LECTURE ON DRAFTING DISPUTE RESOLUTION CLAUSES TO JTC STUDENTS AT UNAM IN WINDHOEK ON 12 AUGUST 2020

Introduction

1. The two major dispute resolution processes alternative to court litigation are: mediation and arbitration.

2. This lecture is limited to private mediation and arbitration, and does not extend to court-connected mediation and conciliation and arbitration provided for in sections 82 and 85, respectively, of the Labour Act 11 of 2007 (the Labour Act).

3. Mediation is a flexible and voluntary process, in which the parties are assisted by an impartial and independent person, the mediator, in a private, confidential and without prejudice setting, to settle their dispute by agreement.[1]

4. Arbitration is an adjudicative process pursuant to a written agreement between the parties to refer their dispute specified therein to an independent and impartial tribunal, appointed by or on behalf of the parties according to a method agreed by them for a final decision which is binding on the parties.[2]

Arbitration agreements

5. Arbitration agreements may be self-standing or *ad hoc*. However, they usually take the form of a dispute resolution clause in another contract such as a sale, lease or building contract.

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1 Brand, Steadman and Todd, *Commercial Mediation*, (2012), 19-20
2 Butler, *Arbitration*, LAWSA, Vol 2 (3rd ed), para 75

6. The Arbitration Act 42 of 1965 (the Arbitration Act) governs arbitrations in Namibia. It does not repeal the common law on arbitration. Thus, the common law applies to the extent that it is not inconsistent with the peremptory provisions of the Arbitration Act.

7. The common law does not require an arbitration agreement to be in writing. However, the application of the Arbitration Act is limited to written arbitration agreements. The Arbitration Act provides better and more efficient means of referring disputes to arbitration than the common law.[3]

Requirements of arbitration agreements

8. An arbitration agreement under the Arbitration Act:

8.1. must be in writing;

8.2. must contain at least the terms contained in the definition of an arbitration agreement in the Arbitration Act;

8.3. is invalid to the extent that it purports to refer disputes to arbitration, the reference to arbitration of which the Arbitration Act proscribes.

9. The definition of 'arbitration agreement' in the Arbitration Act may be dissected into the following parts:

9.1. a written agreement;

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[3] Marcus Jacobs, *The Law of Arbitration in South Africa,* 1977, 6-7

9.2. providing for:

9.2.1. the reference to arbitration;

9.2.2. of any existing or any future dispute;

9.2.3. relating to a matter specified in the agreement;

9.2.4. whether an arbitrator is named or designated therein or not.

10. An arbitration agreement does not have to be signed. It is sufficient if the parties thereto adopt and act upon it.[4] An oral agreement recorded in writing meets the requirement.[5]

11. The arbitration agreement must contain the names of the parties thereto. This requirement is implied in 'written agreement'. There can be no agreement without at least two parties thereto.

12. The arbitration agreement is not the same thing as the reference or submission of the dispute to arbitration. The submission to arbitration is the act of the parties to the arbitration agreement of referring their dispute for arbitration to the arbitrator pursuant to the arbitration agreement. It may take various forms: an agreed list of issues, pleadings, and may even be oral. Pleadings cannot constitute the arbitration agreement, because they may be amended unilaterally by one of the parties with leave of the arbitrator, which shows that they lack the attribute of a binding agreement.

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4 David Butler and Eyvind Finsen, *Arbitration in South Africa Law and Practice*, 1993, 38

5 *Merit Investment Eleven (Pty) Ltd v Namsov Fishing Enterprises (Pty) Ltd* 2017 (2) NR 393 (SC) [17]

13. The dispute that the parties in terms of the arbitration agreement agree to resolve by arbitration determines the ambit of the jurisdiction of the arbitrator. This is the important part of the arbitration agreement. Therefore, the nature and extent of the disputes, which the arbitration agreement empowers the arbitrator to decide, must be carefully described therein. It may include that the arbitrator has the power to decide the validity or existence of the agreement containing the arbitration clause.[6]

14. However, if the validity of the arbitration clause itself in the contract is attacked on account of fraud or that the signatories to the contract lacked the power or authority to enter into the contract, the arbitrator may not have the jurisdiction to decide their own jurisdiction. This is so, because the arbitration agreement itself providing that the arbitrator may decide their own jurisdiction never came into existence.[7] The arbitrator can only derive jurisdiction from a valid arbitration agreement.

