



**IN THE HIGH COURT OF SOUTH AFRICA,
MPUMALANGA DIVISION, (MIDDELBURG LOCAL SEAT)**

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED YES/NO
<u>21 JULY 2026</u> DATE	<u>H.F. FOURIE</u> SIGNATURE

In the application between:

CASE NUMBER: 3006/2024

TJP CAPITAL HOLDINGS (PTY) LTD

FIRST APPLICANT

JECSTRUCT (PTY) LTD

SECOND APPLICANT

JACOBUS THEROHN GELDENHUYS

THIRD APPLICANT

and

OLUF HENDRIK ERICHSEN N.O.

FIRST RESPONDENT

MICHELLE ALIDA ERICHSEN N.O.
(In their capacities as trustees of the
Oluf H Erichsen Family Trust)

SECOND RESPONDENT

ADV L NKOSI-THOMAS SC

THIRD RESPONDENT

JUDGMENT

FOURIE AJ

INTRODUCTION:

[1] The application and counterapplication at hand deal with three central issues:

[1.1] The interplay between arbitration and litigation.

[1.2] The possible repudiation of an arbitration agreement and the ultimate effects thereof; and

[1.3] Whether good cause has been shown for the Court to intervene and, in terms of Section 3(2) of the Arbitration Act, 42 of 1965, have the arbitration between the First Applicant and the Respondents cease to exist on whatever basis.

BACKGROUND:

[2] At the heart of the current dispute lies a business venture undertaken by the Applicants and Respondents regarding the possible joint development of certain properties for profit.

[3] Although some dispute exists between the Applicants and Respondents as to the exact terms of the agreements concluded from time to time, and whether these agreements ultimately constitute agreements in writing or orally, those issues are not before this Court to decide.

- [4] For purposes of the current application and counterapplication, it is accepted that, either on the version of the Applicants or the Respondents in terms of how the contract came to be, the ultimate contract in whatever form had embedded into the contract a *provisio* that, should a dispute in respect of the relationship between the Applicants and the Respondents arise, then such dispute ought to be resolved by way of arbitration.
- [5] It is largely common cause that the relationship between the First Applicant and the Respondents arose around June 2019.
- [6] During 2023, the ultimate underlying dispute between the parties arose, the nature of which is not relevant for the current application nor counterapplication.
- [7] In May 2023, the Third Respondent was appointed as arbitrator after being nominated to such position by the LPC.
- [8] To say that the arbitration process has thus far been acrimonious, laden with incorrect legal propositions by the respective parties, and in certain instances, as will be noted hereinafter, simply irregular, would be to state it mildly.
- [9] After the Third Respondent was initially appointed, the First and Second Respondents (hereinafter “the Trust”) indicated that a *point in limine* would be raised regarding the jurisdiction of the arbitrator.
- [10] On 4 July 2023, the First Applicant (hereinafter “TJP”) and the Trust attended a first pre-arbitration meeting with the Third Respondent (hereinafter “the Arbitrator”).
- [11] On 10 August 2023, and during the second pre-arbitration meeting, the Trust abandoned its jurisdictional *point in limine*.

- [12] What unfolded after the second pre-arbitration meeting was in essence that TJP, by way of their legal representatives, proceeded with the arbitration as if same was on motion.
- [13] Between 1 September 2023 and 7 November 2023, significant correspondence was exchanged between the legal representatives of TJP and the Arbitrator, dealing predominantly with a persistence by the legal representatives of TJP insisting that the arbitration was to be done by way of motion proceedings, that is on affidavit and arguments only.
- [14] During this time and the more TJP was informed that the matter would be dealt with under AFSA Rules and *via* the leading of evidence, the more the legal representative for TJP insisted that the Arbitrator was wrong and continually showed their displeasure to the manner in which the Arbitrator was handling the proceedings.
- [15] To repeat all the statements of each and every letter would serve no practical purpose for the current Judgment, but it is necessary for the letters advanced by TJP's legal representatives on 7 November 2023 and its content to be highlighted, specifically in the following terms:
- [15.1] A full timeline setting out the process followed to that stage was highlighted.
- [15.2] TJP took issue with a "procedural order" made by the Arbitrator.
- [15.3] TJP persisted with their views that the matter ought to be considered as a motion.
- [15.4] TJP highlighted that the arbitration places a time limit upon a tribunal to complete the arbitration in four months, and the fact that the parties have not agreed to extend the period of four months.

