IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NO: 06/21283

In the matter between:

KMATT PROPERTIES (PTY) LTD Applicant

and

SANDTON SQUARE PORTION 8 (PTY) LTD First Respondent

THE REGISTRAR OF DEEDS PRETORIA Second Respondent

J U D G M E N T

BLIEDEN, J:

Introduction

[1] The applicant purchased a sectional title unit in the Michelangelo

Towers from the first respondent in terms of a written agreement of sale concluded on 14 February 2003 (the agreement). The second respondent has been joined in these proceedings inasmuch as it has an interest therein. No costs have been claimed from him and he has not in any way participated in this litigation. Nothing further need be said about this respondent.

[2] In terms of the agreement the applicant acquired a unit comprising section number 19-7 on the 19th floor of the building, an undivided share in the common property and the exclusive use of, *inter alia*, parking bays 14 and 15 on parking level 1 (the parking bays).

[3] The applicant contends that in terms of the agreement, upon the opening of the sectional title register, the first respondent is obliged to reserve the exclusive use of the parking bays for it in the manner contemplated in section 27(1) of the Section Titles Act 95 of 1986 (as amended) (the Act) and to thereafter, on transfer of the sectional title unit to it, cede the exclusive use of the parking bays to it by registration of a unilateral notarial deed of cession in its favour.

[4] The applicant accordingly seeks an order compelling the first respondent to give effect to its alleged obligations in terms of the agreement.

[5] In response to this claim the first respondent contends that it will have complied with its obligations in terms of the agreement if the exclusive use of the parking bays is reserved to the applicant in the manner contemplated in section 27A of the Act.

[6] The question of the applicant's rights and the first respondent's corresponding obligations in terms of the agreement accordingly entails an

interpretation of the relevant clauses of the agreement against the legislative background of the applicable provisions of the Act.

[7] Each of the parties contends that the relevant clauses in the agreement have a plain and unambiguous meaning.

[8] The first respondent contends further that the applicant, in seeking to enforce rights and impose obligations on the first respondent for which the agreement makes no provision, has repudiated the agreement and that the first respondent has as a result terminated it. The first respondent has brought a counter-application for relief consequent upon the termination of the agreement.

[9] On the papers before the court the first respondent has also sought to terminate the agreement on the ground of certain breaches by the applicant of its provisions. However, it did not persist with this as a ground for cancellation and nothing further need be said on this issue.

[10] The applicant relies on the provisions of clause 30 of the agreement for its contention that the counter-application should not be heard by the court but should be referred to arbitration.

[11] The issues which arise for determination are accordingly the following:

11.1 The manner in which the exclusive use rights of the applicant are to be reserved for it in terms of the agreement. This involves an interpretation of the relevant clauses in the agreement;

11.2 Whether, in the circumstances, and having regard to the provisions of clause 30 of the agreement, the court should entertain the first respondent's counter-application if it is found that the applicant's interpretation is incorrect;

11.3 If the counter-application is entertained, whether there has been a repudiation by the applicant which entitles the first respondent to cancel the agreement, and the consequences of such cancellation.

The legislative background – the Act

[12] In terms of section 1:

12.1 a "*unit*" is defined as "*… a section together with its undivided share in the common property apportioned to that section in accordance with the quota of the section*";

12.2 a "*section*" is defined as "*… a section shown as such on a sectional plan*";

12.3 "*common property* " is defined as, *inter alia*, "*… the land included in the scheme …*" and "*… such parts of the building or buildings as are not included in a section*";

12.4 "*exclusive use area* " is defined as "*… a part or parts of the common property for the exclusive use by the owner or owners of one or more sections*".

[13] In terms of section 2(a) to (c) a building in a scheme and the land on which the building is situate may be divided into sections and common property. Separate ownership of such sections may be acquired and the owners of the sections own the common property in undivided shares.

[14] In terms of section 12 the Registrar of Deeds shall, subject to compliance by the developer with, *inter alia*, the requirements of the Act, register a sectional plan and open a sectional title register.

[15] In terms of section 5(3)(d) and (f) the sectional plan is to delineate the sections and, in the prescribed manner, any exclusive use area. As already indicated, common property consists of the land included in the scheme and such parts of the building as are not included in a section.

