

SUMMARY OF THE JUDGMENT

IS AN ARBITRATION CLAUSE IN AN (ALLEGED) VOID AGREEMENT ENFORCEABLE?

Seabeach Property Investment No 28 v Nunn (18310/18) [2019] ZAWCHC 9 (22 February 2019)

If you conclude a contract for the sale of a property and include an arbitration clause to deal with disputes, will that clause still stand if the validity of the sale agreement is disputed because of a material misunderstanding relating to the nature of exclusive use areas that were included in the sale? This question was addressed in the judgment under discussion. Ultimately, the answer depends on the intention of the parties when they contracted, as it appears from the wording used in the agreement.

The Judgment can be viewed [here](#).

FACTS

In February 2018, Seabeach Property Investment No 28 (SPI) sold a flat in Sea Point to Nunn for R 32 million. The purchase was in respect of the flat as well as exclusive use areas consisting of two parking bays and a roof terrace.

Nunn argued that at the time of signing the sale agreement she was led to believe by SPI's estate agents that she would acquire 'full' ownership of all the exclusive use areas, specifically including the roof terrace. However she learnt afterwards that she could not obtain ownership of the roof terrace as it was common property and belonged to the body corporate.

According to Nunn, the estate agents' misrepresentation was made with the intention of inducing the contract. (She however did not allege any fraud on the part of the estate agents.) The estate agents denied the alleged misrepresentation or that the sale agreement was void.

SPI referred the matter to arbitration in terms of clause 13 of the sale agreement which read as follows:

"13. ARBITRATION

13.1 Any dispute between the parties in connection with or arising out of:

13.1.2 this Agreement, or

13.1.3 the interpretation of this Agreement, or

13.1.4 their respective rights and obligations, or

13.1.5 any actual or purported termination or repudiation of this Agreement and any matters arising therefrom, or

13.1.6 the formation, implementation, validity, enforceability, rectification of this Agreement, or

13.1.7

shall be referred to and be determined by Arbitration in terms of this clause 13.

13.2 - 13.6....

13.7 The provisions of this clause-

13.7.1 constitute an irrevocable consent by the parties to any proceedings in terms hereof and no party shall be entitled to withdraw therefrom or claim at any such proceedings that he/she/it is not bound by such provisions.

13.7.2 are severable from the rest of this Agreement and remain in effect despite the termination of or invalidity for any reason of this Agreement or any part thereof."

Nunn argued that, owing to the fundamental mistake on her part that was brought about by SPI's estate agents, the entire contract between the parties should be regarded as void *ab initio*, and all of its clauses, including the arbitration clause, must fall with it. Nunn insisted that only a court can resolve the dispute.

SPI therefore approached the Court for an order that the dispute between the parties had properly and validly been referred to arbitration, alternatively that the dispute is arbitrable and should accordingly be referred to arbitration by the Court. SPI argued further that there was no fraud and that, on a proper reading of clause 13, the parties clearly intended that all disputes regarding the question whether the agreement was void or merely voidable, should be determined by the arbitrator. It was further contended in as much as it is trite that any agreement which is brought about or occasioned by misrepresentation or a mistake, is either voidable or void and will in such event be invalid and unenforceable, any dispute in relation to any alleged misrepresentation or mistake should go to arbitration.

HELD:

- The approach adopted by our courts in deciding whether a dispute comes within the provisions of an arbitration clause in a contract, is that it is possible, in principle, for parties to agree that the question of the validity of their agreement may be determined by arbitration even though the reference to arbitration is part of the agreement being questioned. This is so because the question whether a given dispute comes within the provisions of an arbitration clause or not depends, primarily, upon the terms of the clause itself.
- The argument advanced by Nunn that if a contract is void from the outset, all clauses including an arbitration clause will be void from inception, is misguided. The principles regarding the interpretation of contracts are well settled in our law: A court must ascertain what the parties intended by having regard to the purpose of their agreement, and interpret it contextually so as to give it a commercially sensible

meaning.

- With regard to the effect of fraud that induces a contract, our law holds that generally the contract is regarded as voidable: the aggrieved party may elect whether to abide by the contract and claim damages (if it can prove loss) or to rescind – to regard the contract as void from inception and to demand restitution of any performance it may have made, tendering return of the fraudulent party's performance. (In the present instance, however, given the disputes of fact regarding the fundamental mistake Nunn alleged she laboured under when signing the offer to purchase, the Court noted that it was not asked to make a determination whether the agreement was in fact void or voidable, and in any event also could not do so with evidence having been produced on affidavit only.)
- The ultimate question for consideration is whether the parties intended that if a dispute arose, as in this instance, that dispute would be determined by an arbitrator, and if so, then he or she should determine whether the contract is valid and enforceable, or voidable or void. (It needs to be remembered that in the present matter fraud was neither proven or common cause.)
- In considering the arbitration agreement as recorded in clause 13, it is evident that the parties agreed, inter alia, that any dispute regarding the "formation, implementation, validity, enforceability and rectification of the Agreement, shall be referred to and determined by Arbitration." Furthermore, clause 13.7 also provides that the provisions of clause 13 "constitute an irrevocable consent by the parties to any proceedings in terms hereof and no party shall be entitled to withdraw therefrom or claim at any such proceedings that he/she/it is not bound by such proceedings", as well as that the provisions of clause 13 are "severable from the rest of the Agreement and remain in effect despite the termination of or invalidity for any reason of this Agreement or any part thereof."
- It is therefore evident that the parties envisaged and intended, at the time of concluding the agreement, that all their disputes regarding the principal agreement, whether it was void or voidable, would be determined by arbitration. To view it differently would give the agreement a commercially insensible meaning.
- In fact, clause 13.7.2 makes it clear that 'despite the termination of or invalidity for any reason of this Agreement or any part thereof' the arbitration clause will remain in effect. The Arbitration clause constituted a separate self-standing agreement to refer disputes such as the one that features in this matter to arbitration whatever the ultimate consequence or outcome thereof might be in relation to the remainder of the principal agreement by providing that the provisions of the clause constitute an

irrevocable agreement to go to arbitration, from which agreement the parties could not withdraw. The parties intended to isolate and ring-fence their agreement to go to arbitration. Thus, in the judge's view, even if the remaining part of the principal agreement was to be found void or voidable, the parties intended and agreed that this would not affect the validity and enforceability of the arbitration clause.

- SPI therefore properly referred the matter to arbitration as the dispute was arbitrable in terms of the agreement.

The application therefore succeeded.

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