- [15.5] TJP indicated that they would not receive a fair adjudication if the matter continued to be heard.
- [15.6] TJP complained of the fact that the matter was in essence *in limbo* for 23 weeks at that stage without clear and proper answers from the Arbitrator.
- [15.7] TJP stated to be of the opinion that the Arbitrator refused and neglected to act in a proper and professional manner as expected from an arbitrator or that the arbitrator was unwilling, alternatively unable to conduct the arbitration in a professional manner.
- [15.8] TJP took issue with the interim invoice issued by the Arbitrator.
- [15.9] TJP requested the Arbitrator to resign and indicated that a complaint against the Arbitrator would be lodged with AFSA.
- [16] On 9 November 2023 the Trust, by way of their legal representatives, issued correspondence which is significantly important in that it conveys at least the following:
- [16.1] It highlighted the actions of TJP's legal representatives and the tone in which the letter was sent as unwarranted, uncalled for and scandalous.
- [16.2] The Trust highlighted the actions of the TJP as seen to avoid the cross-examination of witnesses.
- [16.3] The Trust regarded the attack on the Arbitrator as aimed at escaping the previous rulings of the Arbitrator.

- [16.4] The Trust indicated that, if TJP succeeded in having the Arbitrator resign, the Trust would not further participate in any further and/or *de novo* arbitration processes.
- [17] On 9 February 2024, TJP's legal representatives advanced a letter to the Arbitrator and the Trust indicating the letter to be the termination of the Arbitrator's appointment. The letter was advanced solely by TJP and was premised upon the following grounds:
- [17.1] The Arbitrator's failure to comply with the requirements as set out in Section 23 of the Arbitration Act, for failing to make an award within four months of the date at which the arbitration was referred.
- [17.2] The Arbitrator abandoned their duties according to TJP, by failing to act as the Arbitrator.
- [17.3] In terms of Section 10(1) of the Arbitration Act, the Arbitrator has refused to act in a proper manner as the appointed arbitrator and the party who appointed the arbitrator, being TJP, was allegedly empowered to appoint another arbitrator.
- [18] The manner in which the Arbitrator was addressed and attacked in the correspondence by TJP's legal representatives can only be regarded as unnecessary and out of order. It is evident that at that stage TJP lost faith in the Arbitrator, but the manner in which the correspondence was phrased leaves much to be desired.
- [19] On 12 February 2024, the Trust, by way of their legal representatives, advanced a letter to the respective parties indicating:

- [19.1] The distancing by the Trust of themselves from the letter as advanced by TJP's legal representatives, indicating same to be defamatory and factually and contextually incorrect.
- [19.2] The Trust highlighted that they would not participate in any *de novo* arbitration.
- [19.3] The Trust indicated TJP's purported termination of the Arbitrator's appointment as a self-serving and unlawful ploy to escape from procedural rulings and interim awards made by the Arbitrator.
- [20] After the aforesaid exchange between the parties, TJP appointed new legal representatives who advanced a letter to the Trust on 13 March 2024, which was aimed at regulating further proceedings between the respective parties. For purposes of the current application, the following is necessary to be highlighted:
- [20.1] TJP conceded that the parties were at an impasse.
- [20.2] It was proposed that the current arbitration proceedings be abandoned and replaced with new proceedings on a different basis and before a different arbitrator.
- [21] On 20 March 2024, the Trust's legal representatives responded *inter alia* stating that:
- [21.1] The Trust viewed that TJP repudiated and abandoned the arbitration proceedings.
- [21.2] As a result of the repudiation and abandonment the arbitration proceedings terminated.

[21.3] The Trust reaffirmed that it would not participate in further arbitration proceedings.

[22] As there was no further movement pertaining to an arbitration, in June 2024, the Trust issued Summons against TJP, and after not receiving a Plea from the Applicants, a Notice of Bar was served by the Trust, flowing from which, on 4 September 2024, the current application and subsequent counterapplication were made.

RELIEF SOUGHT:

[23] In the main application, TJP seeks:

[23.1] That the proceedings instituted by the First and Second Respondents (the Trust) against the Applicants in the High Court be stayed in terms of Section 6(1) of the Arbitration Act, 42 of 1965 pending the finalisation of the arbitration proceedings commenced with and pending before the Third Respondent.

[23.2] An Order declaring that:

[23.1.1] The arbitration proceedings initiated by the First Applicant against the First and Second Respondents before the Third Respondent are of full force and effect and pending finalisation.

