HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED. OK

15/2/2018 .....

DATE SIGNATURE

15/2/18

CASE NO: 10623/2015

In the matter between:

TUBATSE CHROME (PTY)LTD **Applicant**

and

WALKING STICK TRANSPORT CC **Respondent**

JUDGMENT

---

1. This is an application for payment of the costs in the action instituted by the respondent, as plaintiff, against the applicant, as defendant, prior to the parties' reference of the dispute between them to arbitration.

2. The relevant facts of the matter are largely common cause. Briefly, they are the following. The respondent instituted an action against the applicant in the course of 2015 claiming damages for breach of contract. The pleadings were closed and on two occasions the matter was set down but did not proceed. On the first occasion, 6 May 2016, the matter was postponed as the trial was not ready to proceed and costs were reserved. On the second occasion, 25 November 2016, the matter was postponed for the reason that no judges were available to hear the matter. On this second occasion an order was made by agreement between the parties that costs should be costs in the cause. From the evidence before this court it is not known what the facts and circumstances were which lead to the costs being reserved on 6 May 2016.

3. Thereafter, on 2 December 2016 the party signed an arbitration agreement in terms of which they agreed that the dispute be referred to arbitration.

4. The arbitration was concluded before retired Justice Harms as arbitrator who made an award as follows: "The claim is dismissed with costs as defined in clause 9.1 of the Arbitration Agreement."

5. The applicant, as successful party in the arbitration proceedings, subsequently demanded from the respondent payment of the costs relating to the action proceedings instituted in the high Court prior to the reference to arbitration. The respondent denied that the applicant was entitled to such costs and that is the issue which this court has to decide.

6. It is necessary to refer to certain clauses in the Arbitration Agreement. They are the following:

> "1 INTERPRETATION
>
> 1.1 In this Agreement, unless the context indicates a contrary intention, the following words and expressions bear the meanings assigned to them and cognate expressions bear corresponding meanings -
>
> 1.1.1 "Act" means the Arbitration Act, 42 of 1965, as amended;
>
> ...
>
> 2 RECORDAL
>
> 2.1 Walking Stick has instituted action proceedings against Tubatse in the Gauteng Division, Pretoria of the High Court under case number 10623/15 ("the Claim").
>
> 2.2 The Parties wish to have the dispute referred to and disposed of by Arbitration in terms of the Act, the Rules and the terms of this Agreement."
>
> 3 WHEREFORE THE PARTIES AGREE AS FOLLOWS:
>
> 3.1 The parties are in agreement that the dispute is arbitrable and hereby referred to Arbitration.
>
> ...
>
> 5 POWERS OF THE ARBITRATOR
>
> 5.1 The Arbitrator shall determine the claim, together with all ancillary issues, including any issues of law and/or fact, arising therefrom in the pleadings, in accordance with the laws of the Republic of South Africa.
>
> 5.2 The Arbitrator have all such powers in the conduct of the arbitration as conferred by the Act and as set out herein and, as between the parties, shall have the same powers and jurisdiction as would a High Court Judge presiding in a court of first instance.
>
> 6 PROCEDURE
>
> 6.1 All pleadings have been exchanged between the Parties, which define the issues in the Arbitration.
>
> ...
>
> 9 COSTS
>
> 9.1 The costs of the arbitration, including the costs of the Arbitrator, the recording and transcription of the proceedings, and the costs of either Party in preparing for

and conducting the Arbitration, shall be costs in the cause as determined by the Arbitrator, or, if applicable, costs in the cause as ultimately determined by the appeal.

...".

7. On12 June 2017 the applicant's attorneys addressed a letter to the respondent's attorneys stating that: "(i)nsofar as costs until the 12th December 2016, kindly let us have your client's notice of withdrawal of the action and the tendering of our client's costs of therein."

8. In responding to this letter the respondent denied liability for such costs stating, inter alia, that clause 9.1 of the arbitration agreement governed "everything".

9. It was submitted on behalf of the applicant that clause 9.1 of the arbitration agreement only covers the costs of the arbitration and does not cover the litigation costs up to the arbitration. Such costs of the litigation, according to the applicant, had not been determined and in light of the fact that the applicant was successful in its defence in the arbitration proceedings, it is also entitled to the costs of the action up to the date of the signature of the arbitration agreement. It was further submitted by the applicant that the arbitration agreement was never meant nor intended to deal with the costs of the action up to and until the arbitration agreement was signed. It was submitted that it was self-evident at the time of the signing of the arbitration agreement that the costs of the action would follow the result.

