IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE:

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES YES/~~NO~~
(3) REVISED:

21 June 2021
DATE

SIGNATURE

CASE NUMBER: 43966/2020

In the matter between :

TZANENG TREATED TIMBERS (PTY) LTD **Applicant**

and

KOMATILAND FOREST SOC LIMITED **First Respondent**

PEET COETZEE SC N.O. **Second Respondent**

JUDGMENT

Heard on: 3 June 2021

Judgment handed down: 22 June 2021 (by publication on CaseLines)

VAN ZYL AJ

INTRODUCTION

1. This is an application for certain declaratory relief regarding arbitration proceedings between the Applicant ("*Tzaneng*"), the defendant in the arbitration proceedings, and the First Respondent ("*Komati*"), the claimant in each instance. The Second Respondent is the appointed Arbitrator (hereinafter "*the Arbitrator*").

2. The declaratory relief being sought is formulated thus by Tzaneng:

> "1. It is declared that no arbitration agreement exists between the applicant and the first respondent in respect of the disputes set out in the statements of claim delivered by the first respondent and annexed to the founding affidavit as annexures "A13", "A14" and "A15" (the statements of claim");
>
> 2. It is declared that the second respondent does not have jurisdiction to determine the disputes set out in the statements of claim;"

3. The parties are in agreement that the statements of claim are in material parts the same and any order by this court will impact on all three arbitrations equally. Each of the three statements of claim rely on written agreements between the parties, which in each instance contains a similarly worded clause referring disputes, falling in the ambit of that clause, to arbitration. Komati has initiated the arbitration proceedings in each instance relying on that clause to allege that the Arbitrator has jurisdiction to entertain its claims.

4. The irony of the matter is that both parties are contending that it (the arbitration agreement) does not apply to certain payment disputes that have arisen between them. The dividing point is that Tzaneng contends that the Arbitrator does not have jurisdiction to make any declaration in this regard, whereas Komati contends the contrary.

5. The relief sought by Tzaneng raises a number of matters for consideration in the main:

   5.1 First, whether a court may grant declaratory relief of the type sought herein in circumstances where arbitration proceeds have been commenced, but not yet concluded;

   5.2 Secondly, whether there is an arbitral dispute between the parties; and

   5.3 Lastly, how to deal with the Arbitrator's jurisdiction.

6. The facts are considered first, whereafter each of these matters is considered in turn.

BACKGROUND

7. Tzaneng conducts business in the sourcing, treatment and supply of timber products to industrial customers in South Africa. Komati is a wholly owned subsidiary of the South African Forestry Company SOC Ltd and conducts

forestry related business which includes timber harvesting, processing and the sale of timber products to entities such as Tzaneng.

8. It is common cause between the parties that three written contracts were concluded which they have referred to as the "Woodbush Contract" (concluded on 21 May 2019), the "Entabeni (a) Contract" (concluded on 26 March 2019) and the "Entabeni (b) Contract" (concluded on 22 March 2019). (The parties are *ad* idem that there were a total of seven such contracts, but only the aforementioned ones are currently relevant.) For convenience the aforementioned three contracts are collectively referred to herein as "*the Contracts*". In terms of the Contracts, Tzaneng was allowed to harvest and remove standing eucalyptus trees from the areas (referred to as compartments) in the plantations referred to in each of the Contracts.

9. The Contracts each record the point of sale as being "Standing" and then provides for a price/m^3 (excluding VAT), eg. under the Woodbush contract it is R475 per m^3.

10. All three the Contracts have the exact same Conditions of Sale, which contains the following clause (quoted in relevant part):

> "3.3 The Purchaser shall have the right to a reduction in price in respect of logs delivered at roadside and processed in South Africa that contain inherent quality defects.
>
> In the event of a claim based on inherent quality defects the following procedure shall apply:
>
> […]

- the parties shall use their best endeavours to agree a reduction in price in respect of such logs, including such reasonable compensation in respect of wasted transport costs incurred by the Purchaser as the parties may agree to, failing which the matter shall referred to arbitration.

- The arbitrator shall be such person agreed upon by the parties, or failing such agreement a person appointed by the Dean of agriculture and Forestry of the University of Stellenbosch, who shall act as an expert and whose award shall be final and binding on the parties."

11. Clause 3.3 also provides for an arbitrator (appointed in terms of the clause) to verify that the product constituting the subject matter of the claim is derived from deliveries by the Seller, that the arbitrator shall make his award within 20 days from the date of referral and an entitlement to make a costs award.[1] There may be a question whether the Arbitrator is acting as an arbitrator or a valuer, but the point was not taken and is accordingly not considered.

12. At the outset it is important to emphasise that clause 3.3 only applies to claims in respect of "logs delivered at road side". This interpretation of the clause is common cause between the parties.

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[1] In argument on the day of the hearing, Mr Els, counsel for Tzaneng, sought to rely on the 20 days' period. This had not been raised in the affidavits filed of record, nor was it raised in Mr Els's heads of argument. In fact, in an email dated 1 July 2020, Mr Louis Erasmus of Tzaneng's appointed attorneys, Thomas & Swanepoel Inc, wrote to the Arbitrator and recorded that, with "*reference to the 20 days limitation, we are of the view that such a period is impractical … My client is willing to waive that limitation*." I need not decide whether such a waiver occurred, because it was not a point open to Tzaneng to take in argument without having raised it in its founding affidavit.

13. On 10 March 2020, Ms Rasha Raamdhew of Komati sent Tzaneng a notice of default in which payment in the sum of R12,441,750.81 was claimed seemingly as a globular amount for all of seven of the contracts.

14. On 12 March 2020, Mr Riaan du Plessis responded to the notices by email. The email is worth quoting in full:

> "Dear Rasha ,
>
> Thank you for your email below and the letter attached.
>
> Komatiland Forests account records are totally wrong as you know…….. Tzaneng Treated Timbers (Pty) Ltd is NOT indebted with Komatiland Forests with an amount of R12,441,750.80 whatsoever, we totally disagree with this outstanding balance.
>
> We had several meetings ,discussions and communications with yourself and Mr Andries Themba about Tzaneng's outstanding payments /Credits from Komatiland Forests but absolute nothing was sorted.
>
> We contacted Mr Seteria now (See attached email to Mr Seteria) after the suspension of Mr Themba to sort all payments/credits out that is due to Tzaneng.
>
> Tzaneng will settle the final balance that is due once ALL Tzaneng's payments/credits that is due are sorted and issued and when we agree with the balance on the account.
>
> This outstanding balance of R 12,441,750,80 is totally wrong and is the incorrect reflection of what Tzaneng need to pay to Komatiland Forests, please be aware before any actions are taken as per your demand letter attached.
>
> If Tzaneng Treated Timbers (Pty)Ltd credit rating, image or name suffer any damages due to this mismanagement, negligence and misconduct by

> Komatiland Forests on our account we will not hesitate to claim for damages caused by Komatiland Forests.
>
> I humbly request you and everybody involved to sort out payments /credits that is due to Tzaneng out urgently to enable us to settle the correct balance on the accounts and to enable us to move forward."
>
> (Typographical errors not corrected.)

