IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIVIL TRIAL 3484/08

In the matter between:

SWAZILAND LILANDA SUPPLIERS (PTY) LTD **Plaintiff**

And

THE MINISTER OF ENTERPRISE & EMPLOYMENT 1* Defendant THE SWAZILAND INVESTMENT PROMOTION AUTHORITY **2nd Defendant**
THE SWAZILAND GOVERNMENT **3rd Defendant**
THE ATTORNEY-GENERAL **4th Defendant**

Date of hearing: 04 February, 2009
Date of Judgment: 03 March, 2009

Mr. Attorney Z. Shabangu for the Plaintiff
Mr. Attorney S.V. Mdladla, with him Mr. N.N. Mabuza for the 2nd Defendant Mr. Attorney S. Khumalo for the 1st, 3rd and 4th Defendants

JUDGMENT

MASUKU J.

[1] This judgment is concerned with a special plea of the alleged failure or neglect by the Plaintiff to refer a dispute *inter partes* to arbitration in compliance with an agreement to refer any disputes arising between the parties in the first instance to arbitration.

In order to conduce to a proper understanding of the *lis,* it would no doubt be proper to briefly chronicle the facts which give rise to the proceedings. I must state from the onset that at the heart of this action is a lease agreement which it would appear particularly from the 1st, 3rd and 4th Defendants' plea, is disputed.

For present purposes and for the express purpose of deliberating and making judgment on the special plea aforesaid, I will briefly narrate the averments contained in the Plaintiffs particulars of Claim. The Plaintiff, it is common cause is a company registered in accordance with the company laws of this Kingdom with its offices situate in Mbabane.

The 1st Defendant is the Minister responsible for Enterprise and Employment. The 2nd Defendant is the Swaziland Investment Promotion Authority (hereafter referred to as "SIPA"). It is a body corporate established in terms of section 3 of the Swaziland Investment Promotion Act of 1988, also having its offices in Mbabane. The 3rd Defendant is the Swaziland Government duly represented by the Attorney-General in terms of Section 3, of the Government Liabilities Act, 1967. It would appear that the Attorney-General is cited in his nominal capacity.

The Plaintiff avers that in or about November, 2006, it submitted a business proposal to 1st, 2nd and 3rd Defendants with a view to it leasing from the Defendants, certain premises at Ebuhleni Industrial area, Hhohho District, from which it intended to conduct the business of packaging sugar and other related products. The Defendants, who were represented by one Sabelo Mabuza, instructed the Plaintiff to amend its

proposal in order for it to be eligible to be offered a lease of the premises in question. The Plaintiff obliged and amended its proposal accordingly.

Having submitted its amended version, the Defendant's, again represented by Mabuza, formally made an offer of lease to the Plaintiff. A copy of the said lease agreement is annexed to the Summons. The Plaintiff alleges that this was with the authority of the Defendants. In the alternative, the Plaintiff avers that the Defendants are estopped from denying the authority of the said Mabuza to act on their behalf in the conclusion of the said agreement of lease.

The Plaintiff accordingly accepted the offer of lease and signified that fact by signing the lease agreement on 22 February, 2007 and returning the signed copy thereof to the Defendants. It is unnecessary, for present purposes to state the material provisions thereof. On 22 February, 2007, the 2nd Defendant granted possession of the leased property to the Plaintiff. Because the premises were in a bad state of repair, it was agreed *inter partes* that the Plaintiff would effect the necessary repairs to restore the premises to a habitable state, the costs of which were to be off set against the rental. It is the Plaintiffs contention that it duly effected the said repairs.

[8] In June, 2007, further avers the Plaintiff, the 1st and 2nd Defendants breached the lease agreement by forcibly and unlawfully ejecting the Plaintiff from occupation of the said premises. This was so, it was contended, notwithstanding that in terms of the

aforementioned lease agreement, the Plaintiff was entitled to occupy the premises for a minimum period of five years from inception of the agreement.

[9] In consequence of the breach alleged, the Plaintiff has lodged various claims against the Defendants, including the equivalent in monetary terms of its property that was in the premises but never returned to it upon its ejectment from the premises; a refund for repairs it effected on the premises; damages incurred for storage of its goods; travel expenses incurred in preparing to start its business and damages for loss of profit. The total claim against the Defendants, which are sued jointly and severally, is E20, 479, 187.00 with interest thereon and costs.

