IN THE HIGH COURT OF SWAZILAND

Civil case No: 1499/12

In the matter between:

A.G. THOMAS (PTY) LIMITED **Applicant**

AND

SALGAOCAR SWAZILAND (PTY) LIMITED **Respondent**

Neutral citation: *A.G. Thomas (PTY) Ltd and Salgaocar Swaziland (PTY) Ltd (1499/12) [2012] SZHC254 (2012)*

Coram: **M.C.B. MAPHALALA, J**

Summary

Law of Contract – cancellation thereof and the effect of an arbitration clause in light of the Arbitration Act of 1904.

JUDGMENT

31 OCTOBER 2012

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[1] The application was instituted challenging the cancellation of a Transport Agreement concluded between the parties on the 1st May 2012. The applicant further sought an order declaring that a dispute exists between the parties arising from the Transport Agreement. The applicant also sought an order directing the parties to resolve the dispute in accordance with clause 16 of the Transport Agreement and further refer the dispute to arbitration as provided in the said Agreement.

[2] The parties concluded a Transport Agreement on the 1st May 2012 for a period of five years; the contract could be extended in writing sixty days prior to the date of termination for a further period of two years. In terms of the said contract, the applicant was to transport goods for and on behalf of the respondent from Ngwenya to Mpaka; and, to ensure that the applicant met its transport targets, it had to provide a maximum of forty trucks.

[3] The applicant purchased a further twenty three new trucks to execute the contract; additional drivers and assistant drivers had to be employed in order for the applicant to comply with the provisions of the contract.

[4] On the 30th May 2012, the Respondent cancelled the contract allegedly in terms of clause 14.1; and, it further gave thirty days notice of cancellation

commencing on the 1st June 2012. No reasons were given for the cancellation of the contract. Clause 14.1 provides that, "Either party shall be entitled to terminate this Agreement, by giving thirty days written notice to the other party".

[5] The applicant disputes that the respondent is entitled to cancel the contract in terms of clause 14.1; it has attempted to refer the dispute for arbitration. However, the respondent denies that there is an arbitral issue and refuses to arbitrate the dispute.

[6] The applicant argues that it has not breached the provisions of the contract to allow for the cancellation of the contract. It further argues that it was never the intention of the parties that the respondent could cancel the contract for no apparent reason directly related to the performance of the contract or for no reason at all. It further argued that it was never envisaged by the parties that the contract would only endure for a period of one month.

[7] The applicant decried the fact that it had spent millions of emalangeni in purchasing the trucks which have only been utilised for one month; it further decried the fact that the respondent on the day it gave notice of cancellation of the contract, advertised in a newspaper for a tender for

trucks to transport iron ore from Ngwenya to Mpaka and Maputo; it sought fifty trailer trucks with a total capacity of thirty-four tons.

[8] The applicant argued that the interpretation of clause 14.1 advanced by the respondent that it could cancel the contract anytime without giving reasons constitutes a legal dispute because it was of the view that the cancellation of the contract should relate to the performance of the contract; hence, it calls for the arbitration of the alleged dispute in terms of clause 16. It argued that the dispute between the parties is covered by clause 16 because it relates to the interpretation of clause 14.1 and further involves the termination of the agreement by the respondent.

[9] Clause 16.1 provides the following:

> **"16.1 In the event of any dispute or difference arising between the parties hereto relating to or arising out of this agreement, including the implementation, execution, interpretation, rectification, termination or cancellation of this agreement, either of the parties shall be entitled to declare a dispute provided the details thereof are notified in writing to the other party hereto, whereupon the party shall forthwith attempt to amicably settle such dispute and failing such settlement within a**

period of fourteen days after delivering of the written details of such dispute, such dispute may be submitted to arbitration in accordance with the provisions set out below by any party hereto."