15. It is noticeable that nowhere in this correspondence, or for that matter in any of the following correspondence, is there a challenge to the price *per* m^3 under any of the Contracts or any reliance on clause 3.3.

16. Between 11 to 14 May 2020, Komati delivered seven separate notices of referral to Tzaneng. The dispute declared in each of the notices is generic and is recorded as being "*the refusal of [Tzaneng] despite demand to pay the total amount of [amount recorded] that is due to [Komati] on the Eucalyptus timber delivered to Tzaneng in terms of the Agreement*" (parenthesis added). From this statement it is clear that the dispute as formulated by Komati is a dispute about payment under the Contracts.

17. Each of the notices then proceeded to record that Komati refers the "*foregoing dispute as it relates to the Outstanding Payment to an arbitration process as contemplated under the 2nd bullet of sub-clause 3.3 of the Conditions of Sale of 2019/20 of the Agreement*". In the end, Komati only proceeded with three of the declared disputes, but has reserved its rights to also proceed in respect of the others.

18. Mr Louis Erasmus of Tzaneng's appointed attorneys, Thomas & Swanepoel Inc, responded to the notices on 15 May 2020. Erasmus did not take issue with the dispute as formulated by Komati, i.e. one of a dispute about payment. Instead, his letter recorded that Tzaneng objected to Komati resorting to the provisions of clauses 3 of the Contracts as the instrument by which the arbitration process was called into action. In this regard his letter recorded the following:

> "3. We are particularly concerned with your reliance upon portions of the applicable clause 3 (in relation to all of the above defined agreements) in order to substantiate your insistence upon arbitration.
>
> […]
>
> 5. A simple reading of the above passage evidences that the disputes identified in your referenced notices must certainly are not limited to "…*inherit quality defects* …". We must state that the disputes, in the main, deal with the failure to credit our client consequent to, inter alia, incorrect charges, non-application of incurred credits and the like. Consequently, your reliance upon clause 3 of the agreement, for purposes of arbitration, is wrong.
>
> 6. The above being said, we are instructed that our client is not (in principle) opposed to alternative disputes resolution mechanisms in order to finally resolve the current *impasse* as between our client and KLF. Such mechanisms may include (and are of course subject to) an agreed meditation process, alternatively a substantive agreement in relation to arbitration."

19. Komati did not agree with Tzaneng's phrasing of the disputes and wrote back in the following terms:

> "3. Please take note that KLF does not want to be drawn into a debate about the particulars of the dispute that it is formally referring to arbitration in terms of the Agreements as referenced above at this stage. It is suffice to state at this stage that KLF stands by the content of each letter of notification of arbitration that has been formally sent to your client on each of the Agreements mentioned hereinabove in the subject line.
>
> 4. Based on the excerpt of the Agreements that you have quoted in paragraph 4[2] of your abovementioned letter, there is a (sic) clear and undisputable provisions for an arbitration process in terms of the Agreements concluded between KLF and your client …"

20. Further correspondence exchanged iterated the parties' disparate views on whether there is an arbitral dispute or not and need not be repeated, suffice to say that Tzaneng did not relinquish its stance that the anticipated dispute did not fall within the four corners of sub-clause 3.3. In the founding affidavit deposed to by Du Plessis, he remarks that Komati "*remained coy about the full particulars of the "disputes" referred by it*". The facts validated the comment in full.

21. The parties failed to agree on the way forward and Komati then resorted to the provisions of the fourth bullet point under clause 3.3 which provides for the Dean of Agriculture at the University of Stellenbosch to appoint an arbitrator. The Dean then appointed the Arbitrator.

22. Following his appointment, the Arbitrator wrote to the parties, but his correspondence was not placed before the court. What is before the court is the response from Mr Siyabonga Mpotshana, Head of Legal Services of

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[2] Paragraph 4 of Erasmus's letter merely quotes the provisions of clause 3.3.

Komati, on 30 June 2020. Therein Mpotshana *inter alia* recorded that Komati "*is incapable of any agreement with Tzaneng at the moment on the issue of the dispute and other procedural matters*". Erasmus also responded on 1 July 2020. Therein he *inter alia* again recorded that Tzaneng had invited Komati to disclose the nature / grounds of the disputes claims referred by it in terms of the agreements. Erasmus then recorded that Tzaneng required that "*the parties agree, for purposes of the referral, that the Arbitrator be clothed with the power / jurisdiction to make a finding in the arbitration as to his own jurisdiction if an objection thereto is raised by [Tzaneng]*".

23. A virtual pre-arbitration meeting was held before the Arbitrator on 6 July 2020 at which Tzaneng was represented by Mr Els, counsel for Tzaneng, and Komati was represented by Mponthsana. No other attendees were recorded. Tzaneng contends that there is a dispute about what was discussed and agreed at the meeting. This is dealt with further below.

24. On 30 July 2020 and as agreed at the procedural meeting, Komati filed its statements of claim. The contents of these statements of claim are dealt with in greater detail below. This was the first time that the disputes that it contended were referred to arbitration were set down.

25. On 24 August 2020, Tzaneng filed its statements of defence (referred to as "pleas" by Tzaneng), which in each instance included a special plea under the heading "*no arbitration agreement / jurisdiction of the arbitrator*". This too is considered in more detail below.

26. At the same time as filing its statements of defence, Erasmus also addressed correspondence to Mpontshana in which Tzaneng, for the first time, took issue with the minute of the procedural meeting. Mpontshana thereafter took issue with Erasmus's version of what should be in the minute.

27. The present application was launched on 20 September 2020.

THE POWER OF THE COURT TO MAKE A DECLARATORY ORDER

28. Before dealing with the main issues, it is necessary to consider the Court's powers in granting declaratory relief of the type sought by Tzaneng. Counsel for Komati submitted that the court cannot such declaratory relief unless the application is brought in terms of the provisions of section 3 of the Arbitration Act (Act 42 of 1965) ("*the Arbitration Act*"). The submissions is correct insofar as Tzaneng did not expressly refer to section 3 of the Arbitration Act, but that is not fatal.

29. If a party seeks to rely on a particular section of a statute, he must either state the number of the section and the statute he is relying on or formulate his defence sufficiently clearly so as to indicate that he is relying on it.[3] In Naude v Fraser)[4] at 563G, Schutz JA said that there is no magic in naming numbers. The significance is that the other party should be told what he is facing. In Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism

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3 Yannakou v Appollo Club 1974 (1) SA 614 (A) at 623G-H.