[10] As indicated earlier, the Defendants, being the 1st, 3rd and 4th, deny that the lease agreement was entered into. Because of the nature of their plea, they did not feature actively in this hearing. The 2nd Defendant, for its part, filed a special plea which records the foil owing;-

"l.The Plaintiffs claim arises from a written contract between the parties.

2. Clause 16 of that agreement provides that any dispute between the parties shall be referred to arbitration by a nominated arbitrator.

3. Inasmuch as the 2nd Defendant disputes the Plaintiffs claim however but for the Plaintiffs action, 2nd Defendant would have prior to

the institution of the action, informed the Plaintiff of such dispute the Plaintiffs claim is in dispute as envisaged in this clause.

4. The Plaintiff has not referred the dispute to arbitration.

5. The 2nd Defendant prays that the Plaintiffs action be dismissed/alternatively, it be stayed pending the final determination of the dispute by the arbitration in terms of the agreement."

[11] The Plaintiff filed its replication which was terse. It stated therein that in view of the fact that the Defendants dispute that the contract alleged by the Plaintiff was entered into all, and because the dispute *inter partes* includes the question of the existence of the very contract in which the arbitration clause is embodied, the dispute cannot in law be submitted to arbitration.

[12] In averring that the Defendants deny the existence of the contract, the Plaintiff placed reliance on a letter dated 15 May, 2008, addressed to the Plaintiffs attorneys by the 4th Defendant. In that letter, the 4th Defendant stated without equivocation that his clients deny having ever entered into the lease agreement alleged with the Plaintiff. It was the 4th Defendant's contention that his client advised that the "agreement" referred to was merely a "draft" lease, crafted to facilitate negotiations *inter partes.*

[13] Mr. Mdladla learned Counsel for the 2nd Defendant, cried foul and contended that the replication, which records the attitude of the 1st, 3rd and 4th Defendants to the claim appears to have been determined by the Plaintiff to vicariously include the 2nd

Defendant's attitude when the latter had not at any stage indicated its position regarding the existence or otherwise of the lease agreement in issue. It appears to be Mr. Mdladla's contention that his client did not accept the validity of the lease agreement in specific terms.

[14] The protestations by Mr. Mdladla appear to be justified, considering the stage these proceedings have reached. I say so because it is now clear that the 4th Defendant represents only the 1st and 3rd Defendants, with the 2nd Defendant opting to secure separate legal representation. This is so notwithstanding that the Plaintiff avers in his particulars of claim that the 2nd Defendant acted as an agent of the other Defendants. I am, however, unable, for paucity of information, to know whether at the time the letter referred to above was written to the Plaintiffs attorney by the 4th Defendant, it had been already made clear that the 2 nd Defendant would have its own set of lawyers to represent it in the dispute.

[15] Whatever the correct answer to that question may be, I am of the *prima facie* view that a resolution of that issue is rendered academic for present purposes. I say so for the reason that by filing its special plea in the terms stated above, whatever else the 2nd Defendant had not previously said or done, the wording of the special plea has momentous significance regarding its attitude to the question of the existence of the lease agreement in question.

It is, in my view, quite clear that from the wording in paragraph 10 of the special plea above, the 2nd Defendant admits the existence of the

contract. In the heads of argument, however, the 2nd Defendant prevaricates and claims that it is the Plaintiff who imposed the conclusion on the 2nd Defendant that it admits the existence of the contract in question. According to the 2nd defendant it has not, "at this point filed any document which denies the existence of the contract. Infact, the 2nd Defendant has only filed the Special Plea", to quote from the 2nd Defendant's heads of argument.

It is clear, however, as I have sought to demonstrate above, that the 2nd Defendant's action of holding the Plaintiff to clause 16 of the contract appears to be totally inconsistent with its denial of the existence of the contract in argument. To this extent, it is my *prima facie* view that the 2nd Defendant cannot be allowed to approbate and reprobate at the same time. The special plea would, in the absence of any other pleading ordinarily indicate what the 2nd Defendant's attitude to the claim is and whatever else it may submit in its heads of argument will not avail it as it cannot be allowed to sing in two voices as it were.

At the same time, it does not appear to me proper for the Plaintiff to hold the 2nd Defendant to the position taken by its co-defendants. I am well alive to the fact that in its particulars of claim, as stated above, the Plaintiff alleges that the 2nd Defendant acted as the agent for the 1st and 3rd Defendants in the conclusion of the lease agreement in issue. Whatever the position the Plaintiff may hold in that regard, it is clear that the 2nd Defendant is an independent entity that has appointed its own attorneys and is it accordingly entitled to adopt its own position to the claim, even if it be inconsistent with that of its co-defendants. In the

context of this case, I find nothing untoward with the implied acceptance of the lease agreement by the 2nd Defendant and the denial thereof by the 1st and 3rd Defendants. What I have some difficulty with is for the 2nd Defendant to recognize the existence of the lease agreement in the special plea and later seek to deny its existence should it subsequently be allowed to plead over on the merits. This is, however, an argument that can be appropriately raised and determined at the opportune time.

