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The existence of a disputed arbitration agreement: Whose call?

2 February 2022 *8 min read*

Arbitration agreement

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Arbitration is a consensual process – it depends on an agreement between the parties to refer their dispute to arbitration. An agreement to arbitrate could be contained in a wider-ranging "main" agreement, in the form of an arbitration clause; or it could take the form of a separate and self-standing arbitration agreement. In either case, it sometimes happens that a party resists going to arbitration on grounds that the arbitration agreement is invalid, unenforceable or even non-existent. This then gives rise to a dispute as to whether a valid and enforceable arbitration agreement exists. The question of which forum has the jurisdiction to resolve this preliminary dispute – the court or an arbitrator – is a particularly tricky one, yet one that has not previously yielded a great deal of guidance in the form of jurisprudence in South Africa.

The Supreme Court of Appeal (SCA) recently grappled with a matter (*Canton Trading 17 (Pty) Ltd t/a Cube Architects v Fanti Bekker Hattingh NO*[1]) in which a party against which arbitration had been invoked (Canton) denied the very existence of any agreement to arbitrate, and so refused to participate. This had led the counter-party (the Trust) to apply to court for an order compelling Canton to submit to arbitration in relation to the dispute as to whether any arbitration agreement existed (for which the SCA used the shorthand "existence dispute"). The Trust relied on an agreement it had prepared to formalise its appointment of Canton as a provider of architectural services to the Trust.

That agreement contained an arbitration clause, but had never been signed. Canton denied ever having entered into the agreement, thereby creating a material dispute of fact regarding the existence of the agreement. The High Court and the full bench had resolved this dispute in favour of the Trust by applying the "robust approach" referenced in *Fakie NO v CCII Systems (Pty) Ltd*[2], effectively concluding on the affidavits that Canton's denial of the existence of the agreement was not genuine and could be rejected out of hand. They had thus concluded that there was a valid and binding arbitration agreement, and ordered Canton to submit to arbitration.

No scope for resolving the factual dispute

On appeal, the SCA found that there was no scope for resolving the factual dispute on the papers by means of the "robust approach". Canton had set out its version as to why no agreement had been concluded to refer any dispute to arbitration, and this version was neither fictitious nor so far-fetched and clearly untenable that it could confidently be said, on the papers alone, that it was demonstrably and clearly unworthy of credence. Furthermore, the weight placed by the Court *a quo* on the provisions of the AFSA[3] Rules granting the arbitrators wide powers to determine their own jurisdiction was misplaced. True, the unsigned agreement mandated the use of the AFSA Rules; but the dispute concerned whether that agreement itself had ever come into existence, so it would be circular to rely on a provision that would only come into play if the agreement in fact existed.

The SCA noted that parties have wide-ranging autonomy to agree that matters concerning the validity, enforceability and even existence of an agreement be referred to arbitration. Determining precisely which disputes are to be referred will involve the interpretation of the parties' written agreement. If the very agreement to submit the disputes to arbitration is subject to challenge, then the starting point is the dictum in *Heymans v Darwins Ltd*[4] – *"[i]f the dispute is as to whether the contract which contains the clause has ever been entered into at all, that*

issue cannot go to arbitration under the clause, for the party that denies he has ever entered into the contract is thereby denying that he has ever joined in the submission". That is however not the end of the matter.

The dispute goes to arbitration or to court may arise at different stages

The SCA noted that a dispute over whether a dispute goes to arbitration or to court may arise at different stages. If it comes up for the first time before the arbitrator, then the arbitrator will determine it. If it comes up at review or enforcement stage, then the court will do so. When – as in this case – it comes up at commencement, then a court "*will want to steer a course between the discouragement of time-wasting obstructionism and protecting a party from being forced to arbitrate without their consent*".

The SCA discussed two approaches employed by courts in these circumstances. The first, the doctrine of separability, is based on the recognition that an arbitration clause may express the intention of the parties that a question of validity, enforceability or indeed the very existence of the main contract is to go to arbitration. If that is the correct interpretation, then the court may conclude that the arbitration clause is separate from the main agreement. Absent a direct challenge to the validity, enforceability or existence of the arbitration clause, the court will then require the parties to submit the dispute to arbitration. But where there *is* a direct challenge to the existence of the arbitration clause, as in this case, the separability doctrine takes matters no further.

The second approach is the competence-competence principle, which means that arbitrators enjoy the competence to rule on their own jurisdiction and are not required to stay their proceedings to seek judicial guidance. The SCA stated: "*Where the dispute has already been referred to an arbitrator, the court will not rule upon the validity, existence or scope of the arbitration agreement, but will leave these questions of jurisdiction for the arbitrator to decide, at least initially. But, even if the dispute has not yet been referred to arbitration, the court may be disinclined to decide the question of jurisdiction, unless the arbitration agreement is manifestly void*" (emphasis added).

Thus, the courts will be inclined to allow the arbitrator to decide questions of jurisdiction, unless the challenge before the court shows that there is a "*manifest basis*" to resist it. The principle, was thus said to favour the facilitation of arbitration and restrict pre-emptive court challenges to the jurisdiction of an arbitrator, "*save in the clearest of cases*".[5]

Genuine dispute of fact on the existence dispute

Where the very existence of an agreement to refer an existence dispute to arbitration is denied, however, the party resisting arbitration does not need to go so far as to show that the arbitration agreement is "manifestly void". The true test, as evidenced in the SCA's ruling, is whether there is a genuine dispute of fact on the existence dispute. If so, the court will not compel a party to arbitrate in the face of its insistence that it never agreed to it.

In the case at hand, the SCA found that it could not be determined on the papers whether the arbitration clause in the main agreement (the existence of which was disputed) was intended to constitute a separate agreement referring any such existence dispute to arbitration, as there was a "thorough-going dispute of fact" in relation to which the parties had marshalled contradictory evidence. The correct approach by the court *a quo* would have been either to dismiss the application, or to refer it to oral evidence. The SCA referred the matter back to the court *a quo* for this purpose.

In light of the judgment in *Canton Trading 17*, it appears that a distinction ought to be drawn between validity and enforceability, on the one hand, and existence on the other. Logically, parties can easily agree that a dispute regarding the validity or enforceability of an arbitration agreement must itself be arbitrated. It however requires mental gymnastics to conceive of a situation where it can be found that parties have agreed that any dispute over the existence of that same agreement must be arbitrated.

Thus, the position appears to be that where a dispute arises at commencement as to the validity or enforceability of an arbitration agreement, the court will interpret the arbitration agreement, with the aid of the doctrines of separability and competence-competence, to ascertain whether the parties intended to refer a dispute of that nature to arbitration. Where however the dispute pertains to the very existence of an arbitration agreement, there will be far less scope for the court to find that the parties intended such a dispute to go to arbitration; and so, provided that the party resisting arbitration puts up a version that is not so implausible that it can be rejected out of hand, the dispute will be determined by the court.

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[1] (479/2020) [2021] ZASCA 163 (1 December 2021).

[2] 2006 (4) SA 326 (SCA).

[3] The Arbitration Foundation of Southern Africa.

[4] [1942] 1 All ER 335 (HL) at 343F, affirmed by the SCA in *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) SA 1 (SCA). My case note arguing that *North East Finance* was wrongly decided can be found here: https://werksmans.com/legal-updates-and-opinions/one-step-backwards-for-arbitration/

[5] The competence-competence principle has been incorporated into South African international arbitration law by means of the International Arbitration Act (Act 15 of 2017) which incorporates the UNCITRAL Model Law, Articles 8(1), 8(2) and 16 of which are relevant.



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