[16] In terms of section 16 the common property is owned by the owners of the sections jointly in undivided shares proportionate to the quotas of their respective sections as specified on the sectional plan. A section and its undivided share in the common property are together deemed to be a unit.

[17] In terms of section 15B when a sectional title register has been opened and a sectional plan has been registered, ownership in any unit is transferred by means of a deed of transfer signed or attested by the registrar of deeds.

[18]

18.1 Exclusive use of common property is dealt with in section 27;

18.2 In terms of section 27(1)(a), if parts of the common property are delineated on a sectional plan in terms of section 5(3)(f) the developer may when making application for the opening of a sectional title register and the registration of the sectional title plan, impose a condition by which the right to the exclusive use of such parts of the common property is conferred upon the

owner or owners of one or more sections;

18.3 In terms of section 27(1)(b) a developer shall cede the right to the exclusive use of parts of the common property to the owner or owners of units in the scheme by the registration of a unilateral notarial deed in their favour;

18.4 In terms of section 27(4)(a):

> "*An owner of a section in whose favour the right to the exclusive use of a part of the common property delineated on the sectional plan is registered, may transfer his or her interest in such right to the owner of another section in the scheme by the registration by the registrar of a notarial deed of cession entered into by the parties.* "

18.5 In terms of section 27(6):

> "*A right to the exclusive use of a part of the common property registered in favour of an owner of a section, shall for all purposes be deemed to be a right to urban immovable property over which a mortgage bond, … may be registered.* "

18.6 An alternate means of reserving rights of exclusive use is provided in section 27A which was inserted in the Act in 1997 and became operative from October 1997:

18.7 In terms of section 27A:

> "***Rules regarding exclusive use areas.*** *– A developer or a body corporate may make rules which confer rights of exclusive use and enjoyment of parts of the common property upon members of the body corporate: Provided that such rules shall –*
>
> *a) not create rights contemplated in section 27(6);*
>
> *b) include a lay-out plan to scale on which is clearly indicated –*
>
> *(i) the locality of the distinctively numbered exclusive use and enjoyment parts; and*
>
> *(ii) the purposes for which such parts may be used;*
>
> *c) include a schedule indicating to which member each such part is allocated.* "

[19] It is therefore plain that:

19.1 when a unit in a scheme is transferred, ownership of the section together with an undivided share in the common property apportioned to such section is transferred to the transferee. Ownership of the undivided share in the common property is, however, transferred subject to rights of exclusive use of parts of the common property which may be reserved to other owners of other sections;

19.2 the reservation of exclusive use rights in relation to any part of the common property on the other hand, represents a distinct transaction occurring in terms of either the procedure set out in section 27(1) or in terms of section 27A;

19.3 transfer of a right of exclusive use reserved in terms of section 27(1) occurs by means of a notarial unilateral deed of cession, while such rights reserved in terms of section 27A are reserved to the owner (from time to time) of a particular section in terms of the management rules and are therefore automatically transferred along with the relevant section;

19.4 The practical effect of section 27(1) is that:

19.4.1 when a sectional plan is prepared for the purpose of opening a sectional title register, the parking bays and other parts of the common property in respect of which the developer intends to grant exclusive use rights to purchasers of units in the scheme, are individually surveyed and delineated on the sectional plan;

19.4.2 the exclusive use of such parts of the common property is then reserved by the developer upon

the opening of the sectional title register and thereafter, by way of the registration of unilateral deeds of cession, in favour of the purchasers of units, such rights of exclusive use are transferred to such purchasers;

19.5 the practical effect of section 27A is that:

19.5.1 a developer who intends to open a sectional title register simply prepares management rules which incorporate provisions conferring the right of exclusive use of specified parts of the common property upon the owners of specified units in the scheme;

19.5.2 attached to the management rules is a layout plan drawn to scale, depicting the particular parts of the common property and indicating the use to which they may be put;

19.5.3 a schedule is also attached to the management rules indicating which parts of the common property are reserved for the owners of specified

units in the scheme.