4 Naude v Fraser 1998 (4) SA 539 (SCA at 563G; Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd 2020 (5) SA 35 (SCA); Fundstrust 1997 (1) SA 710 (A) at 725H – 726A.

and Others[5] it was held that where a litigant relies upon a statutory provision, it is not necessary to specify it, but it must be clear from the facts alleged by the litigant that the section is relevant and operative. In the present case these sentiments apply. That said, the matter concerns the inherent jurisdiction and powers of a court rather than the provisions of section 3 of the Arbitration Act.

30. The learned authors of *Mustill & Boyd*[6] (2nd Edition) state (in the context of the then operative English Arbitration Act 1950) that the courts of England have frequently exercised a jurisdiction to grant declaratory relief in the context of a pending arbitration, it seems as part of the courts' general supervisory powers. Unfortunately no authorities are cited, but the footnote records that the authors "*have never heard of a challenge to the general propriety of declaratory relief*". The same sentiments are repeated in Ramsden's *The Law of Arbitration*[7] also notes this as a general occurrence:

> "There is no need for a defendant to await the making of an award before challenging the jurisdiction of the arbitrator. It is common practice for a party to apply to court for a declaration that he is not bound by the alleged arbitration agreement which usually results in the arbitration being stayed pending a decision of the court on the jurisdictional issue."

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5 Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC) paragraph [27].

6 The Law and Practice of Commercial Arbitration in England, Mustill & Boyd, 2nd Edition, 1989 (hereinafter "*Mustill & Boyd*"), page 525.

7 In Ramsden's *The Law of Arbitration*, 2012 Reprint (hereinafter "*The Law of Arbitration*"), page 91.

31. In Zhongji Development Construction Engineering Co Ltd v Kamoto Copper Co SARL[8], Wallis JA said, in interpreting the majority judgment in the Constitutional Court delivered by O'Regan ADCJ in Lufuno Mphaphuli v Andrews[9], that the South African law of arbitration is not only consistent with but also in full harmony with prevailing international best practice in the field.

32. I was referred to no judgment in our courts which pronounces expressly on the power of a South African court to grant declaratory relief on whether there was an arbitral dispute or on the jurisdiction of an arbitrator while an arbitration was *in media res*. There are, however, ample examples in our jurisprudence of where our courts have granted such relief or taken no issue when it was asked for (but declined on other grounds).

33. In Pretoria City Council v Blom and Another[10], the applicant disputed that there was a valid arbitration agreement and applied for an order declaring the arbitration invalid and that the appointed arbitrator was not entitled to proceed with the arbitration. Jansen J found that the alleged arbitration agreement had not been proved and granted an order in terms of the prayer.

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8 Zhongji Development Construction Engineering Co Ltd v Kamoto Copper Co SARL 2015 (1) SA 345 (SCA) at paragraph [29].

9 Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another 2009 (4) SA 529 (CC) (2009 (6) BCLR 527; [2009] ZACC 6) especially in paras [195] – [236].

10 Pretoria City Council v Blom and Another 1966 (2) SA 139 (T); Inter-Continental Finance and Leasing Corporation (Pty) Ltd v Stands 56 and 57 Industria Ltd and Another 1979 (3) SA 740 (W) at 753.

34. In South African Transport Services[11] an application was made for a declaratory order and certain ancillary relief relating to the jurisdiction of an arbitrator. In that matter an arbitrator had made certain interim awards as to costs but, after his jurisdiction had been challenged, he refused to make further costs awards. The court *per* Van Zyl J issued a declaratory order that the"*[arbitrator in that matter] at all relevant times had the jurisdiction to make interim awards in respect of costs …*". The judgment does not deal with the basis upon which the application was launched, but it seems clear that it was not brought as review proceedings under the Arbitration Act.

35. Goodwin Stable Trust[12] an application was made to put a stop to arbitration proceedings which had commenced before an arbitrator.[13] The matter came before Selikowitz J. In that matter a pre-arbitration meeting had been held before the arbitrator, Prof Christie, and the parties had agreed to his appointment and, what the judgment records as "*formal and procedural matters were then considered and agreed upon*". A dispute subsequently arose about the *locus standi* of the claimant and the respondent (the applicant in the proceedings before Selikowitz J) refused to further participate in the

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11 South African Transport Services v Wilson NO 1990 (3) SA 333 (W).

12 Goodwin Stable Trust v Duohex (Pty) Ltd 1998 (4) SA 606 (C).

13 The grounds upon which the application were brought are recorded at 610B - C as: "Applicant contended that there was no binding arbitration agreement between applicant and first respondent; that the appointment of second respondent as arbitrator was invalid; that there was no arbitrable issue between itself and first respondent; that the cession by which first respondent claimed the right to arbitrate was invalid or alternatively unenforceable against applicant; and that the clause purporting to permit first respondent to act in the name of the cedent was invalid."

arbitration proceedings. The application was subsequently launched by the respondent in the arbitration proceedings, but referred to in the judgment as "the applicant". At 615D – F, Selikowitz J stated the following in respect of onus and the jurisdiction of an arbitrator:

> "Applicant now contends that the first respondent bears the onus of proving that the arbitration can proceed. Mr MacWilliam, who appears for applicant submits that although his client has initiated these proceedings the onus to prove that there is a valid arbitration agreement which permits it to make a claim; an arbitrable issue and that the arbitrator has been validly appointed rests upon first respondent who wishes to proceed with the arbitration.
>
> These issues go to jurisdiction and the party wishing to utilise the arbitration procedure should, in my view, establish that it is competent in the particular circumstances so to do. Jurisdiction either exists or it does not. Jurisdiction cannot arise simply because applicant fails to prove that the jurisdictional requirements are absent."

36. Selikowitz J referred by analogy to situations where orders were obtained *ex parte* and then states the following at 616B - C that:

> "The respondent in those proceedings contends that there is no arbitration agreement or that there is arbitrable issue. The arbitrator cannot determine his/her own jurisdiction. (See Christopher Brown Ltd v Genossenschaft Oesterreichischer Waldbesitzer Holzwirtschaftsbertriebe Registrierte Genossenschaft mit Beschrankter Haftung [1953] 2 All ER 1039 (QB) at 1042B--G; South African Transport Services v Wilson NO and Another 1990 (3) SA 333 (W) at 336E.). The respondent in the arbitration is thus compelled to approach the Court to set aside the arbitration proceedings. This he does by launching an application on notice."