15. It is not a requirement for its validity that the arbitration agreement stipulates who the arbitrator will be. Though it is advisable that the parties in the arbitration agreement agree on a mechanism for the appointment of the arbitrator upon their failure to agree thereon.

16. Section 2 of the Arbitration Act provides that a reference to arbitration shall not be permissible in respect of:

16.1. any matrimonial cause or any matter incidental to any matrimonial cause;[8] or

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6 *Zhongji Development Construction Engineering Co Ltd v Kamoto Copper Co Sarl* 2015 (1) SA 345 (SCA) [52]-[55]

7 *North West Provincial Government and Another v Tswaing Consulting CC and Others* 2007 (4) SA 452 (SCA) [13]; *Wayland v Everite Group Ltd* 1993 (3) SA 946 (W) 951H-952G

8 *Taylor v Kurtstag NO and Others* 2005 (1) SA 362 (W) [59]

16.2. or any matter relating to status.[9]

17. Arbitration of any matter relating to status is also prohibited by the common law.[10]

18. A dispute, the resolution of which is by statute reserved for the exclusive jurisdiction of the courts, cannot be referred to arbitration, for example, a constitutional issue or the review of administrative conduct.[11]

Mediation and arbitration rules

19. It has become standard practice to incorporate by reference into the arbitration agreement the rules that will govern the proceedings in the arbitration held pursuant thereto.

20. It should become the standard practice to put in all commercial contracts dispute resolution clauses.

21. Commercial arbitrations in Namibia are regulated by the Arbitration Act.

22. An arbitration tribunal is neither a court or tribunal mentioned in article 12, nor an administrative tribunal contemplated in article 18, of the Namibian Constitution.[12]

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9 *Berg en Dal Estate (Incorporating Moutaindale Estate) Homeowners Association v Van Huyssteen NO; Berg en Dal Estate (Incorporating Mountaindale) Homeowners Association v Brunt NO* 2009 JDR 0109 (C) [9]-[18]

10 Voet 4.8.10

11 *Airports Company of South Africa Ltd v ISO OR Tambo (Pty) Ltd and Another* 2011 (4) SA 642 (GSJ) [68]

12 *Westcoast Fishing Properties v Gendev Fish Processors Ltd and Another* 2016 (4) NR 1191 (SC) [36]-[42]; *Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd and Another* 2002 (4) SA 661 (SCA) [23]-[25].

23. Alternative dispute resolution (ADR) refers to any method of resolving disputes other than court litigation. Mediation and arbitration are the main forms of ADR, but are distinguishable from other forms of ADR such as: negotiation, conciliation, adjudication, expert determination, valuation, certification, and the like.

Advantages and disadvantages

24. The benefits of mediation are:

24.1. One: speed. Mediation should not take longer than a week from commencement to settlement agreement.

24.2. Two: cost saving. Normally two days are taken up by a mediation. The parties contribute equally to the fee of the mediator and the venue, and each pays their own costs.

24.3. Three: the success rate. The success rate of a skilled and well-trained mediator should approximate 90%. (The success rate of court-connected mediation in Namibia is on average about 60%. I believe this figure may be improved by better training, moderation and assessment of court-connected mediators for accreditation.)

25. The advantages of arbitration to court litigation are:

25.1. One: arbitration is expeditious, efficient and inexpensive compared to court litigation, which takes long, is burdened by formal inflexible rules rendering the process uneconomical, and is costly. An arbitration properly conducted should not take longer than four months. If nothing goes wrong, court litigation normally

takes two years. See at pages 23 to 24 hereof the calculation comparing the costs of court litigation to the costs of arbitration.

25.2. Two: the parties by agreement appoint the arbitration tribunal. A Court is appointed by the State, which may be unsuitable to adjudicate the dispute in terms of applicable practical experience.

25.3. Three: arbitration is a private process closed to the public. A process open to the public is compulsory in court litigation, save in exceptional circumstances.