[20] Whilst a right of exclusive use reserved in terms of section 27A of the Act is not deemed to be urban immovable property with the result that the registration of a separate mortgage bond over it is not possible, the right nevertheless attaches to the unit to which it has been allocated and therefore forms an integral part of the security of the holder of a mortgage bond registered over the unit.

[21] The reservation of an exclusive use area in the management rules gives full protection to the owner of the unit to which it attaches, as the rules can only, by virtue of section 35(2)(a) of the Act and Regulation 30(4) published thereunder, be changed by way of the unanimous resolution of the body corporate. Moreover, section 1(3)(c) requires that any unanimous resolution which affects the proprietary rights or powers of a member of the body corporate as owner, shall only be effective if consented to by such member in writing.

[22] The effect of these sections and the Regulation is that an owner has a right of veto to protect his exclusive use area and the holder of a mortgage bond over the unit can reserve to itself, for so long as the mortgage bond exists, the right to vote on the owners' behalf at any special meeting of the body corporate.

[23] The effect of the provisions of the Act which pertain to management rules is that the rights of owners of units in the scheme to which rights of exclusive use have been reserved in terms of the management rules, are fully secured. This is by reason of the following:

23.1 Section 35(1) provides that a body corporate shall be controlled and managed by means of the rules;

23.2 Sections 35(2) and 35(4) provide that management rules shall comprise rules prescribed by regulation which prescribed rules may be substituted, added to, amended or repealed by a developer when submitting an application for the opening of a sectional title register, or by a body corporate from time to time by unanimous resolution;

23.3 The prescribed management rules are contained in Annexure 8 to the Regulations published in terms of the Act;

23.4 Section 35(5)(a) provides that where the prescribed management rules are substituted, added to, amended or repealed, the body corporate shall, in the prescribed form, lodge with the registrar of deeds, a notification of such substitution, addition, amendment or repeal; and

23.5 Section 35(5)(c) provides that a substitution, addition, amendment or repeal of the prescribed management rules shall come into effect on the date of the filing of the notification thereof as required by section 35(5)(a). The management rules

governing a body corporate therefore stand as a public document for all to see.

[24] It is not seriously put in issue that the section 27A means of reserving exclusive use rights is acceptable to all of the major lending institutions and is commonly utilised by most property developers when selling sectional title units.

The relevant provisions of the agreement

[25] In terms of clause 5 of the Schedule (pp 25-26) a unit is defined as:

25.1 "*a unit comprising:*

5.1 the Section/s referred to in clause 3 above; and

5.2 *an undivided share in the common property apportioned to the Section/s in accordance with its participation quota.*
"

25.2 The section is described in clause 3 of the Schedule (p 25) as "*Section no/s 19-7 on the 19th floor …*".

25.3 Areas of exclusive use are defined in clause 18 of the Schedule

(pp 27-28) as follows:

"*18.1 Parking bays as marked on annexure 'B' hereto which has been initialled by the parties for identification purposes.*

18.2 The balcony or terraces which abut the section.

18.3 *Subject to the provisions of annexure 'A1' an undivided share with all the residential units from the 8th Floor upwards in:*

18.3.1 The lifts and the lift shaft housing the lifts to the residential units from the 8th Floor upwards;

18.3.2 *The two lift lobbies to the residential units on the 8th Floor and upwards (off Maude Street and the banking level in Sandton Square) and the lift lobby from the apartment parking area;*

18.3.3 *Subject to 4.9 of annexure 'A1' certain service ducts;*

18.3.4 *The swimming pool, swimming pool area and change rooms on the 11th Floor; and*

18.3.5 *The gymnasium area on the 12th Floor.*

18.4 An undivided share together with the residential units on the same floor in the domestic staff dining / kitchen wash basin and toilet areas and the lift lobbies on each floor.

All as shown and indicated on annexure 'B'. …"

25.4 "*Common property* " is defined in clause 1.1.5 of annexure "A1"

as "*the land and such part of the buildings as are not included in any section and subject to exclusive use rights as set out herein*".

25.5 "*The rules* " are defined in clause 1.1.4 of annexure "A1" as "*the rules referred to in clause 13.1.4 hereof*".