37. The decision of Snyders J (as she was then) in Greenacres Unit 17CC and Another v Body Corporate of Greenacres and Another[14] is instructive. In that matter, the first respondent, the body corporate of a sectional title scheme, had initiated arbitration proceedings against the owner of a unit in the sectional title scheme (the first applicant in the matter). The first respondent had filed a statement of claim. In the statement of claim the body corporate relied upon the provisions of rule 71(1) of annexure 8 to the Sectional Titles Act (Act 95 of 1986) which provided that "*any dispute between the body corporate and an owner or between owners arising out of or in connection with or related to the Act, these rules or the conduct rules, save where an interdict or any form of urgent or other relief may be required or obtained from a Court having jurisdiction, shall be determined in terms of these rules.*" The first applicant protested that the dispute was not arbitrable and in due course served a special plea to that effect raising four grounds of objection, one of which was that, in essence, the provisions of rule 71(1) excluded the dispute between the body corporate and the owner from the jurisdiction of an arbitrator appointed under the rules. The arbitrator ultimately ruled against the first applicant whereupon the proceedings before high court proceedings were instituted. The basis for application before the high court does not appear from the judgment of Snyders J, but it is also clearly not a review application. Snyders J found for the owner and issued an order in the following terms:

> "The current claims by the first respondent against the first applicant set out in the first respondent's statement of claim annexure NOM1 to the Notice of Motion

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[14] Greenacres Unit 17CC and Another v Body Corporate of Greenacres and Another [2006] 4 All SA 78 (W), overturned on appeal.

> are not capable of being determined by arbitration in terms of rule 71 of annexure 8 to the Sectional Titles Act 95 of 1986."

38. The decision of Snyders J was overturned by the Supreme Court of Appeal[15], but on the basis that she had interpreted the provisions of rule 71(1) incorrectly. Neither court took issue with the fact that declaratory relief had been sought in the fashion that it was.

39. In *The Law of Arbitration* it is opined that the court should grant relief by way of an interdict where an applicant can show that the impending arbitration proceedings would be invalid.[16] The rationale being that it would be unrealistic and inconvenient to expect such an applicant to participate in proceedings under protest, or otherwise await the conclusion and then, if the result goes against him, oppose the award being made an award of court, and suffer the costs in the meantime. *Mustill & Boyd* express the same sentiments[17] and point out that a party in such a position may find himself having to spend money on costs which he may have difficulty in recovering.

40. The power to issue declaratory relief orders in respect of anticipated or ongoing arbitration proceedings is consistent with section 21(1)(c) of the Superior Courts Act (Act 10 of 2013) which deals with the power of the court to grant declaratory orders.[18]

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15 Body Corporate of Greenacres v Greenacres Unit 17 CC 2008 (3) SA 167 (SCA).

16 *Law of Arbitration* supra page 110.

17 *Mustill & Boyd supra*, page 525.

18 Section 21(1)(c) provides: "'A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and

41. I accordingly find that the court has the power to grant declaratory relief in respect of ongoing arbitration proceedings.

42. An application for a declaratory order involves a two-stage enquiry: First the Court must be satisfied that the applicant is a person interested in an existing, future or contingent right or obligation, and then, if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it.[19]

43. In Baleni and Others v Minister of Mineral Resources and Others[20] at paragraph [30], Basson J said:

> "Declaratory orders are discretionary and flexible as the court pointed out in Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others:
>
> > '[107] It is quite clear that before it makes a declaratory order a court must consider all the relevant circumstances. A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values. Declaratory orders, of course, may be accompanied by other forms of relief, such as mandatory or prohibitory orders, but they may also stand on their own. In considering whether it

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all other matters of which it may according to law take cognisance, and has the power … in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.'"

19 Durban City Council v Association of Building Societies 1942 AD 27; Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd 2005 (6) SA 205 (SCA) at paragraph [16].

20 Baleni and Others v Minister of Mineral Resources and Others 2019 (2) SA 453 (GP) at paragraph [30], referring also to JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others 1997 (3) SA 514 (CC) at paragraph [15].

> is desirable to order mandatory or prohibitory relief in addition to the declarator, a court will consider all the relevant circumstances.'"

44. The discretion in this sense means no more than that the court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision.[21] In the context of arbitration proceedings these would include honouring the parties' bargain to resolve their dispute by arbitration[22], caution no to enlarge the powers of courts in matters concerning arbitrations[23], minimising the extent of judicial interference in the arbitration process[24] and a general reluctance to retard arbitration proceedings by constant recourse to courts[25].

45. *Keating on Construction Contracts*[26] refers to the power of English courts to restrain arbitration proceedings[27], but says it will only be deployed by the court in exceptional circumstances. This is said in the context of interdicts, but I can

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21 Knox D'Arcy Ltd and Others v Jamieson and Others 1996 (4) SA 348 (A) at 361I.

22 Zhongji Development Construction Engineering Co Ltd v Kamoto Copper Co SARL 2015 (1) SA 345 (SCA) at paragraph [57].

23 Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another 2009 (4) SA 529 (CC) at [235]; Zhongji *supra* at paragraph [56].

24 Aveng Africa Ltd (formerly Grinaker LTA Ltd) t/a Grinaker-LTA Building East v Midros Inv (Pty) Ltd 2011 (3) SA 631 (KZD) at paragraph [13].

25 Cf the *obiter* remark by Gorven AJA in Zhongji *supra* at paragraph [59], referring to the speech of Lord Hoffman in Fiona Trust & Holding Corporation and others v Privalov and others [2007] 4 All ER 951 (HL) at paragraphs [6] and [7].

26 *Keating on Construction Contracts*, 11th Edition (hereinafter "*Keating*"), §17-116.

27 This is in terms of section 37 of Senior Courts Act of 1987 wich provides: "*(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.*"

think of no reason why the same the principles would not be equally applicable in instances where a declaratory order will bring an end to arbitration proceedings. With reference to authorities cited in the text, *Keating* says further that it was held that for exceptional circumstances to exist, it must be shown that a "*legal or equitable rights have been infringed or threatened by a continuation of the arbitration, or that its continuation will be vexatious, oppressive or unconscionable*".[28] The equivalent of these requirements are found in the requirements set for the granting of declaratory relief referred to above[29]. Amongst such recognised instances in English jurisprudence are when an arbitrator lacks the necessary jurisdiction[30] and the matter referred for arbitration is clearly outside the arbitrator's jurisdiction[31].

46. I return to these principles below when dealing with the issue of whether there is an arbitral dispute, but before doing so some comments on the arbitration agreement and its ambit are appropriate.

THE ARBITRATION AGREEMENT AND ITS AMBIT

47. The Arbitration Act defines "arbitration agreement" to mean a written agreement providing for the reference to arbitration of any existing dispute or

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28 *Keating supra* at §17-116.

29 Durban City Council v Association of Building Societies 1942 AD 27; Cordiant *supra* at paragraph [16].

30 *Keating supra* at §17-116 referring to Siporex v Comdel [1986] 2 Lloyd's Rep. 428.