[10] The applicant further referred the court to clause 16.2.2 which deals with the procedure relating to a dispute which is primarily a legal matter, and argued that since the dispute is a legal matter relating to the interpretation of clause 14.1, arbitration is mandatory in the circumstances. It highlighted the fact that clause 16.1 envisages a prompt resolution of the dispute; it stated that the present matter was extremely urgent since the applicant's trucks were presently not working, the drivers and other employees were demanding payment notwithstanding the fact that the applicant had no income.

[11] The applicant, by means of a letter addressed to the respondent and dated 6th June 2012, declared a dispute between the parties in terms of clause 16 relating to the interpretation of clause 14.1. The respondent argued that notwithstanding that the nature of the dispute had been set out in applicant's letter of the 6th June 2012, it further sought to be provided "with details of the purported dispute whereupon our client will seek to amicably

settle the matter failing which the matter can be submitted to arbitration in terms of the provisions of clause 16.1".

[12] The applicant's Attorneys in a letter dated 7th June 2012 and addressed to the respondent's attorneys further set out the nature of the dispute concisely as follows:

> **"2. As is clear from our letter of 6th June 2012, a dispute has been declared by our client, which dispute concerns the interpretation of clause 14.1 of the agreement. Simply put, it is our client's contention that your client by law cannot cancel the agreement for no cause at all or for any cause unrelated to the contract existing between our respective clients. Otherwise put, your client does not have an unfettered discretion to cancel the agreement for no reason at all."**

[13] Subsequently thereto, a meeting was held between the parties on the 8th June 2012, where settlement negotiations and proposals were made. On the 11th June 2012, applicant's attorneys wrote a letter to the respondent's attorneys, the contents of which were the following:

"2. As an alternative to the proposal above; Salgaocar will purchase from client all 23 new Mercedes Benz horses and combination trailers from our client.

3. Client has considered the proposals presented and accepts your offer to purchase all 23 horses and combination trailers and one front end loader. The valuations from Mercedes South Africa are annexed hereto."

[14] Various correspondence was exchanged between the parties from the 13th June 2012 indicating that they could not agree on the purchase price of the trucks, trailers and front end loader; however, negotiations continued between the parties. On the 22nd June 2012 applicant's Attorneys accepted the purchase price offered for the trucks, trailers and front end loader. This letter reads in part:

"2. Client instructs us to accept your offer of E1 500 000.00 (one million five hundred thousand emalangeni) per 2012 model "horse" with combination trailer and E1 400 000.00 (one million four hundred thousand emalangeni) per 2011 model "horse" with combination trailer for the purchase of all 23 "horses" and combination trailers.

3. Separately; let us know if your client accepts our client's offer of E1 600 000.00 (one million six hundred thousand emalangeni) for the front end loader and the four combination traılders at E420 000.00 (four hundred and twenty thousand emalangeni) per trailer.

4. Please note that the above amounts exclude VAT, which your client is legally obligated to pay and is entitled to claim back.

5. The matter is now concluded."

[15] Notwithstanding this letter, the respondent subsequently raised further conditions to the agreement; this was followed by various correspondence between the parties wherein the applicant complained about the delay in finalising the Settlement Agreement. As on the 20 June 2012, the additional condition was that the contract would be subject to the approval of a company to finance the purchase. Later on the 7th July 2012 the respondent changed and said the contract would be subject to the approval by a financial institution which would finance the purchase. On the 10th July 2012 the respondent introduced another condition that it had identified a reputable contractor which would purchase all twenty three trucks and

combination trailers at the price previously agreed upon but subject to the reputable contractor obtaining bank financing.

[16] This was again followed by several correspondence between the parties in which the applicant decried the delay in finalizing the Settlement Agreement. Incidentally on the 8th August 2012, the respondent added another dimension in the agreement that a dispute in another unrelated contract should be settled simultaneously with the dispute in the Transport Agreement. This other dispute related to another contract between Ngwenya Joint Venture, of which the applicant was a member, and the respondent; a dispute had been declared in respect of that contract.