26. The disadvantages of arbitration are:

26.1. One: it is final and the review powers of the court are limited to:

26.1.1. irregularities in the proceedings causing a miscarriage of justice;

26.1.2. lack of jurisdiction;

26.1.3. defects in the execution of the arbitrator's mandate;

26.1.4. misconduct by the arbitrator tainted by moral turpitude in the sense of dishonesty, partiality, bad faith and the like.

26.2. Two: there is no right of appeal, unless specifically provided for by agreement between the parties.

26.3. Three: an arbitration is only as good as its arbitrator. Lawyers and retired judges lacking arbitration training acting as arbitrators tend to conduct arbitrations according a process approximating court litigation, with disastrous consequences in terms of duration and costs. Therefore, the parties must choose their tribunal

wisely, and impose a duty on the tribunal to take control of the pace and costs of the arbitration, and to conduct it according to an expeditious, efficient and inexpensive process, commensurate with the nature and extent of the dispute, provided the process is fair and just.

Growth in arbitration

27. The recent growth in international commercial arbitrations has been described as 'explosive'.[13] The major drivers of the growth are: (i) economic growth and an increase in cross-border trade and commerce; (ii) dissatisfaction with court litigation; and (iii) harmonization of arbitration laws and procedures.

28. Harmonisation is facilitated by:

28.1. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards agreed at the United Nations Conference on International Commercial Arbitration held in 1958 in New York (*the New York Convention*).

28.2. The Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law (UNCITRAL) 1985 as amended in 2006.

28.3. UNCITRAL Arbitration Rules 1976, revised in 2010, amended by the addition of article 1 paragraph 4 in 2013.

[13] Ben Rigby, *The explosive growth of international arbitration,* 22 August 2016, accessed on 20 January 2018 at https://www.cdr-news.com.

29. The main aim of the New York Convention is to facilitate the recognition and enforcement of foreign arbitration agreements and awards in the same way as domestic arbitration agreements and awards.[14]

30. Namibia is a signatory to the New York Convention, but has to accede thereto, and adopt legislation enforcing the Convention locally, for the Convention to apply in Namibia. In this regard Namibia is lagging behind countries like Angola, South African, Botswana, Democratic Republic of Congo, Lesotho, Zambia and Zimbabwe.

31. The UNCITRAL Model Law is designed to assist States in reforming and modernising their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal, and the extent of court intervention, through the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having being accepted by States of all regions and the different legal and economic systems of the world.[15]

32. The UNCITRAL Model Rules of Arbitration provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship, and are widely used in private commercial arbitrations as well as arbitrations administered by institutions. The rules cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings, and establishing rules in relation to the form, effect and interpretation of the award.

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[14] Butler, *Arbitration*, LAWSA, Vol 2, (3rd ed), para 149
[15] UNCITRAL accessed on 21 January 2018 at www.uncitral.org.

33. Anecdotal evidence of dissatisfaction among legal practitioners with court litigation in Namibia approximates the contemptuous. The main complaints are: judges lack adequate skills and experience in commercial matters, long delays from commencement to judgment, such high costs as effectively hindering access to justice for the ordinary individual, unproductivity of judges and legal practitioners due to case management, and the like.

34. Predictions are that the next major wave in global economic growth will be in Africa, with the attendant increase in commercial transactions, and cross-border trade and commerce, and the concomitant rise in the demand for domestic and international commercial arbitration. Thus, spending money on the following in Namibia is a good investment:

34.1. One: updating arbitration legislation in harmony with global principles, trends and best practices.

34.2. Two: training of legal practitioners in arbitration law and practice.

34.3. Three: promotion of arbitration as a dispute resolution process among commercial legal practitioners, political leaders, and captains of industry and commerce.

Arbitral needs of Namibia

35. The culture of resorting mainly to court litigation to resolve disputes should be changed to resolving disputes where appropriate by alternative dispute resolution processes — in the main mediation and/or arbitration.