25.6 "*Section* " is defined in clause 1.1.16 of annexure "A1" as "*the section described in clause 3 of the Schedule and more fully indicated on the plans …*".

25.7 "*The Schedule* " is defined in clause 1.1.19 of the annexure "A1" as meaning "*… the schedule to which this annexure is attached and forms part of this agreement, which contains details of the units sold, the purchase price and other details hereinafter referred to*".

25.8 "*The unit* " is defined in terms of clause 1.1.20 of annexure "A1" as having "*… the meaning defined in the Act and with regard to the unit hereby sold shall mean the unit specified in the schedule …*".

[26] In terms of clause 3.1 of annexure "A1":

"*The seller hereby sells to the purchaser who hereby purchases the unit from the seller and on the terms and conditions set out in this annexure and as set out in the agreement and schedule to which this annexure is attached.* "

[27] In terms of clause 3.2 of annexure "A1":

"*The precise boundaries of the section forming part of the unit hereby sold shall be as depicted upon the sectional plan as and when approved in terms of the Act.* "

[28] In terms of clause 4 of annexure "A1":

"*4.1 The purchaser shall be entitled to the exclusive use, occupation and enjoyment of the parking bays, described in paragraph 18.1 of the schedule subject to the rights of representatives of the body corporate or of the developer of reasonable access thereto.*

4.2 The purchaser, together with all other owners of residential units on the 8th Floor and upwards shall be entitled to the exclusive use, occupation and enjoyment of the lifts and shafts, lift lobby and entrance lobby, certain service ducts, a fire escape, parking circulation areas, the swimming pool and change room areas and the gymnasium area and the balconies and terraces, all as described in paragraph 18 of the schedule and together with all other owners of residential units on the same floor the exclusive use, occupation and enjoyment of the kitchen and dining areas on the same floor as the section and of the lift lobby on the same floor as the section, all as described in paragraph 18.3, subject to the rights or representatives of the body corporate or of the developer of reasonable access thereto.

4.3 The purchaser's rights in terms of this clause may not without the consent of the developer be sold or otherwise disposed of to anyone except the person to whom the purchaser sells or disposes of the units. Likewise, any domestic staff/storerooms which are sold as sections may only be purchased and owned by owners of sections in the development. The domestic

staff/storerooms may not be used for the accommodation of domestic staff save where a unit owner requires the care and attention of domestic staff on valid medical grounds (where a medical certificate is to be produced to the Trustees to this effect) or where each owner on the particular floor consents in writing to such accommodation. The provisions of this sub-clause shall be incorporated in the Rules. …

4.5 *It is recorded that if permitted by law the exclusive use rights in terms hereof will be allocated in terms of the rules referred to in 13.1.4. The undivided share referred to in 18.3 of the schedule will vary depending on the number of residential units sold and transferred from time to time. Accordingly the undivided share allocated to the purchaser in terms of 18.3 of the schedule will vary and be dependent on the final number of units. Likewise, the share in respect of the exclusive use areas in 18.4 will vary depending on the number of units on the particular floor. …* (emphasis supplied)

4.8 *The exclusive use in respect of the fire escape as shown on annexure 'A' shall be that area which adjoins only the residential units while that area which adjoins the office areas shall be an exclusive use area in favour of the offices. A right of way in favour of the residential units will be secured over the office fire escape exclusive use area. …*"

[29] In terms of clause 13.1.4 (pp 36-37):

"*13.1.4* *the seller intends to procure that upon the opening of the Sectional Title Register and the establishment of the body corporate, the management and conduct rules contained in the regulations to the Act shall apply subject to any changes and modifications allowed by the Act and which the seller may deem necessary provided that:*

13.1.4.1 *such rules be amended, modified or replaced to accord with the reasonable requirements of any building society or bank approved by the seller which may grant mortgage bonds to any purchaser of a unit;*

13.1.4.2 *such rules may grant to the members of the*

body corporate, the sole and exclusive use of areas of the common property;

13.1.4.3 *the provisions of 4.3 to 4.13 shall be provided for an incorporated into the rules.* "

[30] In terms of clause 13.2 (p 37):