[17] On the 16th August 2012 the applicant wrote a detailed letter to the President of the Swaziland Law Society requesting him to appoint an independent arbitrator to hear and determine the dispute between the parties; in the said letter, the applicant set out in detail and chronologically the circumstances and events which have unfolded since the contract between the parties was concluded on the 1st May 2012. The said letter was copied to the respondent's attorneys; however, they insisted that since the contract was terminated in terms of clause 14, it was not subject to the dispute resolution process set out in clause 16 of the Transport Agreement. However, the applicant argued that it is not for the respondent to determine

whether or not there is a bona fide dispute but that this is the responsibility of the arbitrator in light of the Transportation Agreement.

[18] The applicant further argued that the application is urgent on the grounds that it has twenty three trucks and trailers standing dormant and the drivers and their assistants are being paid a salary whilst the applicant is receiving no income. It further argued that the situation created by the Respondent is also creating labour unrest; and, that the employees of the applicant would have to be declared redundant and lose their employment if urgent attention is not given to the dispute at hand. It further argued that the dispute resolution mechanism set out in clause 16 of the Transportation Agreement envisages that any dispute that may arise between the contracting parties should be resolved in a speedy fashion.

[19] As part of its argument on urgency, the applicant alluded to the advert placed by the respondent in the Swazi Observer Newspaper seeking a transport contractor to take over the transportation of iron ore as a substitute to the applicant. It was argued that the respondent refused to make an undertaking that a new transporter would not be appointed pending the finalisation of the dispute between the parties.

[20] In its Answering Affidavit the respondent denied that the application was urgent on the basis that the advertisement for a new transport operator to replace the applicant was made on the 31st May 2012 and this application was launched in court on the 21st August 2012 and enrolled for hearing on the 17th September 2012. It was further argued on behalf of the respondent that as early as the 6th June 2012 the respondent had advised the applicant that it would not comply with its demands and that any legal action would be strenuously defended. It was therefore argued on behalf of the respondent that the urgency was self-created.

[21] The respondent also argued that the applicant claims that a Settlement Agreement was concluded between the parties, which means that no dispute exists between them; the respondent argued that the applicant should enforce the Settlement Agreement and not seek the declaration of a dispute as well as arbitration. This submission by the respondent overlooks the fact that after the Settlement Agreement had been concluded, the respondent raised further conditions which effectively undermined and defeated the Settlement Agreement.

[22] The respondent further argued that the applicant had an alternative remedy of claiming potential damages for breach of the Transport Agreement. This would be based on the premise that the termination of the Transport

Agreement was unlawful. It was therefore argued that the interim interdict sought by the applicant pending finalization of arbitration and a award was not competent in light of the availability of the alternative remedy for damages. It was further argued that to the knowledge of the applicant, the respondent has engaged third parties to carry out the obligations previously executed by the applicant in terms of the Transport Agreement; this has not been denied by the applicant.

[23] The respondent argued that the interpretation of clause 14.1 of the Transport Agreement is clear and unambiguous, and, that consequently there is no *bona fide* dispute which is capable of determination by an arbitrator. It was argued that this court is better placed to properly interpret clause 14.1 since it concerns a point of law and that to refer the matter to arbitration would not only cause an unnecessary delay but would also result in the parties incurring unnecessary additional legal expenses.

[24] The respondent further argued that it was apparent from a reading of clause 14 of the Transport Agreement that the right to terminate the agreement was independent of clause 13 which deals with the breach of the contract. The contention by the applicant that the right to terminate the contract can be exercised if there is a reason which relates to the performance of the contract by either party was thus rejected.

[25] In its replying affidavit the applicant submitted that it had never accepted the validity of the cancellation of the Transport Agreement; hence, it entered into the settlement negotiations because it considered the purported cancellation to be unlawful. It conceded that no Settlement Agreement was reached because the respondent was continuously moving the goal posts. It denied that during the period May to August 2012, it did nothing; it argued that during the said period, it tried to resolve and arbitrate the matter but the respondent did not submit to arbitration on the basis that there is no *bona fide* dispute.