[23.1.2] The appointment of the Third Respondent as Arbitrator to the dispute referred to arbitration by the First Applicant against the First and Second Respondents is valid and of full force and effect.

[23.1.3] In the event of it being held that the appointment of the Third Respondent to the arbitration proceedings

commenced by the First Applicant against the First and Second Respondents is not of full force but has lapsed in terms of Section 23 of the Act, that Adv AB Rossouw SC be appointed as Arbitrator to the dispute, alternatively that the chairperson of the Pretoria Society of Advocates be directed to appoint a substitute arbitrator within 20 days of an Order by this Court.

[23.1.4] In the event of it being held that the appointment of the Third Respondent as Arbitrator in the dispute be referred to arbitration by the First Applicant against the First and Second Respondents is of full force and effect and has not lapsed, that the Third Respondent's appointment be terminated, alternatively set aside; and

[23.1.5] A suitable substitute arbitrator be appointed.

[23.3] That the time period allowed in terms of Uniform Rule 26 for the delivery of the First, Second and Third Applicants' Plea under the matter as brought in the High Court be extended in terms of Uniform Rule 27(3) for a period of 15 days calculated from the date of finalisation of the arbitration proceedings referenced *supra*, alternatively 15 days calculated from the finalisation of this application whichever date applies.

[24] In the Counterapplication the Trust sought:

[24.1] That the arbitration agreement referenced in Clause 8 of the Memorandum of Understanding dated 12 June 2019 be and is set aside in terms of Section 3(2)(a) of the Arbitration Act, 53 of 1965 (as amended).

[24.2] That in the alternative to Prayer 1, it be ordered in terms of Section 3(2)(b) of the aforementioned Act, the dispute formulated in the First and Second Respondents' combined Summons under the High Court matter as brought against the First Applicant, shall not be referred to arbitration.

[24.3] In the alternative to the relief sought by means of Prayers 1 and 2, that it be ordered in terms of Section 3(2)(c) of the Act, that the aforementioned arbitration agreement shall cease to have effect with reference to the dispute formulated by means of the First and Second Respondents' Combined Summons in the High Court.

RELEVANT CONCESSIONS:

[25] Having the benefit of hindsight, when the matter was called, the respective legal practitioners dealing with the matter made certain concessions in respect of the views initially held by the legal representatives of the respective parties.

[26] The Trust conceded that their initial challenge to the jurisdiction of the Arbitrator was not one holding merit and indicates that to be the reason why the *point in limine* was not persisted with in the arbitration.

[27] TJP concedes that the persistence by the erstwhile legal representatives for the arbitration to be heard as a motion rather than an action was contrary to the correct position and further concedes that the persistence and the manner of persistence with the challenge to the proceedings and the form thereof was incorrect.

[28] TJP further concedes that the attempted unilateral termination of the Arbitrator's appointment was irregular and inconsistent with the prevailing provisions on how an Arbitrator ought to be removed.

[29] Both parties are in agreement and conceded that, should the arbitration be ordered to recommence and proceed, to a great degree the Third Respondent would be compromised, and it would be in the interest of justice if an alternative Arbitrator is appointed.

[30] The parties are to a great degree in agreement that, if the Court is with the Trust and declares the arbitration agreement to be set aside or to cease to exist, then it would be in the interest of justice if an appropriate amount of time be given to the Applicants for the filing of their Plea, and for the matter to then proceed through the normal litigious routes.

ARBITRATION AS AN ALTERNATIVE DISPUTE RESOLUTION MECHANISM:

[31] It has long been a recognised method of alternative dispute resolution between parties to invoke arbitration as a form of settling disputes between parties.

[32] In ***Dex Group (Pty) Ltd*** [1] at paragraph 20, the Court stated that:

“The advantages of arbitration over litigation, particularly in regard to the expeditious and inexpensive resolution of disputes, are reflected in its growing popularity worldwide. Those advantages are diminished or destroyed entirely if arbitrators are confined to a straitjacket of legal formalism that the parties to the arbitration have sought to escape. Arbitrators should be free to adopt such procedures as they regard as appropriate for the resolution of the dispute before them, unless the arbitral agreement precludes them from doing so.”