31 *Keating supra* at §17-116 referring to AmTrust Europe Ltd v Trust Risk Group SpA [2015] EWHC 1927 (Comm), referred to with approval in Sabbagh v Khoury [2019] EWCA Civ 1219.

any future dispute relating to a matter specified in the agreement, whether an arbitrator is named or designated therein or not. Clause 3.3 satisfies these requirements and stands as an arbitration agreement.

48. In Heyman v Darwins Ltd[32], Viscount Simon said that an arbitration clause is a written submission, agreed to by the parties to the contract, and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made.

49. The general principles of interpretation are well known and need not be restated.[33] In short, in interpreting any document the starting point is inevitably the language of the document but it falls to be construed in the light of its context, the apparent purpose to which it is directed and the material known to those responsible for its production. Context, the purpose of the provision under consideration and the background to the preparation and production of the document in question are not secondary matters introduced to resolve linguistic uncertainty but fundamental to the process of interpretation from the outset.

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32 Heyman v Darwins Ltd (1942) 1 All E. R. 337 at page 343.

33 KPMG Chartered Accountants (SA) v Securefin Ltd and Another 2009 (4) SA 399 (SCA) paragraphs [39] – [40]; Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at paragraph [18]; Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk 2014 (2) SA 494 (SCA) paragraph [12]; Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others 2013 (6) SA 520 (SCA) paragraphs [10] – [17].

50. Clause 3.3 of the Contracts is not the normal, widely worded arbitration clause. Its provisions are only triggered in the event that a claim based on inherent quality defects is made. The phrase "inherent quality defects" is further limited to logs delivered at "roadside". There is nothing contentions about coming to this finding as the parties are in fact *ad idem* that clauses 3.3 only applies to deliveries at roadside.

51. The jurisdictional facts required for an arbitration under clause 3.3 appear from the clause itself and are twofold. Firstly, there had to have been a notice of a claim from Tzaneng to Komati based on inherent quality defects in logs delivered at roadside. Secondly, there must be a failure between the parties to agree on a reduction in price of the logs delivered at roadside. The dispute that clause 3.3 contemplates will be placed before the arbitrator is therefore one of limited scope and can only relate to claims for a reduction in the selling price of logs delivered at roadside. Clause 3.3 further provides (in the third bullet point) that the arbitrator is to act as an expert and that he shall verify that the product constituting the subject matter of the claim is derived from deliveries by Komati.

52. The remarks in paragraphs 50 to 51 above find application in the question on whether the Arbitrator has jurisdiction.

AN ARBITRAL DISPUTE

53. In Parekh v Shah Jehan Cinemas (Pty) Ltd and[34] it was held that:

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[34] Parekh v Shah Jehan Cinemas (Pty) Ltd and Others 1980 (1) SA 301 (D) at 304E – H.

> "Arbitration is a method for resolving disputes. That alone is its object, and its justification. A disputed claim is sent to arbitration so that the dispute which it involves may be determined. No purpose can be served, on the other hand, by arbitration on an undisputed claim. There is then nothing for the arbitrator to decide. He is not needed, for instance, for a judgment by consent or default. All this is so obvious that it does not surprise one to find authority for the proposition that a dispute must exist before any question of arbitration can arise."

54. Subject to statutory limitations that are not relevant at present, any dispute can be the subject of arbitration, but there must be a dispute.

55. In Body Corporate Pinewood Park v Dellis (Pty) Ltd[35], Mpati P writing on behalf of the Court summarised the judgment of Plewman JA in Telecall (Pty) Ltd v Logan[36] as follows:

> "… in Telecall (Pty) Ltd v Logan this court (per Plewman JA) said that before there can be a reference to arbitration, a dispute which is capable of proper formulation at the time when an arbitrator is to be appointed must exist and there cannot be an arbitration, and therefore no appointment of an arbitrator can be made, in the absence of such a dispute. Thus, if the word 'dispute' is used in a context which indicates that what is intended 'is merely an expression of dissatisfaction not founded upon competing contentions no arbitration can be entered into'."

56. When a "dispute" is understood in the sense described above, it is clear that care should be taken not to elevate considerations applicable to whether there

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35 Body Corporate Pinewood Park v Dellis (Pty) Ltd 2013 (1) SA 296 (SCA) at paragraph [8].

36 Telecall (Pty) Ltd v Logan 2000 (2) SA 782 (SCA) at paragraph [12]; De Lange v Presiding Bishop, Methodist Church of Southern Africa 2015 (1) SA 106 (SCA) at paragraph [44]; Mustill & Boyd *supra* at pages 46 – 47.

is a triable issue[37] to the question of whether there is an arbitral dispute. An example of what is not a dispute is to be found in PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd.[38] Therein a defendant in summary judgment proceedings sought a stay of proceedings in terms of the provisions of section 6 of the Arbitration Act and simply pointed out that the contract between the parties contains an arbitration clause in wide terms. The Supreme Court of Appeal *per* Cloete JA held that that was not sufficient, that "*the defendant was obliged to go further and set the terms of the dispute*"[39]. This statement must, however, be read in the context of that judgment where no explanation of what the nature of the dispute was given.

57. The learned authors of *Mustill & Boyd*[40] observe that:

> "… the existence of a dispute between the parties is material, not only to the classification of the agreement to refer, but also to the rights of the parties to put the agreement in effect. Thus if one party to an arbitration agreement makes a claim which the other party admits, this cannot usually be made the subject of arbitration;"

58. As is evident from the correspondence preceding the pre-arbitration meeting on 6 July 2020, Komati had been uncommunicative about what the dispute

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37 Trans-Drakensberg Bank Limited (under judicial management) v Combined Engineering (Pty) Ltd & Another 1967 (3) SA 632 (D) at 637G; Commercial Union Assurance Co Ltd v Waymark NO 1995 (2) SA 73 (Tk) at 77G – H.

38 PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd 2009 (4) SA 68 (SCA).

39 PCL Consulting *supra* at paragraph [7].

40 *Mustill & Boyd supra* at page 47.

was that it was referring to arbitration. In his letter of 14 May 2020, Mpotshana merely states that because there is a dispute about payment, the dispute must be referred to arbitration in terms of clause 3.3. The statement is a study in circular reasoning.

59. In his letter of 15 May 2020, Erasmus made it clear that Tzaneng was not relying on any inherent quality defects and that Komati's reliance on clause 3.3 to determine the payment dispute was wrong. Mpotshana replied on the same day and, as he put it, declined to be drawn into a debate. The upshot was that there was still no answer as to what the dispute was that Komati was seeking to refer.