36. Leaders in Government, the commercial legal profession, and commerce and industry, must apply a policy of attempting to resolve disputes by mediation, and where suitable by arbitration, before resorting to court litigation. Mr Tony Blair did that in Britain, which led to enormous savings in legal costs. [16] Locally, Justice Petrus Damaseb introduced court-connected mediation in Namibia, which reportedly caused savings in legal cost in the order of N$50 million in the first year after its introduction.[17]

37. On a practical level, the Government, commercial lawyers drafting contracts, building contractors, professionals in the building industry, property developers and investors, and commercial institutions such as banks, insurance companies, estate agents, must put arbitration clauses in their contracts. See at page 14 hereof the model arbitration clause of ADR Forum. If the contract relating to the dispute does not have an arbitration clause, the model *ad hoc* arbitration agreement of ADR Forum at page 15 hereof may be used. These model dispute resolution clauses incorporate by reference the ADR Forum rules of mediation and the ADR Forum rules of arbitration. The mediation rules accord with the practice in Canada, and the arbitration rules are the UNCITRAL rules with minor adaptations.

38. A critical mass of legal professionals should be trained in the practice of mediation and arbitration to provide the impetus for the required change of culture from court litigation to dispute resolution by mediation and/or arbitration.

39. A significant feature of the ADR Forum rules of arbitration is this: article 18 paragraph 1 thereof imposes a duty on the arbitrator to take control of the pace

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[16] Brand *et al*, op cit (note 1) 5.
[17] Report on mediation in the High Court 5 March 2015.

and costs of the arbitration, after consulting the parties, and taking into account the requirements of the case.

40. The available mediation and arbitration courses are expensive though:

40.1. Mediation training: Conflict Dynamics offers a 40 hour course over a week to say 18 trainees for approximately N$300 000.00, excluding the venue. Successful completion of the course gives accreditation as mediator at Conflict Dynamics, and on request with an additional assessment fee at Centre for Effective Dispute Resolution (CEDR) in the UK.

40.2. Arbitration training: the Association of Arbitrators (Southern Africa) NPC offers a one year correspondence course for legal practitioners, which may give successful candidates fellowship status at that institution and the Chartered Institute of Arbitrators in the UK, provided Award Writing is passed by at least 70%, at a cost of about N$40 000.00.

41. The long term solution for Namibia may be to develop in co-operation with UNAM or NUTS an online inexpensive course divided in modules, which busy legal practitioners can successfully complete in and at their own time and pace.

ADR Forum

42. ADR Forum provides mediation and arbitration services. It has its own rules and panel of neutrals (View at adrforumlaw.com). The rules are based on the UNCITRAL Model Rules of Mediation and Arbitration, which provides the following benefits:

42.1. One: they comply with global standards, forms and best practices, and are therefore user friendly to foreign investors.

42.2. Two: uncertainty in the interpretation and application thereof is minimised, because there is a wealth of jurisprudence in which they have already been authoritatively interpreted and applied.[18]

43. Three: some 90 countries have already adopted the UNCITRAL Model Law on International Commercial Arbitration.[19]

Model dispute resolution clause

44. "17. **Dispute resolution**

17.1 Should any dispute, disagreement or claim arise between the parties connected to, relating to or concerning this agreement, including but not limited to its validity or voidability (the dispute), the parties agree to attempt resolving the dispute by mediation according to the ADR Forum rules of mediation.

17.2 If the dispute has not been resolved within 7 days of the notice of desire to mediate, any party may terminate the mediation.

17.3 If the dispute has not been resolved by mediation, the dispute shall be resolved by arbitration according to the ADR Forum rules of arbitration.

17.4 Notwithstanding anything to the contrary contained in this agreement, the [**insert client's name**] shall in its sole discretion be entitled to institute

[18] Case Law on UNCITRAL Texts (CLOUT) accessed on 23 January 2018 at www.uncitral.org.
[19] UNCITRAL accessed on 24 January 2018 at www.uncitral.org.

legal proceedings in a court of law of competent jurisdiction to resolve the dispute.

17.5 If the [**insert client's name**] has instituted legal proceedings in a court of law as contemplated in the preceding subclause, and such legal proceedings are defended or opposed, the [**insert client's name**] reserves the right to refer the dispute to mediation and/or arbitration according to this dispute resolution clause."

