IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 89435/2018

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

29/11/2020
DATE

[redacted]
SIGNATURE

In the matter between:

In the matter between:

ABEL MANGOLENE N.O	**FIRST APPLICANT**
DON MASHELLE N.O	**SECOND APPLICANT**
JOY BALIPELE N.O	**THIRD APPLICANT**
and	
SMALL ENTERPRISE FINANCE AGENCY (SOC) LIMITED	**RESPONDENT**

Coram: Sardiwalla J

Interpretation - ***Whether a question or issue contemplated in respect of an arbitration award creates a new dispute to be referred to arbitration in terms of the arbitration provision in the principal agreement.***

JUDGMENT

SARDIWALLA J:

[1] In this matter, the Applicant seeks to make an earlier arbitration award an order of this Court. Alternatively, that the dispute between the parties had properly and validly been referred to arbitration and therefore there is no live dispute that needs to be referred to arbitration.

[2] The Respondent has a different view and insists that the applicant's claim gives rise to new disputes which only arbitration in terms of the written Trust Deed has jurisdiction to resolve. According to the Respondent, the purported written agreement entered into between the parties is still valid and binding, including the arbitration clause 22 which reads as follows;

> *"22 Arbitration*
>
> *22.1 Should any dispute (other than a dispute in respect of which urgent relief may be obtained from a court of competent jurisdiction) arise between the participants and/or parties in the widest sense in connection with –*
>
> *22.1.1 the formation or existence of;*
>
> *22.1.2 the carrying into effect of;*
>
> *22.1.3 the interpretation or application of the provisions of;*
>
> *22.1.4 the participants and/or parties respective rights and obligations in terms of or arising out of;*
>
> *22.1.5 the validity, enforceability, rectification, termination or cancellation, whether in whole or in part of;*
>
> *22.1.6 any documents furnished by the participants and/or parties pursuant to the provisions of this deed or which relates in any way to any matter*

affecting the interests of the participants and/or parties in terms of this deed, that dispute shall, unless resolved amongst the participants and/or parties within ten business days from the dispute, be referred to and determined by arbitration in terms of this clause, provided that a party to the dispute has demanded the arbitration by written notice to the other participant and/or parties."

[3] The underlying dispute between the parties can be summarised as follows: On 28 September 2017 Advocate J H Josephson handed down an arbitration award in favour of the Applicant ordering that;

"1. The Respondent is to pay the Claimants the sum of R 3 555 511.23;

2. The Respondent is to pay the Claimants interest against the unpaid drawdowns at the prime rate plus 5% calculated from the date of expiry of the 10 business day period set out in the drawdown notices to date of payment;

3. Interest on all other amounts that may be included in the claims are to be paid by the Respondent at the rate of 10.25% per annum from date of demand to date of payment;

4. The Respondent is to pay the Claimants 60% of the taxed or agreed party and party costs of the arbitration;

5. Claimants are to pay the Respondent the taxed or agreed party and party costs of the application to reopen the Claimant's case including the costs of correspondence between the parties' attorney prior thereto;

6. The Claimants are to pay the Respondent's costs or agreed party and party costs occasioned by the Respondent's counterclaim;

7. The Small Business Growth Trust Fund which is annexure "S1" to the claimant's statement of claim is to be dissolved in accordance with the provisions of clause 18 of the trust deed in respect of the said trust fund."

The arbitration award was in respect of the respondent's liability for existing drawdowns issued for the period of 2013 to 2014 and 2015 to 2016. The matter was set down for hearing on 2-3 March 2017 however on 7 March 2017 the applicant requested the matter be re-opened on the basis that the respondent's accounting was inherently flawed and new evidence be tendered. The re-opening of the matter was initially opposed by the respondent, however on 14 March 2017 the parties agreed to a further hearing. Advocates J H Josephson's award was made having regard to evidence led at both hearings. The applicant contends that by ordering the Fund dissolved according to the provisions of Section 18, the arbitrator was fully aware of the fact that, the Fund could only be dissolved after the Funds existing liabilities for the period of 2013-2014 and 2015-2016 together with the future drawdowns issued by the Fund, had been fully discharged to its creditors. The dissolution award in accordance with Section 18 was therefore done with the intention of expenses or creditors being paid up to that date.