60. On 9 July 2020, a minute was produced of the 6 July 2020 meeting. The standing of this minute is dealt with further hereunder, suffice to state for present purposes that nowhere in that minute is it recorded what the disputes are that were being referred to arbitration, nor was any effort made to formulate the disputes. Paragraph 1.3 of the minute merely records that Komati "*has referred 7 disputes to arbitration*" and in paragraph 2.4 Komati recorded that "*the disputes will only be formulated in the statement of claim in each of the 7 arbitrations*". At the time these disputes can notionally only have been the payment disputes raised in the correspondence referred to above.

61. The nearest to which the parties came to formulate the disputes was in paragraphs 4.1 to 4.4 of the minute. Tellingly, paragraph 4.3 records that it was Komati's stance that, to paraphrase, Tzaneng was jumping the gun "*because* [Komati] *was yet to deliver its statement of claim*". On Tzaneng's

approach the referred dispute would only become known once the pleadings were exchanged.

62. What emerged in the statements of claim is more attempted sophistry than actual cause of action. In substance it comes down to an argument that Tzaneng's refusal to make payment is actually a claim for a reduction in selling price under clause 3.3, that clause 3.3 only applies to road side deliveries and that *ergo* Tzaneng cannot claim for a reduction in the selling price. The pivot of this argument is reflect in the statements of claim as follows:

> "10 The defendant's claim against the totality of sums of various monies due to the claimant has an effect in reduction the invoice price of R475.00 per m^3 excluding value added tax for Products delivered by the claimant to the defendant in terms of *Ad hoc* Sale Agreement-Woodbush as provided for in sub-clause 3.3 of the Conditions of Sale."

63. This is a contortion of what Tzaneng's defence is to Komati's claims for payment. On the common cause facts Tzaneng does not claim for a reduction in the selling price in terms of clause 3.3 and, if that was not already clear in the preceding correspondence, it was made clear in Tzaneng's subsequently filed pleadings that (i) all deliveries were on the standing basis; (ii) it does and will not rely on the provisions of clause 3.3; and (iii) the provisions of clauses 5.6 and 5.6.1 apply to the sales made by Komati to it. On the face of it, no dispute therefore arises as to whether Tzaneng's claims fall or will ever fall under the rubric of clause 3.3.

64. Secondly, Komati's argument also seems to be based on a fatally flawed premise: In order for its contention that the refusal to pay has the effect of

reducing the cubic meter sales price to be true and hence that Tzaneng's defence to its payment claims is actually a "claim" for a reduction under clause 3.3, the assumption has to be made that the parties are in agreement on both the volume of logs and the price for those logs and that Tzaneng's refusal to pay is only in respect of a reduction of the sale price. For that assumption to have been put in play Komati would have to have pleaded those facts, but none were pleaded.

65. If the dispute is whether Tzaneng can claim under clause 3.3, then no dispute has arisen. Tzaneng agrees that it cannot and also states that it will not.

66. What remains is an argument based on what seems to be a fatally flawed premise, but that is not enough for Tzaneng to succeed. Nomihold v Mobile Telesystems Finance SA[41] is authority for the principle that even if an argument may seem to be unarguable, that is not a ground for a court to intervene at stage such as the present matter.

67. The same sentiments are repeated in Hyde Construction CC v Deuchar Family Trust and Another[42] by Rogers J (as he was then and writing on behalf of the full Court) when he said:

> "The party seeking to invoke the court's residual jurisdiction must make out a 'very strong case' or provide 'compelling reasons', though in Universiteit van Stellenbosch v JA Louw (Edms) Bpk 1983 (4) SA 321 (A) Galgut AJA thought it

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41 Nomihold v Mobile Telesystems Finance SA [2012] EWHC 130 at paragraph 49.

42 Hyde Construction CC v Deuchar Family Trust and Another 2015 (5) SA 388 (WCC) at paragraph [69].

> impossible and indeed undesirable to attempt to define with any degree of precision what would constitute a 'very strong case' (at 334A – B)."

68. In Pledream Properties Limited v 5 Felix Avenue London Limited[43], a matter concerning the provisions of the Leasehold Reform, Housing and Urban Development Act 1993, Lewison J said:

> "… a dispute may arise in fact even if the outcome of a dispute is a foregone conclusion. We all have experience of litigants advancing hopeless cases with no prospects of success. It would be a misuse of language to say that there was no dispute simply because the outcome was inevitable."

69. Lewison J referred to the judgment of Saville J in Hayter v Nelson[44] as authority for his views. The headnote of Hayter *supra* accurately summarises Saville J's finding that "*"disputes" and "differences" in the arbitration clause should be given their ordinary meaning ; neither the word "disputes" nor the word "differences" was confined to cases where it could not then and there be determined whether one party or the other was in the right; and because one party could be said to be indisputably right and the other indisputably wrong did not entail that there was never any dispute between them*". These statements accord with Telecall *supra*.[45]

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43 Pledream Properties Limited v 5 Felix Avenue London Limited [2010] EWHC 3048 (Ch) [2011] L&TR 20.

44 Hayter v Nelson [1990) 2 LI.Rep 265; endorsed in Court of Appeal decision in Halki Shipping Corporation v Sopex Oils Ltd [1998] 2 All ER 23.

45 Telecall *supra* at paragraph [12.

70. Therefore as weak as Komati's contentions seem to be, a notional dispute exists and it remains for the Arbitrator to determine whether there actually is an arbitral dispute before him. Whether the dispute is a dispute that falls in the Arbitrator's jurisdiction is a different matter.

JURISDICTION

71. In Christopher Brown Ltd v Genossenschaft Oesterreichischer Waldbesitzer Holzwirtschaftsbertriebe Registrierte Genossenschaft mit Beschrankter Haftung[46] it was held that for an arbitrator to have jurisdiction, three requirements must be answered. These are (i) that there must be an arbitration agreement between the parties; (ii) that the dispute that arose must be within the terms of the agreement; and (iii) that the arbitrator was appointed in accordance with the clause that contains the agreement. The first and third requirements are not in issue in the present matter. The jurisdiction of the Arbitrator has, however, throughout been a matter of dispute between the parties.

72. An arbitrator derives his jurisdiction from the agreement of the parties at whose instance he is appointed. He has such jurisdiction as they agree to give him and none that they do not.[47]

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[46] In Christopher Brown Ltd v Genossenschaft Oesterreichischer Waldbesitzer Holzwirtschaftsbertriebe Registrierte Genossenschaft mit Beschrankter Haftung [1953] 2 All ER 1039 (QB).

[47] Ashville Investments v Elmer Contractors [1989] Q.B. 488 CA at 506; referred to in *Keating supra* at §11-023.