"*13.2 By his signature hereto the purchase irrevocably and in rem suam appoints the seller as his agent and attorney to attend any meeting of the body corporate at which the purchaser is entitled to be present and then and there to vote, on behalf of the purchaser for the amendment of the rules as referred to in paragraph 13.1.4 above or the adoption of any house rules.* "

The interpretation of the relevant clauses in the agreement

[31] The applicant contends that clause 18.1 of the Schedule and clause 4.1 of annexure "A1" thereto "*… record that the exclusive rights furnished in terms of clauses 18.1 and 18.2 of the Schedule are not subject to the provisions of clause 4.5 of Annexure 'A1'*".

[32] This submission is made because neither clause 18.1 nor clause 18.2, in contradistinction to clause 18.3, contains any reference to "… *the provisions of annexure 'A1' …*".

[33] Clause 4.5 of annexure "A1", so the argument runs, does not therefore apply to the areas of exclusive use referred to in clauses 18.1 and 18.2 of the Schedule but only to those areas of exclusive use referred to in clause 18.3 of

the Schedule.

[34] This is emphasised, so it is contended, by the provisions of clause 13.1.4.3 of annexure "A1" in terms of which it is provided that the provisions of clauses 4.3 to 4.13 of annexure "A1" "… *shall be provided for and incorporated into the rules*".

[35] Thus it is contended that:

> "*The failure of clauses 4.5 and 13.1.4.3 to pertinently refer to clause 18.1 of the Schedule and clause 4.1 of Annexure 'A1' demonstrates that the exclusive use rights provided for in these latter paragraphs were not to be governed by the Management Rules, but were exclusive use provisions as envisaged in Section 27(1) of the Act …* "

[36] In my view the applicant's analysis overlooks the following:

36.1 That clause 4.1 of annexure "A1" provides in express terms that the Applicant "*… shall be entitled to the exclusive use … of the parking bays, described in paragraph 18.1 of the schedule subject to the rights of representatives of the body corporate or of the developer of reasonable access thereto*" (emphasis supplied);

36.2 Although clause 18.1 of the Schedule contains no reference to the provisions of annexure "A1" it is clear that the exclusive use

of the parking bays referred to in clause 18.1 is indeed referred to in clause 4.1 of annexure "A1" as an "*exclusive use*" right.

36.3 That clause 4.2 of annexure "A1" provides that the "*… purchaser, together with all other owners of residential units on the 8th Floor and upwards shall be entitled to the exclusive use, occupation and enjoyment of the lifts and shafts, lift lobby and entrance lobby, certain service ducts, a fire escape, parking circulation areas, the swimming pool and change room areas and the gymnasium area and the balconies and terraces, all as described in paragraph 18 of the schedule … subject to the rights of representatives of the body corporate or of the developer of reasonable access thereto*" (emphasis supplied);

36.4 The balconies and terraces are the subject of clause 18.2 of the Schedule which, as in the case of clause 18.1, contains no express reference to annexure "A1". It is again clear, however, that the exclusive use of the balconies and terraces is subject to the provisions of clause 4.2 of annexure "A1";

36.5 This is emphasised by the fact that the lifts and shafts, lift lobby and entrance lobby, service ducts, fire escape, parking circulation areas, swimming pool and change room areas and

the gymnasium area, are all the subject of clause 18.3 of the Schedule which in its express terms renders the exclusive use of those areas "*Subject to the provisions of annexure 'A1' …*";

36.6 As clause 4.2 of annexure "A1' regulates the use of the exclusive use areas which are the subject of both clauses 18.2 and 18.3 of the Schedule, it is fallacious to suggest that the provisions of annexure "A1" apply only to clause 18.3 and not to clause 18.2 of the Schedule. The exclusive use areas referred to in clause 18.2 of the Schedule are as much subject to the provisions of clause 4.2 of annexure "A1" as those referred to in clause 18.3 of the Schedule;

36.7 Any residual doubt is entirely and conclusively dispelled by the first sentence of clause 4.5 of annexure "A1" which reads:

> "*It is recorded that if permitted by law <u>the exclusive use rights in terms hereof</u> will be allocated in terms of the rules referred to in 13.1.4*" (emphasis supplied).