Model ad hoc agreement to arbitrate

45. "We,

AB of _____

and

CD of _____

hereby agree that any dispute, disagreement or claim between us:

1. connected to, relating to or concerning the contract between us dated _____, a copy of which is attached hereto,

or

2. set out in the schedule to this agreement,

shall be resolved by arbitration according to the ADR Forum rules of arbitration."

Miscellaneous

46. The dispute resolution clause may further stipulate the place or seat of the arbitration, for example, Windhoek, Namibia. The law of the seat of the arbitration governs the arbitration, and the courts of the seat of the arbitration have jurisdiction in respect of the arbitration.

47. It is further useful to stipulate in the arbitration clause the law which governs the substantive rights of the parties, which may or may not be the same as the law of the seat of the arbitration. This may minimise disputes thereover later.

Labour disputes

48. In my view, existing and future labour disputes may be referred to private arbitration under the Arbitration Act by a dispute resolution clause in an employment contract on the grounds that follow.

49. Labour disputes may be resolved by private arbitration according to the following three discernible procedures:

49.1. First: private arbitration according to a dispute resolution clause in a collective agreement contemplated in section 73(1) of the Labour Act (collective agreement private arbitration).

49.2. Second: private arbitration of a dispute which the parties thereto agreed in writing to refer to arbitration contemplated in section 91(2) of the Labour Act (section 91(2) private arbitration). This arbitration is subject to review by the Labour Court in terms of the Labour Act.

49.3. Third: private arbitration pursuant to a dispute resolution clause in an employment contract under the Arbitration Act (Arbitration Act private arbitration). This arbitration may be subject to review by the Labour Court in terms of the Arbitration Act by section 117(1)(c) of the Labour Act.

50. The phrase 'a dispute resolution procedure' in section 73(1) is sufficiently wide to include Arbitration Act private arbitrations to resolve existing and future disputes arising from employment contracts. For example, a registered trade union and an employer may agree in a collective agreement that existing and future disputes arising from employment contracts between the employer and members of the trade union shall be referred to Arbitration Act private arbitrations. Or a collective agreement may provide that existing and future disputes shall be referred to private mediation under Chapter 8 Part D of the Labour Act.

51. In *Labour Supply Chain Namibia (Pty) Ltd v Hambata* 2012 (1) NR 313 (LC) (*Hambata*) the employment contract provided that future disputes arising therefrom be referred to private arbitration as per section 91 of the Labour Act. The employee resigned but laid a dismissal complaint with the Labour Commissioner's office which referred the matter to arbitration before an arbitrator under Chapter 8 Part C of the Labour Act. The employer contended that the arbitrator lacked jurisdiction because the parties had referred the dispute to private arbitration as contemplated in section 91(2) of the Labour Act. The Court held at [13] that only existing (as opposed to future) disputes may be referred to private arbitration in terms of section 91(2). It was not contended, considered or decided by the Court that an employer and an employee may not in terms of the dispute resolution clause in the employment contract between them agree to refer future disputes arising therefrom to Arbitration Act private arbitration, or that their mentioned dispute resolution agreement is not enforceable against an arbitration tribunal constituted under Chapter 8 Part C. Thus, *Hambata* in my opinion does not deprive employers and employees of their contractual freedom and dignity to

refer existing and/or future disputes to Arbitration Act private arbitration by a dispute resolution clause in their employment contract.

52. The freedom of employers and employees alike, to refer by a dispute resolution clause in an employment contract between them any existing and **future** dispute arising therefrom to Arbitration Act private arbitration, is protected by the values of freedom and dignity enshrined in the Constitution, and is enforceable per *pacta sunt servanda* (agreements must be complied with) by virtue of the Constitution (*Barkhuizen v Napier* 2007 (5) SA 323 (CC) [57]).

53. The Labour Act does not expressly or by necessary implication oust the resolution of existing or future disputes arising from employment contracts by Arbitration Act private arbitration. The implication to curb the freedom of contract as mentioned above must be clear, and it cannot be clear, if it has to be astutely winkled from the contextual crevices of the Labour Act (with apologies to Holmes AJA (as he then was) in *Rogat v Rogat* 1982 (3) SA 928 (A) at 939E-H).