10. The respondent's answering affidavit comprised four pages. Most of the factual allegations of the applicant were admitted or merely noted. I shall refer to those aspects which constitute the respondent's answer to the application. The applicant

referred to a letter written by the respondent on 13 June 2017 in response to the applicant's claim for payment for costs of the court proceedings prior to the reference to arbitration. The respondent admitted the contents of this which stated, inter alia, as follows:

"We find this bizarre as you were aware that once the arbitration route kicks in, then everything is determined by the forum as per clause 9.1 of the agreement.

We have also for the record advised our client prior to opting for this route that in the event the order is in their favour, they are entitled to costs as per clause 9.1 and nothing else.

Our client is not willing to accept any cost order from a different court for this matter and instructs us to oppose any application against him."

11. The respondent further denied that it had erred in its interpretation of clause 9.1 and more particularly the respondent denied the applicant's interpretation that clause 9.1 only covered the costs of the arbitration and did not cover the litigation costs up to the arbitration. The respondent also denied the allegation by the applicant that the reason for the arbitration agreement only dealing with the costs after the signing of the arbitration agreement and that it was not meant to nor intended to deal with the costs of the action up to and until the arbitration agreement was signed was that it was self-evident at the time of the signing of the agreement that the costs of the action would follow the result. The respondent consequently also denied the applicant's submission that since the applicant was successful in its defence in the arbitration proceedings, it is entitled to the costs of the action up to the date of the signature of the arbitration agreement.

12. Lastly, it may be noted that in response to the applicant's reference to the signed arbitration agreement, the respondent in paragraph 3 of the answering affidavit referred in addition to clause 2.2 of the arbitration agreement in terms of which the parties agreed that the High Court dispute will be disposed of in terms of the Arbitration Act.

13. On behalf of the applicant advocate Smit submitted, inter alia, that the court is still ceased with the proceedings which have merely been stayed. He submitted that the action is therefore still "alive" and that this court can make an order as far as costs of the proceedings before it are concerned. In support of this argument I was referred to the matter of GK Breed (Bethlehem) Edms Bpk v Martin Harris & Seuns (OVS) EdmsBpk 1984 (2) SA 66 (O).

14. In Rood, at p71D to 72H the court, per Lichtenberg J, dealt as follows with the consequences of his order that the special plea of the defendant that the dispute between the parties should be subjected to arbitration as envisaged in the arbitration clause in the parties' agreement, should be granted:

"In sy smeekbede vra verweerder dat eiser se eis met koste afgewys word. Eiser vra daarenteen dat - indien verweerder se spesiale pleit sou slaag - die aksie slegs gestuit word hangende die afhandeling van die arbitrasieverrigtinge. Mnr Cillié, namens verweerder, het betoog dat dit sinneloos sou wees om die aksie bloot te stuit omdat daar niks oorbly wat hierdie Hof kan beslis nie indien sowel die hoof-asook die alternatiewe verweer deur 'n arbiter beslis moet word want, so lui die betoog, sowel ingevolge die gemenereg asook in terme van die onderhawige arbitrasieklousule is arbitrasie finaal en is daar niks wat na afsluiting van die arbitrasie-verrigtinge met betrekking tot die onderhawige geskille nog deur hierdie Hof besleg kan of hoef te word nie. Hy het verder aangevoer dat 'n

bevel wat slegs stuiting van die aksie, met koste teen eiser en dus ten gunste van verweerder, gelas, slegs die koste van die spesiale pleit en die Hofverrigtinge in verband dáármee sou betrek, met die gevolg dat daar dus nie nou reeds oor die koste van die res van die saak 'n beslissing gevel word nie maar dat die partye ná die voltooiing van die arbitrasieverrigtinge sal moet terugkom na hierdie Hof ten einde 'n beslissing oor dié koste te verkry waaroor daar nie nou beslis word nie omdat die aksie slegs gestuit word maar nie afgewys word nie. Sodanige "terugkoms" na hierdie Hof sal vanselfsprekend ook weer verdere koste meebring. Dit kan alles uitgeskakel word deurdat daar nou reeds 'n finale bevel van afwysing van die aksie, met koste, gemaak word. Die arbiter kan wel 'n bevel met betrekking tot die koste van verrigtinge voor hom maak (art 35 van die Arbitrasiewet), maar hy het geen regsmag om oor die Hofkoste wat oorstaan nadat die Hofaksie gestuit is, te beslis nie. Mnr Cillié het my egter na geen gesag verwys ingevolge waarvan die bevel wat hy aanvra, 'n bevoegde bevel is nie.