[4] The Respondent however disputes that the extent of the Fund's current liabilities extends after 1 October 2016. It further disputes that it is obliged to pay the Fund such an amount in terms of clause 10.2.9.1 of the trust deed and that the drawdowns issued for the period 1 October 2016 to 2017 are claims covered by the arbitrator's award. It therefore pleads that the relief sought in payers 2 and 3 of the notice of motion cannot be made orders of court on the pretext of such being part of

the earlier arbitration award but are rather new disputes that ought to be referred to arbitration.

[5] The Respondent accordingly launched an application in terms of section 6(1) of the Arbitration Act 42 of 1965 (the "**Arbitration Act**"), which appears at page 116 of the papers. That application, to which reference will be made as the "stay application", is based on the fact that the parties' relationship is regulated in terms of a written trust deed. It avers that the written trust deed contains an arbitration clause with an ambit that covers the types of disputes that are raised by the Applicants in the main application, as well as the fact that the new disputes aired in the main application raise factual issues that are not capable of being resolved in motion proceedings where the applicants are seeking final relief on affidavit.

[6] The approach adopted by our Courts in deciding whether a dispute comes within the provision(s) of an arbitration clause in a contract, was discussed by the Supreme Court of Appeal, in ***North East Finance (Pty) Ltd v Standard Bank of South Africa LTD***[1], which dealt in particular with the effect fraud has on an arbitration clause in general. The parties entered into a settlement agreement which contained an arbitration clause. The two issues considered on appeal were firstly, whether the arbitration clause could be construed so as to compel submission to arbitration on whether the bank was induced by North East's fraud to conclude the settlement agreement and secondly, if so, whether the allegations were wholly unfounded.[2] The arbitration clause provided specifically that *'any dispute . . .*

---

[1] *2013 (5) SA 1 (SCA)*
[2] *North East supra, at p5 par.11*

including any question as to the enforceability of this contract would be referred to arbitration.

[7] Lewis JA, speaking on behalf of the Court in North East, stated in paras 15 and 16,the following:

> *"[15]...It is not, however, necessary (indeed it is not possible, given the disputes of fact in respect of the alleged fraud) for this court to determine whether the settlement agreement was void from inception or voidable until the bank had elected to resile. I consider that the term 'enforceability' refers to both a void and a voidable contract; if the parties had intended that the question whether fraud inducing the contract should be determined by an arbitrator, then he or she would determine whether the contract was valid and enforceable, or voidable or void."*
>
> *[16] It is in principle possible for the parties to agree that the question of the validity of their agreement may be determined by arbitration even though the reference to arbitration is part of the agreement being questioned. That is suggested in Heyman v Darwin's Ltd[3]. Lord Porter said:*
>
> > *'I think it essential to remember that the question whether a given dispute comes within the provisions of an arbitration clause or not primarily depends upon the terms of the clause itself. If two parties purport to enter into a contract and a dispute arises as to whether they have done so or not, or as to whether the alleged contract is binding upon them, I see no reason why they should not submit that dispute to arbitration. Equally, I see no reason why, if at the time when they purport to make the contract they foresee the possibility of such a dispute arising, they should not provide in the contract itself for the submission to arbitration of a dispute as to whether the contract ever bound them or continues to do so. They might, for instance, stipulate that, if a dispute should arise as to whether there had been such a fraud, misrepresentation or concealment in the negotiations between them as to make a purported contract voidable, that dispute should be submitted to arbitration. It may require very clear language to effect this result, and it may be true to say that such a*

---

[3] *[1942] ALL ER 337 (HL) at 334; 357 B-D.*

contract is really collateral to the agreement supposed to have been made, but I do not see why it should not be done."