High Court Rules

54. It is inadvisable, for the reasons that follow, to incorporate by reference into an arbitration agreement, the High Court Rules or to conduct an arbitration according thereto.

55. The High Court Rules are formal, inflexible and time-consuming, compared to the typical arbitration rules.

56. Under the High Court Rules the arbitrator will have to apply the rules of evidence strictly. Absent the application of the High Court Rules, the arbitrator has a discretion to admit evidence.

57. Arbitration ensures confidentiality, and its objective is the final resolution of the dispute between the parties. The opposite applies under the High Court Rules, by public hearings, default judgments, and absolution.

58. Discovery of documents according to the High Court Rules is cumbersome and overbroad. In arbitration discovery of document is limited to those that are material to the outcome of the case, focused and expeditious, for example, by the circulation of a Redfern Schedule.

59. The High Court Rules provide for absolution from the instance, which is inimical to the object of arbitration, namely, finality.

Impact of Arbitration Act on arbitration agreements

60. The Arbitration Act gives the following extended meaning to 'party' in relation to an arbitration agreement: a party to the arbitration agreement or reference to arbitration, a successor in title or assign of such party, and a representative recognised by law of such party, successor in title or assign.

61. By virtue of section 2(1) of the Arbitration Act an arbitration agreement cannot be terminated except by consent of all the parties thereto, unless the arbitration agreement provides otherwise.

62. Section 4(1) of the Arbitration Act provides that, unless the arbitration agreement stipulates otherwise, it or any appointment of an arbitrator or umpire[20] thereunder shall not be terminated by the death of any party thereto. In terms of section 4(2) of the Arbitration Act, if a party to an arbitration agreement or reference to

[20] In short, if the arbitration is conducted by two arbitrators, and they deadlock on any matter, they may appoint an umpire to decide the issue on which they deadlock.

arbitration dies, or vacates or is removed from their office after any dispute has been referred to arbitration, the arbitration is stayed until their executor or other legal representative or replacement has been appointed.

63. Section 5 of the Arbitration Act has similar provisions in respect of the sequestration or liquidation of a party to an arbitration agreement.

64. Under section 8 of the Arbitration Act, where an arbitration agreement to refer future disputes to arbitration provides that any claim to which the arbitration agreement applies shall be barred, unless some step to commence arbitration is taken within a time fixed therein, and a dispute arises to which the arbitration agreement applies, the Court may extend the time for such period as it considers proper. The Court may do so, if it is of the opinion that in the circumstances of the case undue hardship would otherwise be caused.

65. The Court may undo the binding effect of an arbitration agreement in three discernible ways:

65.1. One, under section 3(2)(a), (b) or (c) of the Arbitration Act;

65.2. Two, by section 6 of the Arbitration Act; and

65.3. Three, under the common law.

66. The Court may in terms of section 3(2) of the Arbitration Act at any time on the application of any party to an arbitration agreement on **good cause** shown:

66.1. set aside an arbitration agreement (section 3(2)(a));

66.2. order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration (section 3(2)(b)); or

66.3. order that the arbitration agreement shall cease to have effect with reference to any dispute referred to arbitration pursuant thereto (section 3(2)(c)).

67. Under section 6 of the Arbitration Act, if any party to an arbitration agreement commences any legal proceedings in any court against any other party thereto in respect of any matter in terms thereof agreed to be referred to arbitration, any party to such legal proceedings may at any time after entering an appearance, but before delivering any pleadings or taking any other step in the proceedings, apply to the Court to stay such proceedings. If the Court on any such application is satisfied that there is **sufficient reason** why the dispute should not be referred to arbitration in accordance with the arbitration agreement, the Court may make an order staying such proceedings subject to such terms and conditions as it may consider just.