36.8 No exclusive use rights are conferred in terms of clause 4.5 and the words "*the exclusive use rights in terms hereof*" can only refer therefore to such exclusive use rights as are conferred elsewhere in the agreement;

36.9 The exclusive use rights described in terms of the provisions of clause 18 of the Schedule are conferred in clause 4.1 and 4.2 of annexure “A1”;

36.10 The provisions of clause 4.5 therefore apply to the exclusive use rights which are conferred in terms of those clauses;

36.11 To hold otherwise would be to accord no meaning to the first sentence of clause 4.5 of annexure “A1” as the word “*hereof*” cannot refer to clause 4.5 itself;

36.12 As pointed out above, section 27A of the Act permits the allocation of exclusive use rights in terms of the management rules. The rules referred to in clause 13.1.4 of annexure “A1” are none other than the management rules. In terms of clause 13.1.4.2 the management rules “*may grant to the members of the body corporate, the sole and exclusive use of areas of the common property*. This can only be a reference to the exclusive use areas defined in clause 18 of the Schedule;

36.13 The applicant’s reliance on clause 13.1.4.3 of annexure “A1” is misconceived. In terms of that clause the provisions of clauses 4.3 to 4.13 of annexure “A1” are to be provided for and

incorporated into the management rules. Thus the provisions of clause 4.5 are to be incorporated in the management rules. Clause 4.5 is concerned with the rights of exclusive use described in terms of clause 18 and conferred in clauses 4.1 and 4.2 of annexure "A1";

36.14 It is evident therefore that the exclusive use rights are to be reserved for the applicant in terms of the provisions of section 27A of the Act and not section 27(1) of the Act.

[37] The applicant's application, premised as it is on its interpretation of the agreement, which I have rejected, therefore falls to be dismissed with costs, such costs are to include the costs of two counsel.

The counter-application

[38] This is an application brought by the first respondent confirming the cancellation of the agreement, it being claimed that the applicant's application constitutes a repudiation of the agreement by it, which repudiation the first respondent has accepted. Various ancillary relief is claimed arising out of the purported cancellation. Because of my rejection of the applicant's interpretation of the agreement, the counter-application is now relevant.

[39] In response to the counterclaim the applicant relies on the contents of

clause 30 of the agreement, the arbitration clause. The provisions of this clause preclude this Court from adjudicating on this issue, so it was submitted by counsel for the applicant. The relevant terms of the clause read:

> "*30.* ***Arbitration***
>
> *Save in respect of urgent relief, whether of an interim or final nature, any difference or dispute arising out of this agreement including (but without limiting the generality of the aforegoing):*
>
> *30.1.1 the interpretation thereof; …*
>
> *30.1.4 the parties' respective rights or obligations thereunder;*
>
> *30.1.5 a breach thereof;*
>
> *30.1.6 the termination thereof;*
>
> *30.1.7 and/or any matter arising out of the termination thereof;*
>
> *30.2 shall be submitted to and decided by arbitration in the manner set out in this paragraph 30 …* "

[40] The first respondent relies on the provisions of section 3(2)(b) of the Arbitration Act No. 42 of 1965 (the Arbitration Act) which states:

> "*3(2) The Court may at any time on the application of any party to an arbitration agreement, on good cause shown:*
>
> *a) …*
>
> *b) order that any particular dispute referred to in any arbitration agreement shall not be referred to arbitration.* "

[41] As was said by Colman J in *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales (Pty) Ltd* 1971 (2) SA 388 (W) at 391, referring to "*good cause*" as contained in this section:

> "*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 the 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.* "

[42] In the present case, counsel for the first respondent submitted that as the dispute involves a pure question of law and nothing else this Court should exercise a discretion by refusing a stay. In my view the fact that the issue for arbitration is a legal one as submitted by the first respondent's counsel should not make any difference in the context of the present application where the issues for arbitration and particularly those stated in subclauses 30.1.5, 30.1.6 and 30.1.7 plainly include legal issues. *Lancaster v Wallace NO* 1975 (1) SA 844 (W) at 847; *Baragwanath v Olifants Asbestos Co (Pty) Ltd* 1951 (3) SA 222 (T) at 230.