73. The learned authors of *Keating supra* state that the extent of an arbitrator's jurisdiction depends upon the proper construction of the arbitration agreement in each case and in all the circumstances, including the terms of the notice of dispute which initiated the arbitration.[48] Since arbitration is a matter of contract, a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.[49]

74. In Radon Projects (Pty) Ltd v NV Prop (Pty) Ltd[50], Nugent JA said that the question whether a tribunal has jurisdiction to consider a claim is not dependent upon its merit or otherwise. The question is only whether the claim as formulated in in the pleadings falls within the scope of his jurisdiction to consider. There is no presumption that a dispute is arbitrable.[51]

75. As was shown above, the Arbitrator's jurisdiction in the present matter is pegged by the narrow provisions of clause 3.3. Komati's claim has the paradoxical feature that the Arbitrator must find that the "claim" by Tzaneng (as Komati calls it) is a claim that in fact falls outside the parameters of clause 3.3. Assuming that there was actually a dispute on this score (which there is not), then success on the part of Komati would mean that the Arbitrator

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48 *Keating supra* at §11-023, referring to Heyman v Darwins Ltd [1942] A.C. 356 HL at 360 and Lesser Design & Build v Surrey University (1991) 56 B.L.R. 57.

49 AT&T Technologies Inc. v. Communication Workers of Am. 475 U.S. 643 at 648.

50 Radon Projects (Pty) Ltd v NV Prop (Pty) Ltd 2013 (6) SA 345 (SCA) at paragraph [23].

51 *Law of Arbitration supra* at page 88, referring to Local 827 International Brotherhood of Electrical Workers v Verizon New Jersey Inc U.S. 3rd Circuit Court of Appeals 08/17/06 05-3613.

decides that he does not have jurisdiction to decide on Tzaneng's claim since it is not a claim advanced in terms of clause 3.3. More specifically, he cannot declare that a claim outside of the purview of clause 3.3 is in fact or in law good or bad.

76. Which brings on to the questions of whether the Arbitrator has the power to decide on his jurisdiction and, if he does, whether there are nonetheless grounds for this court to rule on that before he does.

77. Clause 3.3 of the Contracts patently does not grant the arbitrator the power to decide his own jurisdiction, but that does not mean that the parties could not by agreement have clothed him with that authority.[52] In Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd[53], Smallberger AJP said that the hallmark of arbitration is that it is an adjudication, flowing from the consent of the parties to the arbitration agreement, who define the powers of adjudication, and are equally free to modify or withdraw that power at any time by way of further agreement. Whether or not such a separate arbitration agreement was subsequently concluded is a question of fact.[54]

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52 Allied Mineral Development Corporation (Pty) Ltd v Gemsbok Vlei Kwartsiet (Edms) Bpk 1968 (1) SA 7 (C) at 14G – 15B; Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd 1994 (1) SA 162 (A) at 169C – E; South African Transport Services *supra*.

53 Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd 2002 (4) SA 661 (SCA) at paragraph [25].

54 The Law of South Africa (LAWSA), Arbitration (Volume 2 - Third Edition), paragraph 90, footnote 18.

78. The factual enquiry starts with the procedural meeting of 6 July 2020. After that meeting Els prepared a minute of the meeting which was circulated to Komati ("*the Els minute*"). Mpotshana amended the Els minute and then sent it back to by Erasmus. The amendments are dealt with in more detail below.

79. On 9 July 2020, the Arbitrator addressed an email to the parties to which he attached a draft minute ("*the 9 July minute"*) which he stated "*constitutes an accurate reflection of the matters discussed, agreed and disagreed upon and can be signed as such*". Mpontshana signed the minute on the same day and sent it back to the Arbitrator and Erasmus. As pointed out below, there was no demur from Erasmus until 24 August 2020.

80. In reply, Erasmus did not dispute that the arbitrator had circulated the minute, but stated that the arbitrator did not purport to make any ruling as to what was discussed or agreed between the parties. This misses the point. There is no need for the arbitrator to make any ruling on what was discussed. The minute either correctly records what was discussed at the meeting or it does not. E. S. Pugsley states the following in *The Law of South Africa (LAWSA)* in regard to minutes of meetings in general:

> "Minutes of a meeting are the official record of meetings that were held, as well as the business that was dealt with at those meetings. Once signed by the chairperson, they are regarded as prima facie evidence of what took place."[55]

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[55] LAWSA, Meetings (Volume 29 - Third Edition), §200.

81. Although the Arbitrator did not sign the minutes, I see no reason why the same principle should not also apply to the 9 July minute, which he clearly indicated was acceptable to him.

82. On 24 August 2020 and in response to the Statements of Claim, Erasmus sent an amended minute and Tzaneng's Statements of Defence to Mpotshana. This minute struck through certain of the additions made by Mpotshana to the Els minute and reverted to back to the Els minute. Mpotshana in turn rejected this amended minute on 25 August 2020. The differences in opinion are more perceived than actual. This is apparent from the statements of defence filed by Tzaneng.

83. In the statements of defence a special plea challenging the jurisdiction of the Arbitrator was raised in each instance. Significantly, it was pleaded that "*the Arbitrator has jurisdiction, as agreed between the parties at a pre-trial conference, to make a determination regarding his jurisdiction*". Paradoxically, Du Plessis states in his founding affidavit that the Arbitrator cannot make a finding as to his own jurisdiction, because, so says Du Plessis, the parties failed to agree that he has jurisdiction to do so.

84. There are a reasons that make Du Plessis's statements untenable:

    84.1 First, none of the minutes record that Du Plessis was present at the 6 July 2020 meeting. He can therefore not speak to what was discussed or not. There is also no confirmatory affidavit from Els, who acted as counsel for Tzaneng in the present application. Mr

Els sought to make statements from the bar regarding what occurred at the meeting, but that is not permissible and I have taken no cognisance of his submissions that strayed beyond what may permissibly be made on the affidavits before me. On the facts the *prima facie* proof of what was discussed at the procedural meeting stands firm.

84.2 Secondly, there is patently an agreement between the parties that the Arbitrator has jurisdiction to make a determination regarding his jurisdiction. That is specifically pleaded in paragraph 1.8 of the Tzaneng's statements of defence and Du Plessis cannot now seek to gainsay what is recorded in Tzaneng's pleadings.

84.3 Thirdly, these are motion proceedings and the application fell to be determined on the version of Mpotshana, together with any undisputed evidence in the affidavit of Du Plessis and the supporting affidavit of Erasmus. On that version there is an agreement that the Arbitrator has "*the necessary jurisdiction to at least make a ruling on his own jurisdiction*".

85. It is necessary to consider the minute in order to ascertain what the agreement was between the parties in regard to the powers granted to the Arbitrator to determine his jurisdiction.