68. A party to an arbitration agreement may in terms of the common law raise a special plea that the court litigation be stayed pending arbitration. The Court has a discretion to grant such relief, but this discretion must be judicially exercised and **a very strong case** therefore must be made.[21]

69. In *De Lange v Methodist Church and Another* 2016 (2) SA 1 (CC) the Court held:

> "[36] The question still remains whether Ms De Lange has advanced good cause to escape the agreement. The Act is not particularly helpful on what could make up good cause. Nor have our courts expressly defined good cause. It is, however, clear that the onus to demonstrate good cause is not easily met. [30] A court's discretion to set aside an existing arbitration

[21] The Rhodesian Railways Ltd v Mackintosh 1932 AD 359 at 375

agreement must be exercised only where a persuasive case has been made out. [31] It is neither possible nor desirable, however, for courts to define precisely what circumstances constitute a persuasive case. [32]

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[30] *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) at 391E–F.

[31] In *The Rhodesian Railways Ltd v Mackintosh* 1932 AD 359 at 375 the court called it a 'very strong case'.

[32] *Universiteit van Stellenbosch v JA Louw (Edms) Bpk* 1983 (4) SA 321 (A) at 334A. Here, too, the court resorted to the use of a 'very strong case' but was reluctant to define what would amount to one."

70. It has been held that where allegations of fraud is made against a party in arbitration proceedings, they may ask that the dispute be resolved in open Court to clear their name.[22]

In conclusion

71. I hope this will be of some assistance in your practice as a lawyer.

72. It will give me great satisfaction to see that you make use of mediation and arbitration to resolve disputes in the interest of your clients.

I thank you.

Herman Steyn

Chambers, Swakopmund
12 August 2020

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[22] *Metallargical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) 392G-393H

PLAINTIFF'S COSTS OF COURT LITIGATION COMPARED TO CLAIMANT'S COSTS OF ARBITRATION IN A CLAIM OF SAY N$ 5 000 000.00*

COURT LITIGATION		**ARBITRATION**	
Cost item	N$	N$	**Cost item**
Take instructions (½ day at N$18 000 per day)	9 000	9 000	Take instructions (½ day at N$18 000 per day)
Summons (instructing [N$9 000] and instructed [N$18 000] counsel)	27 000	27 000	Statement of claim, together with copies of supporting documents (instructing [N$9 000] and instructed [N$18 000] counsel)
		6 000	Filing fee
Court connected mediation (6h at N$1 800 per hour)	10 800		
Case planning (1h at N$1 800 per hour)	1 800	4 500	Pre-arbitration meeting (Arbitrator [½ x N$1 800] plus instructing and instructed counsel (1h at N$1 800 per hour each])
Summary judgment	20 000		
Plea (reading and considering only) (1h)	1 800	3 600	Statement of defence, together with copies of supporting documents (reading and considering only) (2h)
Case management (1h at N$1 800 per hour)	1 800		
Discovery and production of documents (3h)	3 600		
Witness statements, together with copies of supporting documents (3 days instructing and instructed counsel)	108 000	108 000	Witness statements, together with copies of supporting documents (3 days instructing and instructed counsel)
Status hearings (1h at N$1 800 per hour)	1 800		

Interlocutories	20 000		
		18 000	Arbitrator's preparation for arbitration (½ x 2 days at N$18 000 per day)
Preparation for trial (2 days instructing plus instructed counsel)	72 000	72 000	Preparation for arbitration (2 days instructing plus instructed counsel)
Pre-trial conference (1h instructing plus instructed counsel)	3 600	4 500	Pre-arbitration meeting (Arbitrator (½) plus instructing and instructed counsel) (1h)
Trial (5 days instructing and instructed counsel)	180 000	135 000	Arbitration (Arbitrator (½) plus instructing and instructed counsel) (3 days)
Court building		5 250	Arbitration venue (½) (3 days at N$3 500 per day)
Recording		1 800	Recording (½) (3 days at N$1 200 per day)
Transcription (½) (2000 pages at N$20 per page)	20 000	10 000	Transcription (½) (1000 pages at N$20 per page)
Heads of argument (2 days instructed counsel)	36 000	36 000	Heads of argument (2 days instructed counsel)
Oral argument (1 day instructing plus instructed counsel)	18 000		
Judgment		18 000	Award (½) (2 days at N$18 000 per day)
		5 400	Unopposed application to make award an order of court (3h at N$1 800 per hour)
Total	**N$535 200**	**N$464 050**	**Total**

* This comparison is for illustration purposes only, and shall not be binding on ADR Forum