'n Spesiale pleit waarin arbitrasie as (spesiale) verweer geopper word, is 'n "plea in bar"; sien The Rhodesian Railways Ltd- beslissing supra te 367; Pillay v Pillay 1934 NPD 135 te 137; Nash v Muirhead (1908) 18 CTR 444 te 445. 'n "Plea in bar" is afwysend van aard, nl 'n "declinatory plea", maar die spesiale pleit van arbitrasie is in ons reg nog steeds as opskortend beskou, naamlik as 'n "dilatory plea"; sien Herbstein en Van Winsen The Civil Practice of the Superior Courts in South Africa 3de uitg te 326 - 327; Beck Theory and Principles of Pleading in Civil Actions 4de uitg para 72, Die spesiale pleit van arbitrasie is inderdaad opskortend van aard, en dit is nie afwysend of deklinatoor nie omdat die Hof se regsbevoegdheid nie deur arbitrasie uitgesluit word nie maar slegs gestuit word, hangende die uitslag van die arbitrasie. Die Hof se regsbevoegdheid bly steeds bestaan, al word die geskil na arbitrasie verwys, en op die Hof se regsmag kan te eniger tyd weer aanspraak gemaak word. In die Parekh- beslissing supra te 305E - H word dit deur DIDCOTT R soos volg opgesom:

"An arbitration agreement does not deprive the Court of its ordinary jurisdiction over the disputes which it encompasses. All it does it to oblige the parties to refer such disputes in the first instance to arbitration, and to make it a prerequisite to an approach to the Court for a final judgment that this should have happened. While the arbitration is in progress, the Court is there whenever needed to give appropriate directions and to exercise due supervision. And the award of the arbitrator cannot be enforced without the Court's

imprimatur, which may be granted or withheld. But that is by no means all. Arbitration itself is from an absolute requirement, despite the contractual provision for it. 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. Throughout, its jurisdiction, though sometimes latent, thus remains intact."

Die bogenoemde betoog van mnr Cillié is logies sowel as wat sy praktiese gevolge met betrekking tot koste betref aantreklik, maar dit verloor, na my mening, uit die oog dat die hele wese van 'n spesiale verweer wat op arbitrasie gegrond is, slegs opskortend van aard is met betrekking tot die Hof se regsmag, maar dat dit daardie regsmag nie uitsluit nie, en derhalwe is dit, meen ek, regtens onvanpas om eiser se hele aksie op hierdie stadium, dit wil sê voordat arbitrasieverrigtinge tussen die partye plaasgevind het en afgehandel is, af te wys maar moet die onderhawige geding in hierdie Hof slegs gestuit, dit wil sê opgeskort, word hangende die uitslag van arbitrasieverrigtinge tussen die partye.

Die volgende bevele word derhalwe gemaak:

(1) Die eiser se aksie word gestuit totdat die geskille tussen eiser en verweerder by wyse van arbitrasie besleg is ingevolge die bepalings van klousule 28 van die ooreenkoms aangegaan tussen eiser en verweerder; en

(2) eiser word gelas om die koste te betaal wat verbonde is aan die verrigtinge in verband met verweerder se spesiale pleit.

15. On behalf of the respondent Advocate Tshabalala submitted that the matter of Breed is not applicable *in casu* for the reason that in that case the court dealt with the state of affairs envisaged in section 6 of the Arbitration Act namely of a party approaching the court subsequent to an agreement to refer a dispute between the parties to arbitration. In the present matter the parties decided after the close of pleadings to

enter into an arbitration agreement. Consequently, so it was submitted, the court proceedings were not stayed as envisaged in section 6 of the Arbitration Act.

16. It was further submitted that due to logistical challenges the parties decided to enter into the arbitration agreement and that the parties simply wanted their dispute to be adjudicated by abitration.

17. Advocate Tshabalala further submitted that the issue of the High Court costs was not submitted for the decision of the arbitrator. Consequently the arbitrator was not wrong in not dealing with the High Court costs. He emphasised that the parties had decided to abandon the action that was serving before the High Court and consequently both parties waived their rights to seek costs against each other. He submitted that the abandonment of the court process was a compromise and it was never the intention to return to the High Court and that the proceeds before the High Court had not been stayed.