[19] I now turn to the law applicable to contracts which subject any disputes arising therefrom to arbitration in the first instance. The relevant statutory provision is to be found is section 6 (1) and (2) of the Arbitration Act No.24 of 1904, which provides the following: -

> "(1) If any party to a submission or any person claiming through or under him commences any legal proceedings in any Court against any other party to the submission or any person claiming through or under him in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings apply to such Court to stay proceedings.
>
> (2) Such Court or a judge may, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the

> proper conduct of the arbitration, make an order staying the proceedings."

It would appear to me that the 2nd Defendant's special plea in this matter is largely in compliance with the provisions of sub-section (1) above for the reason that after entering its appearance, which I take to mean its notice to defend in the circumstances, the 2nd Defendant, before taking any further step, moved this Court to stay the proceedings, pending referral of the dispute to arbitration. Regarding the requirements of sub-section (2), there does not seem to be any sufficient reason why the dispute should not be referred to arbitration and nothing was said by either party in opposition to a referral of the matter to arbitration in line with clause 16 aforesaid. There was also no apparent or expressed disinclination by either party towards making all the preparations necessary for the proper conduct of arbitration.

In *Scriven Brothers v Rhodesian Hides and Produce Co. Ltd and Others,* 1943 AD 393, TINDALL J.A. cited with approval the words that fell from the lips of Viscount Simon L.C. in *Heyman v Darwins Ltd* [1942] A.E.R. 337, where the learned Lord Chancellor said *inter alia:*

> "An arbitration clause is a written submission, agreed to by the parties to the contract, and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it was made. If the dispute is as to whether the contract which contains the clause has ever been entered at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is

> contending that it is void **ab initio** (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view, the clause itself is also void."

At page 401, Tindall J.A. stated the *raison d'etre* for such clauses in the following language:

> "The real object of that clause is to provide suitable machinery for the settlement of disputes arising out of or in relation to the contract, and as that is its object it is reasonable to infer that both parties to the contract intended that the clause should operate even after the performance of the contract is at an end."

It will be seen, as stated earlier, that there is some incongruity in the positions taken by the 2nd Defendant on the one hand, and the rest of the Defendants on the other. In respect of the 2nd Defendant, in so far as its special plea is concerned, it would appear to me, subject to what I say below, that there is no reason in logic, principle or in law as to why the referral to arbitration should not be given efficacy by staying the proceedings. This is because the 2nd Defendant does not appear, from the contents of its special plea, to challenge the fact that the contract was entered into.

The position regarding the rest of the Defendants is however, a horse of a different colour and is therefor markedly different. These Defendants challenge the existence of the lease agreement itself and deny that it was ever entered into. For that reason, the terms of the disputed document cannot be used to resolve issues touching upon the very

question of its validity. It is in the latter instance that the *ratio decidendi* in the *Scriven Brothers*' case, cited above, becomes effectual.

There is a further important point to be made. In *Stanhope v Combined Holdings and Industries Ltd* 1950 (3) SA 52 (E.D.L.D.) at page 56 A, Jennett J. stated as follows;

> "The onus is on the defendant to show that the dispute between the parties is one covered by the arbitration clause. In order to reach a decision on this issue it is necessary to ascertain the precise nature of the dispute and then consider whether or not it is one which falls within the arbitration clause."

The above position holds true even in the instant case with, the 2nd Defendant having to satisfy the Court that the dispute *inter partes* is one falling within the ambit of the arbitration clause. As indicated earlier, the position of the other Defendants presents a totally different scenario. There are authorities which propagate the position that the party who applies for the matter to be referred to arbitration should, in the papers, indicate his willingness to do all that is necessary for the proper conduct of the arbitration.

In this regard, Jennett J. stated the following in the *Stanhope* case *{op citj* at page 57 D-E:

> "It does not seem to me that it is necessary for a party who resorts, for the purpose of filing a special plea of agreement to arbitration either to allege or show the readiness and willingness referred to in the Arbitration Acts. Such a plea is the equivalent of the *exceptio litis pendentis* in the case a pending law suit. . . It

> may be that if the party resisting a stay of proceedings is able to show that the party seeking such a stay through a special plea is not ready and willing to do all the things necessary for the proper conduct of the arbitration, the Court might exercise its discretion against the latter and refuse a stay."