[26] The respondent had filed a Notice of Application to strike out certain paragraphs or parts thereof in the applicant's replying affidavit;

[26.1] First, a portion of paragraph 3.2 which provides the following:

> **"To the extent that any settlement agreement came about, which is not admitted, such agreement was induced by the respondent's misrepresentation that the offer was bona fide.**

[26.2] Secondly, paragraph 10.1 provided the following:

“The respondent cannot enforce an agreement that it induced the applicant to enter.”

[26.3] Thirdly, paragraph 12.3 which provides that:

“It is clear that the respondent never intended to be bound by the offer it had made. It misrepresented its own intention.”

[26.4] Fourthly, paragraph 12.4 which provides the following:

“The respondent’s lack of bona fides is demonstrated by its unilateral addition of further terms to the Settlement Agreement, reminiscent of its purported unilateral cancellation of the main agreement, not to mention its failure to state whether it now considers there to be an enforceable settlement agreement or not.”

[26.5] Fifthly, paragraph 13.1 provides the following;

“No settlement was concluded, or if there was a settlement, it was induced by the respondent’s misrepresentations.”

[26.6] Sixthly, paragraph 20.2 provides the following:

> **"Again, the respondent fails to disclose whether it considers the dispute to be settled. In any event, if there is such a settlement, it was induced by fraud."**

[26.7] Seventh, paragraph 26 provides the following:

> **"The dispute has not been settled in that any agreement reached was induced by the respondent's misrepresentation."**

[27] The basis of the Application to Strike Out is that the offending paragraphs or portions thereof constitute new matter in reply or are vexatious. Rule 6 (28) of the High Court which provides the following:

> **"The court may on application, order to be struck out from an affidavit any matter which is scandalous, vexatious or irrelevant with an appropriate order as to costs, including costs as between attorney and client, but the Court shall not grant the application unless it is satisfied that the applicant will be prejudiced in the case if it is not granted."**

[28] Rule 23 (2) of the High Court provides the following:

> **"Where any pleading contains averments which are scandalous, vexatious, or irrelevant, the opposite party may, within the period allowed for filing any subsequent pleading, apply for the striking out of such matter and may set such application down for hearing in terms of rule 6 (14), but the court shall not grant the same unless it is satisfied that the applicant will be prejudiced in the conduct of his claim or defence if it be not granted."**

[29] In the case of *Vaatz v. Law Society* of Namibia 1991 (3) SA 563 (NH) at 566, *Levy J* said the following:

> **"The grounds for striking out as set out in the said rule are… scandalous or vexatious or irrelevant. Needless to say allegations may be irrelevant but not scandalous or vexatious. Even if the matter complained of is scandalous or vexatious or irrelevant, this court may not strike out such matter unless the respondent would be prejudiced in its case if such matter were allowed to remain."**

[30] At page 566 C-D His Lordship stated the following:

> **"In Rule 6 (15) the meaning of these terms can be briefly stated as follows: scandalous matter – allegations which may or may not be relevant but which are so worded as to be abusive or defamatory.**
>
> **Vexatious matter – allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy.**
>
> **Irrelevant matter- allegations which do not apply to the matter in hand and do not contribute one way or the other to a decision of such matter."**

[31] At page 566J -567A-B, His Lordship said the following;

> **"The phrase "prejudice" to the applicant clearly does not mean that, if the offending allegations remain, the innocent party's chances of success will be reduced. It is substantially less than that. How much less depends on all the circumstances, for instance, in motion proceedings, it is necessary to answer the**

other party's allegations and a party does not do so at his own risk. If a party is required to deal with scandalous or irrelevant matter, the main issue could be side-tracked but if such matter is left unanswered, the innocent party may well be defamed. The retention of such matter would therefore be prejudicial to the innocent party."

[32] In the case of *Steyn v. Schabort and Another* 1979 (1) SA 694 at 697 (O), Justice Erasmus emphasized that the procedure for striking out was never intended to be utilised to make technical objections of no advantage to anyone and just increasing costs. He stated that the court should not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it is not granted.