[33] The co-existence of arbitration and the constitution have also, on several occasions, been confirmed by the Court. In ***Lufuno Mphaphuli & Associates (Pty) Ltd*** [2], the Court stated the following:

“The principle of party autonomy, stressed in Telcordia, which requires a high degree of deference to arbitral decisions, and which implicitly informed the approach of the Supreme Court of Appeal in the present matter, is not a weighty consideration against a conclusion that the fairness requirement of section 34 is of application to arbitrations. Telcordia itself, and the authorities it referred to in emphasising the principle, were matters which concerned errors of fact or law to which the well-known and well-established principles governing arbitrations do apply. Procedural irregularities giving rise to unfairness are, however, a horse of a different colour.

In my view, there is no reason why the fairness requirement of section 34 of the Constitution cannot co-exist with the requirements imported by the provisions of section 33(1) of the Arbitration Act. On the contrary, there is every reason why co-existence should be accepted: the fairness requirement in section 34 is part of a fundamental constitutional right incorporated into the Bill of Rights and it is properly to be engrafted onto the principles applicable to arbitrations.

This conclusion is in accordance with the principle that in interpreting any legislation the courts are enjoined to promote the spirit, purport and objects of the Bill of Rights, including the right to a fair and impartial hearing guaranteed by section 34.

- [34] What is necessary to be stated, however, is the fact that parties enter into a contract at a certain stage, placing certain belief in an arbitration process regulated by a specific set of rules.

- [35] The reason why the parties enter into that agreement can be on any number of grounds, but they did so and consciously elected to have same form part of a contract. It can only be taken that, in incorporating an arbitration clause into a contract, the parties place their faith in the resolution of possible disputes in arbitration and the proposed mechanism embedded therein because they believe that, by following arbitration, a just and fair outcome to a dispute would be received.
- [36] The current matter deals with the situation that arises once a party potentially loses faith in the arbitration process through the actions of the other party to the arbitration agreement. The question essentially arises whether a party that initially had faith in an arbitration process and agreement remains bound by such an election made at the inception of the agreement if they believe the facts, for whatever reason, have caused sufficient grounds to exist leading a Court to find that good cause is shown for that party not to be bound to their initial agreement.
- [37] Once entered into, an arbitration agreement is binding on the respective parties until terminated via consent of the respective parties or set aside by the Court. In this regard, Section 3 of the Arbitration Act, 42 of 1965 provides that:

“3. Binding effect on arbitration agreement and power of court in relation thereto

- (1) Unless the agreement otherwise provides, an arbitration agreement shall not be capable of being terminated except by consent of all the parties thereto.*
- (2) The court may at any time on the application of any party to an arbitration agreement, on good cause shown—*

- (a) *set aside the arbitration agreement; or*
- (b) *order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or*
- (c) *order that the arbitration agreement shall cease to have effect with reference to any dispute referred.”*

[38] At hand, the parties are not in agreement in respect of the termination of the arbitration agreement. Accordingly, the Court is called upon to evaluate whether good cause has been shown for the parties not to be bound by the arbitration agreement.

[39] The matter is evaluated by the Court from the perspective of the Counterapplication first as, if the Court is satisfied that the Trust has shown good cause in line with Section 3(2) of the Act, the relief as sought by TJP becomes largely irrelevant save for the right to file a belated Plea. If the Court is however not with the Trust, then the relief sought by TJP deserves evaluation.

[40] Whilst it is so that the sanctity of contracts is to be upheld and parties ought generally to be bound by contractual provisions to which agreed, Section 3(2) of the Act allows the Court to intervene in the contractual arrangement between parties for ultimate justice to be done between the parties.

[41] Whilst our Courts generally defer to litigants' agreements that disputes be determined in terms of arbitration clauses given the autonomy of litigants to make that choice, Courts retain jurisdiction over such disputes, and an arbitration clause does not serve to oust the jurisdiction of a Court.[3]

[42] The disputes between the respective parties ought not be dealt with in several forums, and it is an accepted legal principle that the matter ought to be dealt

with either at arbitration alternatively in this Court, as a multiplication of proceedings might lead to conflicting decisions, time delays, and exorbitant and unnecessary costs.[4]

HAS GOOD CAUSE BEEN SHOWN:

[43] At the heart of the dispute, the Court is requested to adjudicate on the central issue whether the Applicants had repudiated the arbitration agreement, whether the Respondents have accepted such repudiation if indeed a repudiation has existed, and whether same is good cause under the current circumstances.