[8] Having examined the ambit of the arbitration clause in that matter and what the parties intended by having regard to the purpose of their contract (the settlement agreement), it was held by the SCA that the parties intended that the arbitrator's role would only be to determine disputes in respect of accounting issues, and it was not intended that the validity or enforceability of the contract, which was allegedly induced by fraudulent misrepresentations and non-disclosures would be subject to arbitration.[4]

[9] *In casu*, the facts in the present instance are distinguishable from the cases discussed by the Supreme Court of Appeal[5] as in both those matters fraud was either common cause or proven by the aggrieved party who wanted to resile from the arbitration agreement. In the present instance, the parties agreed *inter alia*, that

"any documents furnished by the participants and/or parties pursuant to the provisions of this deed or which relates in any way to any matter affecting the interests

of the participants and/or parties in terms of this deed, that dispute shall, unless resolved amongst the participants and/or parties within ten business days from the dispute, be referred to and determined by arbitration in terms of this clause, provided that a party to the dispute has demanded the arbitration by written notice to the other participant and/or parties."

---

[4] ***Supra para 30.***
[5] ***North West Provincial Government and Another v Tswaing Consulting CC and Others, supra; and North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd, supra***

The respondent contends that, on a proper reading of clause 22 the parties clearly intended that all disputes that affect the parties' interests including the interpretation of the arbitrator's award should be determined by the arbitrator.

[10] Counsel for the Respondent argued that the context in which the parties argued at the arbitration hearing and to which the award was made excluded the current dispute as this was not foreseen and or foreseeable by the Applicants at the time and could not have been in the contemplation of the parties.

[11] The principles regarding the interpretation of contracts is well settled in our law and it is unnecessary to recite them again. The same approach applies in considering the ambit of an arbitration agreement or award. A Court must ascertain what the parties intended by having regard to the purpose of their agreement, and interpret it contextually so as to give it a commercially sensible meaning[6].

[12] In the present instance, given the disputes of fact regarding the award and what it included, it is not possible for this Court to make a determination. The ultimate question for consideration is whether the parties intended that if such a dispute arose, as in this instance, that dispute would be determined by an arbitrator.

[13] In *casu*, at the heart of the Respondent's opposition is that the Applicants at the time did not foresee and therefore never raised the issue of the future drawdowns that would be issued until the dissolution of the trust, therefore the arbitrator did not and could not make an award to that effect. The Applicants only

---

[6] ***See North East, supra at paras 24 – 25 and the cases referred to therein.***

raised the drawdowns that existed at the time for the periods specified. To this end I am mindful of the reference that the Applicants have made with respect to what was argued at the arbitration hearing by the Respondent's counsel, *"I think it is important not to lose sight of the fact that the Fund brought a case which says that we are ultimately liable for their obligations, existing, any obligation or existing liability, not spent ones"*. This is my opinion provides a clear context to what was argued and what needed to be established. If the Respondent intended only to argue existing liabilities for the period of 2013 to 2014 and 2015 to 2016, the arbitrator could not in my mind have made an award that extended after such period.

[14] In considering the arbitration agreement as recorded in clause 22, it is evident that the parties agreed that where a dispute affected the rights of any party that such dispute would be subject to arbitration. Having regard to the abovementioned arbitration clause and the agreement as a whole, it is evident the parties envisaged and intended, at the time of concluding the agreement, that all their disputes would be determined by arbitration. To view it differently would in my view give the agreement a commercially insensible meaning.

[15] For these stated reasons, it follows that the Respondent properly referred the matter to arbitration in terms of the agreement.

[16] In the result the following order is made:

The Application is dismissed with costs.

C M SARDIWALLA

JUDGE OF THE HIGH COURT

Date of Hearing:	19 August 2019
Date of Judgement	29 January 2020

Appearances:

For the Applicant:	Adv. J Berlowitz
Instructed by:	Salant Attorneys
For the First Respondents:	Adv.: S W Burger
Instructed by:	Mothle Jooma Sabdia Inc