[43] Counsel for the first respondent relied on what was said by Didcott J in *Parekh v Shah Jehan Cinemas (Pty) Ltd and Others* 1980 (1) SA 301 (D&CLD) where at page 305 the learned judge made the following comment

in dismissing an application for the stay of certain legal proceedings in court because of an arbitration clause in an agreement:

> "*If either party takes the arbitrable disputes straight to Court, and the other does not protest, the litigation follows its normal course, without a pause. To check it, the objector must actively request a stay of the proceedings. Not even that interruption is decisive. The Court has a discretion whether to call a halt for arbitration or to tackle the disputes itself. When it chooses the latter, the case is resumed, continued and completed before it, like any other.*"

[44] T he present situation is distinguishable from that in the *Shah Jehan Cinemas (Pty) Ltd* case. Here the applicant relied on a special situation created by its alleged need for "*urgent relief*" as stipulated in clause 30 of the agreement, to come to court rather than to go to arbitration. The relief now being claimed by the first respondent, although premised on the findings of this Court in regard to the merits of the applicant's application which is based on the interpretation of the agreement, is something entirely different.

[45] As early as 1875 the English Court of Appeal in *Printing and Numerical Registering Co v Sampson* 1875 LR 19 EQ 462 at 465, per Jessel MR stated:

> "*If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider – that you are not likely to interfere with this freedom of contract.*"

[46] In a reference more specific to ag reements to arbitrate, Wessels ACJ in the *Rhodesian Railways Ltd v Mackintosh*1932 AD 359 at 369 said:

> "*There is nothing illegal or improper in allowing persons who are sui juris to agree upon a reference to arbitration as a mode of settling their disputes, and if such agreement is not illegal it surely ought to be enforced, if it is in the power of the court to enforce it.*"

More recently the Full Bench of the Transvaal Provincial Division in *Transvaal Alloys (Pty) Ltd v Polysius (Pty) Ltd* 1983 (2) SA 630 (T) at 656E stated:

> "*The Courts have been consistent in their approach in requiring a very strong case to be made out by a party seeking to be absolved from a contract to have a dispute referred to arbitration.*"

[47] These sentiments have been reinforced by the Appellate Division in *Universiteit van Stellenbosch v J A Louw (Edms) Bpk* 1983 (4) SA 321 (A) at 333H where Galgut AJA stated that:

> "… the discretion of the Court to refuse arbitration, where such an agreement exists, was to be exercised judicially, and only when a 'very strong case' had been made out",

he went on to state 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*'."

[48] In my view the issue of the repudiation and the subsequent cancellation and what follows therefrom is something separate from the interpretation of the agreement between the parties, and the findings of this Court in that respect. I therefore find that the arbitration clause to which

reference has been made, does preclude me from adjudicating the counter-application. I therefore dismiss that application with costs.

The Rule 30 application

[48] Prior to the hearing of this matter the applicant brought an application to set aside the first respondent's notice of set down dated 7 November 2006. This application was brought in terms of Rule 30. The reasons for the application as stated in the applicant's notice in terms of Rule 30(2)(b) are:

> "*The Notice aforesaid is irregular in that:*
>
> *a) In opposition to the relief sought by the Applicant, the First Respondent delivered its Answering Affidavit and counter application on 11 October 2006;*
>
> *b) The Applicant thereafter delivered its Replying Affidavit in the Main Application and its Answering Affidavit in the counter application on 1 November 2006 being 15 court days after delivery of the Answering Affidavit and counter application;*
>
> *c) In terms of Rule 6(5)(e) read with Rule 6(7)(b) the First Respondent had a period of 10 days within which to deliver a Replying Affidavit in the counter application. That period of 10 days expires on 15 November 2006;*
>
> *d) In terms of Rule 6(5)(f) the Applicant may only apply for a date for the hearing of the application within 5 days of the expiry of the period within which the First Respondent is entitled to deliver a Replying Affidavit i.e. by no earlier than 23 November 2006;*
>
> *e) The First Respondent may only apply for a date for the hearing of the application upon the expiry of the period available to the Applicant to make such application. In the result, the First Respondent is precluded by the provisions of Rule 6(5)(f) from making Application for a date for hearing at any time prior to 23 November 2006;*
>
> f) *In setting the matter down the First Respondent did not comply with Rule 6(5)(f).*"