[44] Both the Applicant and the Respondent referred me to the matter of **Data Color International (Pty) Ltd** [5] where the Supreme Court of Appeal held:

“Conceivable it could therefore happen that one party, in truth intending to repudiate (as he later confesses), expressed himself so inconclusively that he is afterwards held not to have done so; conversely, that this conduct may justify the inference that he did not propose to perform even though he can afterwards demonstrate his good faith and his best intentions at the time. The emphasis is not on the repudiating party’s state of mind, on what he suggestively intended, but on what someone in the position of the innocent party would think he intended to do; repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party. The test is whether such a notional, responsible person would conclude that proper performance, in accordance with a true interpretation of the agreement, will not be forthcoming. The inferred intention accordingly serves as the criterion for determining the nature of the threatened actual breach.”

[45] In the same matter, the Court stated that:

“The repudiation is sometimes set to consist of two parts: the act of repudiation by the guilty party, evincing a deliberate and unequivocal intention no longer to be bound by the agreement, and the act of his adversary, “accepting” and thus completing the breach.”

[46] The question is accordingly whether a reasonable advisory sitting in the chair of the Trust would evaluate the conduct of TJP, including the submissions made by their legal representatives during the arbitration process, and regard the actions of TJP to constitute a repudiation of the arbitration agreement.

[47] In argument, the Court was referred to the matter of ***FL Smidth (Pty) Ltd v Racec Rail (Pty) Ltd*** [6] where the Court stated that:

“Data Color International (Pty) Ltd v Intamarket (Pty) Ltd 2001 (2) SA 284 (SCA) 300 C-D held that, pursuant to a repudiation of an agreement by one party, the declaration by the other party of its intention to cancel an agreement need not be explicit, but may be implicit, provided such declaration is unambiguous. In the present case, as already stated, after the repudiation of the arbitration agreement by Racec on the 18th of June 2013, FLS took no further steps to advance the arbitration and did not file its statement of defence. FLS also instituted the present application by way of urgency, with a view to preventing Racec, CFG, and Mitchel from advancing the arbitration, after the 18th of June.”

[48] The Court was further referred to the matter of ***Sherwood Eleven Thirty Investments CC v Robridge Construction CC and Another*** [7] where **Navsa J** dealt with a delay in arbitration under the auspices of Section 23 of the Arbitration Act, where the Court held that:

“The arbitration agreement obligates the parties to co-operate and to do whatever is necessary to facilitate and finalise the settlement by way of arbitration, subject to the Act. The Applicant, in my view, has complied

with its contractual obligations. It has sought to do so beyond the time period prescribed for the making of an award. The Applicant has reached the point where it has drawn the line and adopted the position that for an arbitration to remain unprosecuted to finality for so long a period of time is untenable.”

[49] Section 23 of the Arbitration Act sets a time for an arbitration award to be made within four months since the inception of the arbitration.

[50] The Applicant contends that Section 23 of the Act finds no application to the matter at hand, as the matter was commenced with and dealt with under the Rules of the Arbitration Foundation of South Africa, which states under Rule 12(1) that:

“The arbitrator shall make his final award as soon as may be practicable, and in any event not later than 60 (sixty) calendar days after completion of the hearing, unless the parties in writing agree to an extension of this period or, in exceptional circumstances, the secretariat extends such period.”

[51] The reasoning of the Applicant is that, since the hearing has not been completed, the 60-day period has not commenced, and the matter is yet to fall foul of time delay *provisions*.

[52] The legal position as advanced by the Applicant in respect of the interplay between the AFSA Rules and the Act is indeed correct. It does, however, stand in direct contrast to the reliance on Section 23 by the Applicants themselves during the unilateral cancellation of the Third Respondent as Arbitrator on 9 February 2024, wherein it was the Applicants who complained of the time delay in the matter and the fact that the matter had fallen foul of the Arbitration Act. It also, to some degree, stands in contrast to the Notice of Motion of the Applicants.

[53] In essence, when it suited the Applicants to rely on an inordinate time delay it was so advanced. Currently, the evaluation of a time delay or not does not suit the narrative of the Applicants, and the Applicants seek to invoke a strict application of Rule 12.1 of the AFSA Rules.

[54] The Applicants further submitted that the Court in **De Lange [8]** found that the reliance on a time delay is not sufficient for good cause to be shown. The current matter is distinguishable from De Lange at least for the following two reasons:

54.1 The delay in respect of the matter in De Lange was for the conclusion of the arbitration agreement and not the finalisation of the arbitration itself; and

54.2 The Court ultimately failed to circumvent arbitration due to the nature of the dispute, which dealt with an internal religious matter falling within the exclusive realm of the church rather than in the current matter which deals with a generic commercial contractual dispute.