18. In the answering affidavit the respondent did no more than to deny the applicant's contentions and to refer to paragraph 2.1 and 2.2 of the arbitration agreement which merely reflect that the respondent had instituted action in the High Court and that the parties wish to have the dispute referred to and disposed of by arbitration in terms of the Act, the Rules and the terms of the arbitration agreement.

19. The respondent did not say that the issue of the High Court costs was part of the issues referred to the arbitrator and that he should have adjudicated that issue. In fact Advocate Tshabalala specifically stated that that was not the respondent's case.

The respondent relied only on the argument that the parties had abandoned the High Court process and had waived their rights in respect of the costs incurred in that process.

20. I agree with the argument on behalf the applicant that the respondent never raised the issues of abandonment and waiver in the opposing affidavit. All that was raised was that the dispute between the parties was referred to arbitration and the only inference to be drawn from that was that the High Court costs was an issue which had also been referred to the arbitrator. Yet that inference was disavowed on behalf of the respondent during argument. In any event, there is no evidence before this court that the parties waived their rights in respect of costs of the High Court proceedings and I can therefore not come to such a conclusion. If anything, the probabilities are against such a notion, for there would be no good reason to abandon costs incurred simply because a different forum to adjudicate the dispute had been selected. This is especially so since the costs incurred by the time that the parties decided to arbitrate must already have reached very high numbers. It would have included the commencement of the case, the preparation, consultations, research and the drafting of pleadings as well as the pre-trial procedures prescribed by the Rules of Court and the appearances in the High Court on two occasions. One would not expect a waiver of the right to claim such costs from the opposing party without some deliberate agreement in that regard by the parties or very clear indications to that effect. There was no such agreement between the parties and no

evidence to form a basis to infer such a waiver as suggested on behalf of the respondent.

21. In my view the correct approach of the matter is to regard the decision by the parties to proceed before an arbitrator instead of before the High Court, as akin to an order by the court in terms of section 6 of the Act namely that the proceedings before the court be stayed and the matter to proceed on arbitration before an arbitrator. Consequently that the proceedings before this court is still alive - at least to enable the parties to approach the court for an order in respect of the costs of the proceedings prior to the submission to arbitration, as is the case *in casu*. It would furthermore retain the authority of the court during the arbitration proceedings as was mentioned in the Breed matter.

22. There is nothing that I can see, and there was nothing suggested during argument, that would militate against such an approach. An appropriate order for costs can sometimes be the subject of intricate arguments and the consideration of many facts or procedures and the Rules of Court in general. Such issues mostly relate to procedural and other questions which have little or nothing to do with the real disputes between the parties. A court would be better placed to adjudicate such issues than the arbitrator whom the parties have selected to concentrate on the merits of their dispute. For the arbitrator to make a finding on such issues, one would have expected a specific reference thereto in the arbitration agreement.

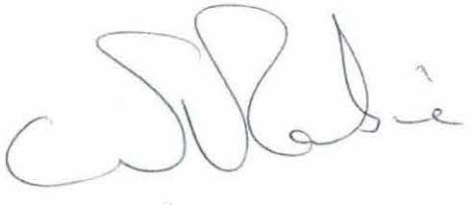
23. In the result I find that this court is entitled to decide the issue of costs relating to the proceedings prior to the conclusion of the arbitration agreement.

24. In deciding the issue of costs, which is a matter of judicial discretion, I have considered the versions of the respective parties, the submissions on their behalf and especially also the award of the arbitrator. In my view there is no reason why the costs incurred during the proceedings before the High Court should not follow the outcome of the dispute as expressed in the arbitrator's award. Regarding the costs that were reserved on 6 May 2016 nothing was placed before this court other than to say that the matter was postponed as the trial was not ready to proceed. In such circumstances the reserved costs should also follow the cause and be paid by the respondent.

25. As far as the costs of this application are concerned there is no reason why costs should not follow the event.

26. In the result the following order is made:

    1. The respondent is ordered to pay the costs, including previously reserved costs, of the action instituted under case number 10623/15.
    2. The respondent is ordered to pay the costs of this application.



C.P. RABIE

JUDGE OF THE HIGH COURT