[49] In addition to these grounds in paragraph 16 of the affidavit filed by the applicant's attorney in support of the Rule 30 application she stated:

"*16.1 the applicant is entirely unaware of what is to be contained in any replying affidavits to be delivered by the first respondent in the counter-application. The applicant is required, in the event that the matter is to be heard on Tuesday, 21 November 2006, to analyse that further affidavit prior to Monday, 20 November 2006 in order to ensure that it is in a position to comply with the practice manual so as to deliver concise heads of argument by no later than 13h30 on Monday, 20 November 2006;*

16.2 given the complexities of the issues raised in the application and the importance to the applicant of those issues and the relief sought by the first respondent in its counter-application, that period is insufficient for the applicant and its legal representatives to properly analyse any further replying affidavit and to prepare heads of argument to deal therewith. Rule 6(5)(f) makes provision for a waiting period of five days after the delivery of the replying affidavit prior to either party being entitled to set the matter down for hearing. The irregular step taken by the first respondent has precluded the applicant and its legal representatives from having the opportunity to properly prepare in the time period provided for in Rule 6(5)(f);

16.3 the applicant has, throughout these proceedings, instructed the same counsel who is steeped in the matter. The applicant's counsel is not available for the hearing of an opposed application in the week of 21 November 2006 as he commences with a trial in the WLD which is set down for hearing on Monday, 20 November 2006. Given the lateness with which the first respondent intends to deliver its replying affidavit and the haste with which it intends to have the matters set down for hearing, there will be insufficient opportunity available to the applicant to properly brief and instruct a different counsel to attend the matter and there will be, in my respectful submission, insufficient time available to such an alternative counsel to properly assess the matter and properly prepare the appropriate heads of argument in the time available.

16.4 *The provisions of Rule 6(5)(f) clearly contemplate that an applicant in any application has, in the first instance, the entitlement to determine when an application is to be set down for hearing. The irregular step taken by the first respondent has removed this entitlement from the applicant and is, for the reasons already advanced, prejudicial to the applicant.*"

[50] When the matter came before the court on Thursday 23 November 2006, the replying affidavit which had been filed on 15 November 2006 was already before the court. It consisted of a five page document the contents of which take the matter no further. It is plain from a reading of the affidavits filed in this Rule 30 application that the sole motivating force behind it is the fact that the applicant anticipated that the counsel who had up to then represented the applicant would not be available during the week concerned. The whole application in fact is little but a stratagem to get the matter postponed at the first respondent's costs.

[51] As luck would have it the applicant's counsel had become available and was present in court on 23 November and had also prepared a set of short and long heads of argument. However, he still persisted with the application to strike out the notice of set down. On his being asked whether the applicant required the matter to be postponed as he was not ready to proceed, he replied in the negative. He indicated that he was ready to argue the matter if the strike out application was not granted.

[52] On being told of this, in the exercise of my discretion, I dismissed the Rule 30 application, and ordered that the matter proceed as it indeed did.

[53] Taking all the above circumstances into account, and particularly the persistence of the applicant's counsel in arguing that the Rule 30 application be upheld, I order the applicant to pay the costs of this application.

Conclusion

[54] In the circumstances the following orders are made:

1. The applicant's main application is dismissed with costs, such costs are to include the costs of two counsel.

2. The first respondent's counter-application is dismissed with costs.

3. The applicant's Rule 30 application is dismissed with costs, such

costs are to include the costs of two counsel.

_____

P BLIEDEN
JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT	ADV A R G MUNDELL
INSTRUCTED BY	MARIE-LOU BESTER INC
COUNSEL FOR FIRST RESPONDENT	ADV A P RUBENS SC G F PORTEOUS
INSTRUCTED BY	STRAUSS SCHER INC
DATE OF HEARING	23 NOVEMBER 2006
DATE OF JUDGMENT	8 DECEMBER 2006