[55] It is evident that the nature of the dispute weighed heavily in the Court's ultimate decision as well as in the subsequent appeal to the Constitutional Court [9].

[56] A time delay in the finalisation of an arbitration is a very relevant consideration when evaluating the matter under the auspices of Section 3(2) of the Arbitration Act.

[57] If the Court finds that a matter is being delayed and is not effectively being dealt with the purpose of arbitration is not being served. I align myself with the sentiments displayed by Navsa J in Sherwood *supra*.

[58] The essence of the Trust's claims is that the actions of TJP made it known that they were not willing to follow the rules of engagement in as far as it relates to the arbitration, and the persistent obstructive actions of TJP and

their legal representatives made it known to the Respondent that speedy, efficient, and just resolution of the matter by way of arbitration would not be forthcoming.

- [59] The Respondents contend that they had warned the Applicants to desist from their obstructive actions and that, should they persist therewith, the Respondents would no longer regard themselves bound by the arbitration agreement.
- [60] When the Applicants, TJP, ultimately, irregularly and unilaterally attempted to cancel the appointment of the Third Respondent, the Arbitrator, the Trust regarded the actions of TJP as a repudiation of the arbitration.
- [61] It is indeed so that the Applicants realised the fatal flaws in their reasoning when they appointed new legal representatives who tried to rectify the position in their approach to the Trust after their appointment, several months after the attempted termination of the Arbitrator's appointment.
- [62] The difficulty the Court has with the reasoning of the Applicant in this regard is simply that, pursuant to the actions of TJP, the Trust made it evidently clear that they regard the arbitration as having terminated due to the actions of TJP, and that they would not consent to a *de novo* arbitration. The Applicant contends that an acceptance of the repudiation was not clearly made. The Court rejects the views of the Applicant in this regard. The Trust made it clear in their correspondence how they regarded the status of the arbitration due to the actions of TJP.
- [63] It is important for the Court to highlight the proposal by TJP on how the arbitration process is to be rescued in the letter by their newly appointed legal representatives on 13 March 2024. In this letter, the proposal was made by TJP that, if the arbitration proceedings are to be commenced *de novo*, the proceedings be regulated in terms of the Rules of the High Court and not per the guidelines provided for by AFSA.

- [64] The essence of the aforesaid would accordingly be that, save for the venue and the chosen arbitrator, the parties would deal with the matter, as it is suggested by TJP, as if it were a normal High Court action.
- [65] In essence, TJP proposed for the whole nature of the arbitration to change.
- [66] The Applicants' contended during the trial that the previous legal representatives were entitled to raise certain issues as and when they arose with the Arbitrator, and that this does not amount to a repudiation of the arbitration. It is indeed so that, in order to facilitate an effective process, clarification on certain issues or guidance may from time to time be sought from an Arbitrator. The manner in which TJP, however, persisted with their erroneous submissions and views, even after being cautioned by the Trust, and the manner in which the TJP irregularly and unilaterally embarked upon the termination of the arbitrator's mandate, far exceeds this right.
- [67] The Court is called on to evaluate whether the actions of TJP would display to a reasonable counterpart partaking in an arbitration process, believing in not only the goals of arbitration but ultimate finalisation and justice to be done between the respective parties, that TJP was no longer of the intention of being bound by the same rules of engagement as their advisory and by the rules ultimately governing the arbitration process. It is this Court's view that a counterpart confronted with the actions of TJP would be justified in viewing the actions of TJP as a repudiation of the arbitration agreement.
- [68] Having acted in the manner in which TJP has in their repudiation of the arbitration, and evaluating all the relevant facts of the matter, the Court is satisfied that good cause has been shown for the setting aside of the arbitration agreement.