86. By way of background introduction, the 9 July minute records *inter alia* that "*the parties consequently agreed that the Arbitrator shall be appointed in all 7*

matters and that the pre-arbitration meeting will be in respect of all 7 matters". Paragraph 2.4 of the minute records that Tzaneng placed in issue whether the arbitration fell within the ambit of clause 3.3.

87. Paragraph 2.5 specifically dealt with the jurisdiction of the Arbitrator. Komati recorded that it was of the view that the Arbitrator has the necessary jurisdiction "*in terms of the relevant provisions of the agreements concluded to consider the claims of the claimant*". In turn, Tzaneng expressly disputed the Arbitrator's jurisdiction, but stated that it was prepared to agree that the Arbitrator will have jurisdiction to make a ruling regarding his own jurisdiction.

88. Paragraph 2.7 of the 9 July minute records as follows (for the sake of reference the portion subsequently struck through by Erasmus is also struck through below):

> "2.7 Whether the Arbitrator can decide his own jurisdiction?
>
> **Answer**: The claimant and the defendant both agreed that the Arbitrator shall have the necessary jurisdiction to at least make a ruling on his own jurisdiction ~~within the relevant provisions of the agreements concluded by the claimant and defendant~~."

89. As pointed out above, on the facts the entire paragraph must be accepted as a correct recordal of what was discussed and agreed at the 6 July meeting. The inclusion of the last portion of the paragraph, however, does not take matters any further. The reference to "the relevant provisions of the agreements concluded by the claimant and the defendant" is no more than a reference to the Contracts. It is common cause between the parties that the

only provision in those agreements that provide for arbitration is clause 3.3. The preposition "within" makes it clear that any determination of the Arbitrator's jurisdiction must happen in the limits set by the Contracts and more specifically clause 3.3.

90. In paragraphs 4.1 and 4.2 Tzaneng recorded that it was of the view that only issues relating to inherent quality defects raised by Komati could be referred to arbitration under clause 3 of the Contracts. It was then recorded that Tzaneng was of the view that "*regardless of the nature and formulation of the disputes in the statement of claims, the Arbitrator will not have jurisdiction to consider the claims of the claimant*". Komati recorded what can only be described as an opaque response in which it recorded that it disagreed with Tzaneng's views. Paragraph 4.4 of the 9 July minute then records (Erasmus's struck through portion is again indicated):

> "4.4. The parties have agreed that, notwithstanding the aforesaid, the Arbitrator shall have jurisdiction to rule upon his own jurisdiction. ~~in terms of the relevant agreements concluded by the claimant and the defendant~~."

91. In Tzaneng's replying affidavit, deposed to by Du Plessis, he states that it "*was in any event made clear by both parties that the agreement will ultimately have to be reduced to writing to ensure that it complies with the Arbitration Act*". That statement does not find support anywhere in the 9 July minute, nor were any facts placed before the court that indicated that this was the parties' intention. In truth, all the facts before court expressly show that the parties considered the minute would be a sufficient recordal of the agreement. This much was also submitted by Mr Els in his heads of argument, albeit that the

submission was that there would be an agreement that the Arbitrator would be allowed to make a ruling on his own jurisdiction, "*provided that an express agreement to that effect be reflected in the pre-trial minute*". On any score all the drafts of the minutes record that there was an agreement that the Arbitrator shall have jurisdiction to rule upon on his own jurisdiction, which was reduced to writing and both parties signed versions of the minute which record that[56] and this is also repeated in Tzaneng's statement of defence.

92. In Zhongji Development Construction Engineering Co Ltd v Kamoto Copper Co SARL[57] the rules applicable to the arbitration in that matter included rule 12.1 of the sixth edition of the Rules of the Arbitration Association which provided that:

> "The Arbitrator may decide any dispute regarding the existence, validity or interpretation of the arbitration agreement and, unless otherwise provided therein, may rule on his own jurisdiction to act."

93. At paragraph [36] of Zhongji *supra* and in light of the provisions of rule 12.1, the majority of the Court held:

> "it was held that In the light of an arbitrator's power to determine his or her jurisdiction in an issue that arises from the referral to arbitration itself, there is, therefore, no reason why the dispute about whether or not the claims arising from the appellant's performance in terms of the interim agreement is indeed

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56 City of Cape Town v Khaya Projects (Pty) Ltd and Others 2016 (5) SA 579 (SCA) at paragraphs [41] – [43].

57 Zhongji Development Construction Engineering Co Ltd v Kamoto Copper Co SARL 2015 (1) SA 345 (SCA)

> arbitrable, should not be decided by the arbitration tribunal prior to an application to the high court."

94. In Zhongji *supra* the parties had not yet filed any pleadings, but the issue of jurisdiction loomed large in the affidavits filed of record.

95. While the current agreement between the parties refers to the Arbitrator having the jurisdiction to "determine" his jurisdiction, as opposed to "rule" in Zhongji *supra*, the difference is immaterial. The parties clearly agreed that the Arbitrator is clothed with the power to make a decision on whether or not he had jurisdiction.

96. In light of Zhongji *supra* this court is compelled to honour the parties' agreement and leave the question of jurisdiction to the Arbitrator to determine.

OTHER OBJECTIONS

97. For the sake of completeness, two further aspects raised by Tzaneng are dealt with.

98. Firstly, Tzaneng argued that the Arbitrator's award as requested by Komati would not be final. In SA Breweries Ltd v Shoprite Holdings Ltd[58], Scott JA, in dealing with the question of the finality of an award said that, depending on the questions, the determination may not necessarily result in a final resolution of a dispute between the parties. That is also the case in the present instance. Tzaneng's point is therefore bad.

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58 SA Breweries Ltd v Shoprite Holdings Ltd 2008 (1) SA 203 (SCA) at paragraph [22].

99. Secondly, Tzaneng argued that declaratory relief is improper. The law affords an arbitrator a considerable variety of forms from which to choose the type of award best suited to the circumstances of the case, including the power to make an award declaring what the rights of the parties are.[59] Tzaneng's point in this respect is therefore also bad.

100. Lastly, a waiver point was raised by Komati, on whose behalf it was contended that Tzaneng had waived its right to challenge the Arbitrator's jurisdiction. There is no need for this court to decide that and it too is left for the Arbitrator to consider.

CONCLUSION AND COSTS

101. In the premises the application falls to be dismissed. I see no reason why the costs should not also follow the result.

ORDER

102. I accordingly make the following order:

102.1 The application is dismissed.

102.2 The Applicant to pay the costs.

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[59] Bidoli v Bidoli and Another 2011 (5) SA 247 (SCA) at paragraph [16].

DIRK R. VAN ZYL

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Appearances:

For the Applicant:	Adv A. P. J. Els
Instructed by:	Thomas & Swanepoel Inc
For the First Respondent:	Adv I. Pillay SC
Instructed by:	Mpungose & Dlamini Inc