[33] From the aforegoing authorities, it is very clear that in an application to strike out, the aggrieved party should not only state the nature of his objection but he must also state the basis why the alleged offending matter is irrelevant, scandalous or vexatious. In addition, he must show that the offending matter would be prejudicial to his case if it were allowed to remain.

[34] The nature and basis of the respondent's objection is that the Settlement Agreement was induced by the respondent's misrepresentation that the offer was *bona fide*; and, that the respondent never intended to be bound by the offer it had made to the applicant.

[35] It is apparent from the evidence that the respondent cancelled the Transport Agreement unceremoniously and without cause allegedly in terms of clause 14.1. The applicant inturn denied that the respondent was entitled to cancel the Agreement in terms of the provisions of clause 14.1 without just cause. The applicant further declared a dispute in terms of the provisions of clause 16 calling upon the parties to settle the dispute amicably and failing which refer the dispute to arbitration.

[36] Simultaneously with the cancellation of the Transport Agreement, on the 30th May 2012, the respondent placed an advert in the Swazi Observer on the 31st May 2012 calling for tenders for transporting iron ore as a substitute to the applicant; the closing date for such tenders was the 6th June 2012. The applicant wrote to the respondent on the 6th June 2012 demanding an undertaking that it would not allocate the tender to another contractor pending a settlement of the dispute between the parties.

[37] The respondent refused to make the requisite undertaking that it would not allocate the tender to another company. The applicant furnished the details of the dispute as being the interpretation of clause 14.1 of the Transport Agreement, it being contended by the applicant that the respondent could not cancel the agreement for no cause at all or for any cause unrelated to the contract. The applicant argued that the respondent did not have an unfettered discretion to cancel the agreement for no reason.

[38] On the 21st June 2012 the respondent offered to purchase each 2012 model truck for E1 500 000.00 (one million five hundred thousand emalangeni) with combination trailer, and, a 2011 model truck for E1 400 000.00 (one million four hundred thousand emalangeni) with combination trailer for the purchase of all twenty three trucks and combination trailers. The applicant accepted the offer made by the respondent.

[39] Notwithstanding the Settlement Agreement, on the 7th July 2012 the respondent's attorneys wrote a letter to the applicant's attorneys confirming the settlement with regard to the purchase of the trucks but invoking an additional condition that the purchase would have to be approved by a financial institution. On the 10th July 2012 the respondent's attorneys advised the applicant's attorneys in writing that a reputable contractor had been identified to purchase all the trucks and trailer combinations at the

price previously agreed but subject to the reputable contractor obtaining bank financing.

[40] The paragraphs sought to be struck off do not constitute new matter in reply because the offer by the respondent to purchase all the twenty three new trucks and combination trailers is well covered by the applicant in its founding affidavit together with the acceptance of the offer by the applicant. Similarly, the applicant further dealt extensively with the new conditions presented by the respondent after the conclusion of the settlement agreement: firstly, that the purchase would now be subject to the approval of a financial institution. Secondly, that a reputable company to purchase the trucks and trailers had been identified, and, the purchase thereof would depend on the availability of finance by the reputable company. The allegation by applicant of a Settlement Agreement induced by misrepresentation is fully covered in the Applicant's Founding Affidavit and it is not a new matter in reply.

[41] In any event the respondent is entitled to invoke Rule 6 (13) and deliver a further affidavit by leave of Court if it wishes to respond to any issue arising from the replying affidavit. However, the respondent has not seen it fit to invoke this rule.

[42] It is against this background that the applicant accused the respondent of having induced it to enter into the Settlement Agreement by misrepresentation thinking that the offer was bona fide; and, that the respondent never intended to be bound by the offer it had made. In the circumstances it cannot be said that the offending matter is irrelevant, scandalous or vexatious or that it is prejudicial to the respondent. The alleged offending matter depicts the true conduct of the respondent in concluding the Settlement Agreement but then refuse to be bound by its terms. In the circumstances the application to strike out is dismissed with costs including the certified costs of Counsel in terms of Rule 68 (2) of the High Court.

