IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

JAY DEE INVESTMENTS (PTY) LTD
Applicant

And

PHAKAMA MAFUCULA FARMERS ASSOCIATION
Respondent

Civil Case No 1398/2007

Coram	S.B. MAPHALALA – J
For the Applicant	MR. S. SIMELANE
For the Respondent	MR. J. WARING

JUDGMENT
1st February 2008

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[1] Before court is an urgent application brought by the Applicant Jay Dee Investment (Pty) Ltd, a company duly incorporated and registered as such in accordance with the company laws of the Kingdom of Swaziland against the Respondent cited as Phakama Mafucula Farmers Association also a company duly incorporated and registered as such, for an order *inter alia*, declaring that the Respondent's cancellation of the contract between the parties to be null and void *abnitio*. Declaring that the Respondent is bound by the terms of the contract between the parties. Alternatively, declaring

the Respondent is liable to pay to the Applicant all sums payable by it to the Applicant under the contract between the parties, as if the said contract had not been terminated. That pending finalization of the application the Respondent be interdicted and restrained from carrying on, any of the works or engaging anyone else to carry on, any of the works (cane cutting), awarded to the Applicant in terms of the contract between the parties. The Respondent pay the costs of this application.

[2] The parties have filed the requisite affidavits where Respondent has raised a number of points *in limine* which are the subject-matter of this judgment. The only point *in limine* addressed by Counsel is that this court has no jurisdiction to hear and/or entertain this matter nor has the Applicant pleaded that the court has jurisdiction. When the matter came for argument this point was further expanded to the effect, that the issue that arbitration is a condition precedent to an approach to the court for it to be arbiter in these proceedings. The Respondent requests that the matter be referred to arbitration in terms of the contract of service, which requires that any dispute between the parties, be sent to arbitration in terms of clause 13 of the arbitration agreement.

[3] Clause 13 of the Memorandum of Agreement attached as annexure "A" reads *in extenso* as follows:

Arbitration

13.1 Any dispute or difference arising between the parties relating to the following issues relating to this agreement:

13.1.1 Implementation;

13.1.2 Interpretation;
13.1.3 Execution;
13.1.4 The parties, respective rights and obligations;

13.1.5 Rectification;
13.1.6 Termination or cancellation;
13.1.7 A breath

The parties shall forwith meeting to attempt to settle such dispute or difference and failing such settlement within a period of 14 (fourteen) days the dispute or difference shall be submitted in accordance with the provisions set out hereunder.

13.2 The arbitration shall be held at Mafucula and held in a summary manner on the basis that it shall not be necessary to observe or carry out strict rules of evidence or the strict formalities or procedures stipulated in the arbitration laws of Swaziland and hence there shall be no written pleadings or evidence nor formal discovery of documents except in so far as required by the arbitrator.

13.3 The arbitration shall be held as soon as practicably possible and with a view to it being completed within 21 (twenty-one) days after it is demanded, particular regard to any agency with respect to the matter.

13.4 The arbitrator shall be, if the question in issue is:

13.4.1 Primarily an accounting matter, an independent agreed upon between the parties;

13.4.2 Primarily a legal matter, a practicing attorney agreed upon between the parties;

13.4.3 Any other matter, an independent person agreed upon between the parties;

13.5 Should the parties fail to agree on such appointment:

13.5.1 If the arbitrator is to be chartered accountant he shall be appointed by the President of the Swaziland Society of Chartered Accountants.

13.5.2 If the arbitrator is to be an attorney, he shall be appointed by the Law Society of Swaziland;

13.6 If the parties are not agreed or ad idem on the nature of the dispute, practicing attorney shall be appointed, in accordance with the fore-going provisions, and shall determine the nature of the question in issue and his decision shall be final and binding.

13.7 The arbitrator shall make just an equitable ruling that takes into consideration the fact that the parties wish to dispose of the dispute expediently, economically and confidentially.

13.8 The above irrevocably agree that the decision of the arbitration proceedings as stated above:

13.8.1 shall be binding on them;

13.8.2 shall be carried into and effect and be capable of being made an order of a competent court;

13.8.3 may come with an award of arbitrator costs

[4] The Respondent contends that a Defendant/Respondent may at any

time raise a point that arbitration is a condition precedent to a claim on a contract by virtue of the terms of the contract itself. In this regard the court was referred to the legal authorities of *Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th Edition* at page *261* and the case of *Willesford vs Watson (1873) LR 8 CHD 473* at page *480* where the following *dicta* was expressed:

> " If the parties choose to determine for themselves that they will have a domestic form instead of the ordinary court, under an Act of Parliament and since that Act was passed, a *prima facie* duty is cast upon the courts to act upon such an agreement".

There is numerous authority for this view see also *Glanfield v ASP Development Syndicate Ltd 1911 AD 374*, where the court approved the view that;
"When a contract contains a term that disputes arising out of the contract should be referred to arbitration neither party is entitled to the assistance of the court unless the matter has first been submitted to arbitration or unless the right to insist upon arbitration has been waived".

[5] The gravamen of the argument of the Respondent is that although the jurisdiction of the court is not ousted by the arbitration clause, the court will not usually interfere and will most often than not compel the parties to go to arbitration. The rational behind this is that **"… there is surely nothing illegal or improper in allowing persons who are *sui juris* to agree upon a reference to arbitration as a mode to settling their disputes, and if such an agreement is not illegal it surely ought to be enforced, if it is in the power of the court to enforce it"** *per* Wessels ACJ in *Rhodesian Railways Ltd vs Mackintosh 1932 A.D. 359* at page *369.*

[6] It is contended further for the Respondent that a litigant can plead at anytime a condition to submit to arbitration. (see *Anglia vs Palatine*

Insurance Co. 1911 N.P.D 299 and Walters vs Allison 1922 N.P.D. 238 and *The King vs Harries 1909 T.S. 292.*

[7] The Applicant has advanced *au contraire* argument to the general proposition that this point raised loses focus of the fact that an arbitration clause in any agreement does not oust the jurisdiction of the court. The court has a discretion in the matter, whether to call a halt to the proceedings or to simply resolve the dispute between the parties itself. In this regard the court was referred to the case of *Parekh vs Shah Jehan Cinemas (Pty) Ltd and others 1980 (1) S.A. 301 (D)* at *302* where the following was stated:

> "Arbitration itself is far from an absolute requirement despite the contractual provision for it. If either party takes the arbitrable dispute to court and the other does not protest, the litigation follows its normal course. To check it, the objector must actively request a stay of proceedings. Not even that interruption is decisive. The court has a discretion whether to a halt for arbitration or to tackle the disputes itself".

[8] Having considered the arguments of the parties as in all cases the grant of a remedy to stay is dependant upon a variety of circumstances. Each case is to be treated on its own circumstances and facts. In the present case a referral of the matter to arbitration at this stage would unduly delay the matter, yet it has already been delayed. Further the procedures to be followed if the matter were to be referred to arbitration is cumbersome and would lead to numerous issues being raised. Such issue if raised would mean a delay to the matter which would not be apposite as justice delayed is justice denied. It is trite law that the court will not normally allow agreements which seem or have the effect of placing matters beyond the jurisdiction of the court. For such to be considered, circumstances which would move the court to do so must be alleged, otherwise such will not be given effect. In the present case no such circumstances have been alleged.

[9] In the result, for the afore-going reasons the point of law *in limine* is dismissed and costs to be costs in the main application.

S.B. MAPHALALA

JUDGE