- [69] Litigants are bound by the actions of their legal representatives, and TJP cannot escape the facts that have unfolded simply because it has now appointed new legal representatives who hold a different view than their previous legal representatives.
- [70] The Applicants contend that the parties ought to be held to their prior election to participate in the arbitration process.
- [71] There comes a point in the process, however, that the Court should evaluate whether persistence with a process remains viable and will lead to ultimate justice, where the process chosen has been delayed, frustrated, ineffective, a waste of money, and at least some of the participants in the process have lost faith in that process to bring ultimate justice between the parties.
- [72] The current matter is one where the Court is satisfied that good cause has been shown for the setting aside of the arbitration agreement.
- [73] Considering that TJP seeks the arbitration to proceed under the Uniform Rules of Court, the only difference between ordering the matter to proceed in this Court than in the arbitration forum would be the venue and the chosen presiding officer. The Court does not believe the rights of the Applicants would be infringed against the backdrop of the aforesaid if the relief as sought by the Trust is granted.
- [74] The Court has considered, albeit briefly, the involvement of the Second and Third Applicants and the possible multiplication of the evidence or actions but, having regard to the manner in which such Applicants are ultimately involved in the litigation process no real weight can be placed on their involvement for purpose of the current application.
- [75] With the information available to the Court, any possible order made against the Second and Third Applicants would flow from an order possibly granted against TJP, and there would be no serious multiplication of issues. As stated,

however, nothing truly turns on this point for the reason the Court ultimately finds.

- [76] Having found as aforesaid, the Court also does not find it necessary to deal with the possible cession of claims.

CONCLUSION AND COSTS:

- [77] Having found as aforesaid, the relief as sought by the Trust in their Counterapplication ought to be granted, and the arbitration agreement stands to be set aside on good cause shown.

- [78] It would further be in the interest of justice for the Applicants, considering the Order the Court makes, to be afforded sufficient time to file their Plea in the action before this Court to the Summons and Particulars of Claim of the Trust. In this regard, the relief as prayed for in Prayer 3 of the Applicants' Notice of Motion ought to be granted.

- [79] In respect of costs, the Trust was ultimately successful in the pursuance of their Counterapplication, which justified similarly the opposition to the main application. Although the issues underlying to the dispute remain alive between the respective parties, the Court believes that no other Court or forum would at a later stage be in a better position to adjudicate an appropriate costs order in respect of the current application. As such, the Court believes that justice between the parties would be done by ordering that the Applicants, jointly and severally, be liable to the First and Second Respondents on a party and party Scale B.

ORDER:

[80] For all the aforesaid reasons, the following Order is made:

[79.1] The arbitration agreement referenced in Clause 8 of the memorandum of understanding dated 12 June 2019, be and is hereby set aside, in terms of Section 3(2) of the Arbitration Act, 42 of 1965 (as amended).

[79.2] The time period allowed for the delivery of the First, Second, and Third Applicants' Plea under Case Number: 3006/24 be extended, and the Applicants be allowed to file their Plea to the Plaintiff's Summons and Particulars of Claim within 20 (twenty) days from the date of this Order.

[79.3] The Applicants shall be liable jointly and severally to pay the First and Second Respondents' costs on a party and party Scale B.



H F FOURIE AJ
ACTING JUDGE OF HIGH COURT, MIDDELBURG

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Judgment reserved on:
Date of delivery:

28 MAY 2026
21 JULY 2026

- [1]** Dex Group (Pty) Ltd v Trust Co Group International (Pty) Ltd and Others (687/12) [2013] ZASCA 120; 2013 (6) SA 520 (SCA); [2014] 1 All SA 375 (SCA) (20 September 2013)
- [2]** Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another (CCT 97/07) [2009] ZACC 6; 2009 (4) SA 529 (CC)
- [3]** Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd 1971 (2) SA 388 (W) at 393
See also Yorigmi Maritime Construction Co Ltd v Nissho-Iwai Co Ltd 1977 (4) SA 682 (C) at 693
See also Foize Africa (Pty) Ltd v Foize Beheer BV and Others 2013 (3) SA 91 (SCA) at 21
- [4]** See Foize *supra* at paragraph 28
See also Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd 2014 (3) SA 265 (GP)
- [5]** Data Color International (Pty) Ltd v Intamarket (Pty) Ltd 2001 (2) SA 284 (SCA)
- [6]** FL Smidth (Pty) Ltd v Racec Rail (Pty) Ltd 2014 JDR 0170 (GSE)
- [7]** Sherwood Eleven Thirty Investments CC v Robridge Construction CC and Another 2011 (4) SA 741 (W)
- [8]** De Lange v Presiding Bishop of the Methodist Church of South Africa for the time being and Another (276-13) [2014] ZASCA 151; 2015 (1) SA 106 (SCA)

- [9]** De Lange v Presiding Bishop of the Methodist Church of South Africa for the time being and Another (CCT 223-14) [2015] ZACC 35