[43] The application has been brought as one of urgency; however, the applicant has failed to explain why it launched the application three months after the contract was cancelled; it is common cause that the contract was cancelled on the 30th May 2012 and that the advert for a new contractor was placed in the newspaper on the 31st May 2012. However, the application was lodged in Court on the 31st August 2012 and enrolled for hearing on the 14th September 2012. In the circumstances the case for urgency has not been made out.

[44] When the matter appeared in Court on the 14th September 2012, the applicant did not insist on urgency; however, the parties agreed to argue both the points in *limine* as well as the merits simultaneously on the 17th September 2012.

[45] It is apparent from the evidence that there is a dispute between the parties with regard to the interpretation of clause 14 of the Transport Agreement. Attempts to settle the dispute have proved futile. As indicated in the preceding paragraphs, an offer to purchase the trucks and combination trailers was made by the respondent and accepted by the applicant. Notwithstanding this, the respondent introduced further conditions to the Settlement Agreement; these conditions vitiated the Settlement Agreement; hence, the applicant invoked the provisions of clause 16 of the Transport Agreement relating to dispute resolution.

[46] I have quoted in full clause 16.1. of the Transport Agreement in paragraph 9 above. It suffices to say that clause 16 provides for a dispute resolution mechanism in the event of any dispute arising between the parties with regard to the implementation, execution, interpretation, rectification termination or cancellation of the agreement.

[47] The applicant argues that it was never the intention of the parties when concluding the contract that it would endure for a period of one month in light of the money spent in purchasing twenty three new trucks and combination trailers; in addition, additional drivers and assistant drivers had to be employed to ensure that the applicant complied with the provisions of the Transport Agreement.

[48] The applicant further argued that it was never the intention of the parties that the Respondent in its sole discretion, could cancel the contract with thirty days notice for no reason at all or for no reason directly related to the performance of the contract.

[49] The respondent on the other hand contends that the interpretation of clause 14.1 of the Transport Agreement is clear and unambiguous; and that no real dispute can exist with regard to its meaning and that accordingly, there is no bona fide dispute which is capable of determination by an arbitrator.

[50] Clause 16.2.2 deals with disputes of a legal nature and provides the following:

> **"16.2.2 The arbitrator shall be, if the dispute in issue is… primarily a legal matter, a practising senior Advocate of not less**

than ten years standing as such, or a practising attorney of not less than fifteen years standing as such in either event as may be nominated by the president for the time being of the Swaziland Law Society or its equivalent body.'

[51] The interpretation of clause 14.1 of the Transport Agreement is clearly of a legal nature and falls to be determined in terms of the provisions of clause 16. It is not in dispute that clause 16 is an arbitration clause in terms of which the parties agreed that any dispute arising between them relating to the Agreement including the implementation, execution, interpretation, rectification, termination or cancellation of this Agreement would be resolved; either of the parties is entitled to declare a dispute. Thereafter, the parties should attempt to amicably settle the dispute and failing such settlement within a period of fourteen days after the delivery of the written details of the dispute, such dispute may be submitted to arbitration.

[52] It is common cause that immediately after the cancellation of the contract on the 30th May 2012, the applicant declared a dispute with the respondent and further gave written details of the dispute. An attempt to settle the dispute was done by means of settlement negotiations. An offer by the respondent to purchase the trucks and combination trailers was made by the respondent and was subsequently accepted by the applicant. However, the

Settlement Agreement was vitiated by the respondent who subsequently imposed new conditions.

[53] In view of the new conditions imposed by the respondent, the settlement negotiations proved futile, and, the applicant wrote a letter to the President of the Law Society invoking clause 16.2.2 of the Transport Agreement concerning the arbitration process. The respondent refused to submit to arbitration arguing that the termination of the Transport Agreement was done in terms of clause 14 and not clause 16; and, that subsequently the matter was not one which fell within arbitration as envisaged by clause 16.

