stay

Proceedings pending determination

Of dispute to Arbitration

27th May, 2004

The parties in this judgement will be referred to as in the main application. The applicant a company described as A and B Investments (Pty) Ltd has instituted proceedings before this court seeking an order that "(1) the Deputy - Sherrif be and is hereby authorised and directed to seize the equipment, fixtures and fittings and machinery of the respondent situated at the Ritz Cafe, Lot 53 Gwamile Street, Mbabane and deliver the equipment to the Applicant 2. That the Respondent be ordered to pay the costs of this application."

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The respondent has in response to the main application filed what is headed an described as an "Notice of Application in terms of section 6 of Act No. 24/1904." In the latter application the respondent seeks an order "(a) staying proceedings under case no: 2651/03 pending reference of the matter to arbitration, b. Awarding costs of this application against Simon Torgeman de bonis propriis." In support of the present application to stay the main proceedings pending reference of the matter to arbitration the respondent avers in the affidavit filed in support of the application, that,

"3 In the said application the applicant seeks an order effectively cancelling the agreement of sale annexed to the application and annexed marked "ST4" as a result of a dispute having arisen between the parties arising from an alleged failure to pay the rentals in respect of certain equipment, fixtures, fittings and machinery.

4. It is noteworthy that the respondent in the main matter does not list the goods claimed, but merely refers to all equipment, fixtures and fittings and machinery situated at lot No. 53 Gwamile Street, Mbabane.

5. Certain correspondence has been exchanged between the parties on a without prejudice basis and it is clear from that correspondence that there is dispute as to the identity of the goods which are the subject matter of the agreement 'ST4'.

6. Clause 13 of the agreement relied upon makes extensive provisions regarding the resolution of

disputes. It is my humble submission that there is clearly a dispute between the parties in this matter as evidenced by the very institution of proceedings by the respondent against the applicant.

7. There is no reason why the matter should not be resolved in terms of the very agreement upon which the respondent relies.

8. At the time the application was filed the present applicant was ready and willing and still remains ready and willing to do all things necessary for the proper conduct of the arbitration."

It is clear therefore that the basis upon which the respondent seeks to support its application is the alleged existence of a dispute between the parties which dispute according to the respondent needs to be resolved by arbitration as provided for in the agreement which is the basis of the main application. The agreement which is annexure 'ST4' of the main application contains an arbitration clause, which at clause 13 provides the following, in so far as may be relevant and material to the present application:-

"Dispute Resolution-

13.1 Subject to the provisions of clause 13.8 below, in the event of any dispute or difference arising between the parties hereto relating to or arising out of this agreement, including the implementation, execution, interpretation, rectification,

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termination or cancellation of this agreement, either of the parties shall be entitled to declare a dispute provided the terms thereof are notified in writing to the other parties hereto, whereupon the parties shall forthwith attempt to settle such dispute or difference and failing such settlement within a period of 14 (fourteen) days after the delivery or the written details of such dispute, such dispute or difference may be submitted to arbitration in accordance with the provisions set out below by any party hereto."

The subsequent sub-paragraph in clause thirteen makes provision in relation to the appointment of the arbitrator and other ancillary matters.

A respondent who raises an arbitration clause must allege and prove the following (a) the existence of the arbitration clause or agreement (b) that the arbitration clause or agreement is applicable to the dispute between the parties (see *KATHEMER INVESTMENTS (PTY) LTD V. WOOL WORTHS PTY LTD 1970 (2) SA 498(A)*, *UNIVERSITEIT VAN STELLENBOSCH V J.A. LOUW (EDMS) BPK 1983 (4) SA 321 (A)*) (c) that there exists a dispute between the parties. The dispute must be clearly defined in the special plea or application under section six of the arbitration Act (see *PAREKH V. SHAH JEHAN CINEMAS (PTY) LTD & OTHERS 1980 (1) SA 301(D)*) (d) that all the preconditions contained in the agreement for the arbitration have been complied with. (see *RICHTOWN CONSTRUCTION CO (PTY) LTD V. WITBANK TOWN COUNCIL & ANOTHER 1983 (2) SA 409 (T)*).

Mr Flynn's main submission on behalf of the applicant is that the respondent's application should fail because there is no dispute declared and notified in writing to the applicant by the respondent in accordance with the provisions of the arbitration clause. Mr Flynn went on to contend that such dispute is not shown to exist even in the application. The relief claimed in the notice of motion that "the Deputy Sheriff be authorised and directed to seize the equipment, fixtures and fittings and machinery of the Respondent situated at the Ritz Cafe, Lot 53 Gwamile street, Mbabane and deliver the equipment to the Applicant" appears to be based on the alleged non-payment of rental by the respondent. Mr Flynn's submission is that there is no dispute on the allegation that the rental was not paid as from July, 2003. Even though in paragraph three of the affidavit filed by the respondent in support of the application the deponent to that

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affidavit makes reference to a dispute which has allegedly "arisen between the parties arising from an alleged failure to pay rentals," the exact nature, extent and terms of the alleged dispute is not described with any degree of detail and particularity for me to say that there is indeed a dispute

relating to the "alleged failure to pay rentals" which ought to be submitted to arbitration in terms of the arbitration clause. I am unable to come to the conclusion that there is indeed a dispute shown in paragraph three of the affidavit filed in support of the respondents' application, regarding an alleged failure to pay the rentals.

Secondly, the other paragraph in the respondents' affidavit which could possibly be relied upon as revealing a dispute which ought to be referred to arbitration between the parties is paragraph five. That paragraph also does not state with any degree of precision the nature of the dispute and terms, for me to be able to conclude that there is indeed a dispute in existence and that the arbitration clause is applicable to same. I am in agreement with Mr Flynn that it is not sufficient for the respondent to simply state as it has done in its affidavit that "certain correspondence has been exchanged between the parties on a without prejudice basis" and "that it is clear from that correspondence that there is a dispute as to the identity of the goods which are the subject matter of the agreement."

Lastly the respondent contends at paragraph six of the affidavit filed in support of the application, that "there is clearly a dispute between the parties in this matter as evidenced by the very institution of proceedings" by the applicant against the respondent. I do not think the mere institution of proceedings by a party to an arbitration agreement, is evidence of the existence of a dispute. The other party who wishes to have the matter referred to arbitration in terms of the arbitration clause is required to file a special plea or an application in terms of section 6 of the Arbitration Act 24 of 1904 wherein the dispute is clearly demarcated. See PAREK's case supra at page 306. There is a further reason why the application should fail and this is because the respondent has not declared a dispute and notified the applicant of the terms and details of the dispute, as required by clause 13(1) of the arbitration clause. Furthermore, there is no evidence that the parties have after the declaration and notification of the dispute attempted to settle such declared

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dispute as contemplated by clause 13(1) of their agreement. As already observed earlier, if the respondent is to succeed it must further show that all the preconditions contained in the agreement for the arbitration have been complied with. See RICH TOWN CONSTRUCTION CO. (PTY) LTD V. WITBANK TOWN COUNCIL & ANOTHER 1983 (2) SA 409(T). In the circumstances the respondents application that the main proceedings under case No. 2651/03 be stayed pending reference of the matter to arbitration is dismissed with costs.

ALEX S. SHABANSGU

ACTING JUDGE