Speaking for myself, I would certainly incline to the view expressed by the learned Judge above as being the correct approach to the question.

In *Valkin v Valkin* 1953 (4) SA 510 (W.L.D.) at 512 F-G, Ramsbottom J.A. cited with approval the writings of Redman's Law of Arbitration and Award, 5th Ed. page 45, where it was stated:

> "The exercise of the jurisdiction is a matter of discretion, with the Court, which it is bound to exercise, and it is to be exercised judicially and according to well-known and ordinary principles; and if the Judge below has so exercised his discretion the Court of Appeal will hesitate before interfering with it."

Further down on the same page, at H the learned Judge dealt with some of the principles governing whether in a given case, it would be proper to refer the matter to arbitration or not. At page 513 H to 514 A, the learned Judge of Appeal quoted Russell, On Arbitration. 15th Ed. page 66, who states;

> "Whether or not the Court will exercise the power given it by Section 4 (1) of staying the action (except where section 4 (2) applies - see below) is entirely a matter of discretion. This discretion in accordance with the ordinary rules of law, must be judicially exercised..."

Having established that in deciding these issues, the Court exercises a discretion, which is to be exercised judicially and judiciously, if I may add, the question to answer at this juncture is the direction in which the interests of justice require this Court to exercise its discretion in the instant case. In the *Valkin* case *(op cit)* at page 512H-513A, the learned Judge of appeal quoted the fourth principle governing the exercise of the discretion as follows:-

> "(4) where there are several matters some only of which are in the agreement to refer, and the litigation is not of a character to be conveniently cut up into two parts...".

Quoting further from Russell (op *cit)* the learned Judge of Appeal says at page 514 B:-

> "...The Court's exercise of its discretion, however, will of course depend upon whether it is convenient to try different parts of a dispute separately. Thus a stay will normally be entirely refused where only a 'subordinate and trifling' part of the dispute is agreed to be referred; or where two claims one inside and one outside the agreement turn upon substantially the same facts; or the arbitrator can only decide the amount of the claim and not the liability."

On the facts of the case before him the learned Judge concluded as follows at page 514 E:

> "These two disputes turn substantially upon the same facts in so far as they depend upon the income of the respondent and upon his ability to pay. I do not think this dispute could properly be decided in two parts."

It will appear from the foregoing that one of the issues which informs the exercise of the discretion whether or not to grant a stay, is whether the decision to refer a portion of the matter to arbitration will not result in parts of a dispute being tried separately; one by the arbitrator and another by the Court.

On a conspectus of the entire circumstances, it is apparent that because of the divergent positions taken by the various Defendants on the same allegations, it would mean that in respect of the 2nd Defendant, the case may have to be referred to arbitration but in so far as the same claim is concerned in regard to the 1st, 3rd and 4th Defendants, it would have to be submitted to this Court for adjudication. This can hardly be said to be just, proper or convenient.

In any event, with the position adopted by the 1st and 3rd Defendants, it would be proper and convenient not to grant the special plea and to let the issue of the existence or otherwise of the contract be determined by the Court. To do otherwise could possibly result in a rather anomalous situation in which the arbitrator can deal with the claim on the basis that the agreement exists and accordingly grant whatever relief he finds appropriate and for arguments sake, the Court on the dispute before, it

finds that the agreement in question does not exist. This goes to show what calamitous consequences are likely to arise from a decision by this Court to uphold the special plea in the present circumstances.

It would, in my opinion be the proper exercise of this Court's discretion in the circumstances not to grant the special plea and to order that the matter proceeds. Depending upon how the issue of the existence of the lease agreement unfolds, the 2nd Defendant may, if so advised, at the appropriate time, consider whether it would be opportune to raise this plea.

On the question of costs, it would appear proper for me to order the costs to follow the event.

In the premises, I grant the following Order:

34.1 The 2nd Dependant's special plea be and is hereby

dismissed

34.2 The 2nd Defendant be and is hereby ordered to pay the costs occasioned by its aforesaid plea on the scale between party and party.

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE 3rd DAY OF MARCH, 2009.

T.S. MASUKU
JUDGE

Messrs. Magagula and Hlophe Attorneys for the Plaintiff. Messrs. S.V. Mdladla and Associates for the 2nd Defendant.