[54] Section 3 of the Arbitration Act No. 24 of 1904 provides that "unless a contrary intention is expressed therein, a submission shall be irrevocable except by leave of the court, or a judge, or by consent of all parties thereto and shall have the same effect in all respects as it had been an order of court". A "submission" is defined in section 2 of the Act to mean a written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not.

[55] Section 6 of the Arbitration Act No. 24 of 1904 provides the following:

"6. (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 in respect of any matter agreed to be referred to claiming through or under him 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."

[56] It is common cause that the applicant who is a party to the "submission" instituted the present proceedings for a declaratory order that a dispute exists between the parties arising from the Transport Agreement which is legal in nature, and, that clause 16 thereof finds application. The respondent after being served with the application raised three Points in *limine*: First, that the application is not urgent; secondly, that the dispute has since been settled with the respondent agreeing to purchase the trucks

and combination trailers; thirdly, that the applicant has an alternative remedy for a claim in damages for the breach of the Settlement Agreement.

[57] I have dealt with the points in *limine* earlier in this judgment. Suffice to any that the respondent does not seek to stay the proceedings but it seeks to have the application dismissed on the basis of the points in *limine*. With regard to section 6 (2) of the Arbitration Act, there does not seem to be any sufficient reason why the dispute should not be referred to arbitration in light of clause 16 of the Transport Agreement which creates the arbitration clause. The fact that the contract was terminated in accordance with clause 14.1 does not preclude the operation of the arbitration clause. As long as the dispute arises between the parties relating to the Transport Agreement including the implementation, execution, interpretation, rectification, termination or cancellation of the Agreement, that dispute is subject to the arbitration clause.

[58] From the aforegoing, it is apparent that a dispute exists between the parties arising from the Transport Agreement, and that the dispute is primarily a legal matter; in addition, clause 16 of the Transport Agreement finds application. In terms of section 3 of the Arbitration Act, an arbitration clause in a written contract shall be irrevocable and shall have the effect of an Order of Court. The exception occurs by leave of court or by the

consent of the contracting parties; it is common cause that none of the exceptions exist in the present matter. No good cause has been shown why the arbitration clause should not be enforced.

See the cases of *Garden Hotel (PTY) Ltd v. Somadel Investment, (PTY) Ltd* 1981 (3) SA 911 (W) at 916-918; *Telecall (PTY) Ltd v. Logan* 2000 (2) SA 782 (SCA) 786-787; *Sera v De Wet* 1974 (2) SA 645 T 650 B-C; *Metallurgical & Commercial Consultants (PTY) Ltd v. Metal Sales Co. (PTY) Ltd* 1971 (2) SA 388 (W) at 391.

[59] The interpretation of clause 14.1 of the transport Agreement by the arbitrator will also determine whether or not the termination of the contract was lawful; and, if it was lawful, the contract would be enforceable. If the arbitrator comes to the conclusion that the termination was unlawful, the contract would come to an end. In the circumstances it is not necessary for this court to determine prayer 2 of the application.

[60] In view of the peremptory provisions of section 3 of the Arbitration Act no. 24 of 1904 as well as the right to arbitration conferred in clause 16.1 of the Transport Agreement, it was not open to the respondent to refuse to submit to arbitration.

[61] Accordingly, the application succeeds in part as follows:

(a) It is declared that a dispute of a legal nature exists between the parties arising from the Transport Agreement concluded on the 1st May 2012 and consequently clause 16 thereof finds application.

(b) The parties are directed to resolve the dispute between them in accordance with the provisions of clause 16 of the Transport Agreement.

(c) The interlocutory application to strike out lodged by the respondent is hereby dismissed with costs.

(d) The respondent is directed to pay costs of suit on the ordinary scale including costs of two counsel as duly certified in terms of Rule 68 (2) of the High Court Rules. Such costs would include the costs of the interlocutory application for striking out.

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT

For APPLICANT: Advocate Francois Joubert SC
Advocate Zach Joubert
Attorney Joseph Warring

For RESPONDENT: Advocate M.J Fitzgerald
Advocate A.M. Smallberger
Attorney Kenneth Motsa