

November 2018

Without Prejudice

In South Africa, arbitration has become a more appealing alternative to battling an opponent in court. Arbitrations tend to be more efficient, expedient and convenient for litigating parties.

Parties are also able to conclude an arbitration agreement, which gives them the power and freedom to appoint their own arbitrator, decide on a hearing date convenient to all parties and on a time-table on their own terms.

Applicability of the Arbitration Act and binding effect of arbitration agreements

Section 1 of the Arbitration Act provides that it is applicable when a written arbitration agreement is concluded between parties to a dispute, providing for the referral of any existing dispute or any future dispute to arbitration. Furthermore, the Arbitration Act applies to every arbitration under any law passed before or after its commencement.

However, section 40 provides that the Arbitration Act does not apply to any such arbitration where it is excluded by or is inconsistent with that other law or is inconsistent with the regulations or procedure authorised or recognised by that other law.

Section 3(1) of the Arbitration Act stipulates that an arbitration agreement is not capable of being terminated, except with the consent of all the parties thereto.

The extent of a court's involvement in arbitrations

In general, the court's involvement in a matter subject to arbitration is limited, as parties can exercise their contractual autonomy to include an arbitration clause in any agreement they wish to conclude. The courts are therefore enjoined to respect contracting parties' intentions to resolve any disputes by means of arbitration. In *Stieler Properties CC v Shaik Prop Holdings (Pty) Ltd* [2015] 1 All SA (GJ), it was held that arbitration clauses in contracts "do not oust the court's jurisdiction. Under the [Arbitration] Act, the courts retain the powers to assist, supervise and intervene in the dispute and the arbitration before, during and after the arbitration".

Section 3(2)(b) of the Act empowers a court, at any time on the application of any party to an

arbitration agreement, on good cause shown, to order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration.

In addition, section 21 of the Arbitration Act does provide for the general powers of courts and lists limited circumstances in which a court will have the power to make an order under an arbitration agreement. However, in such circumstances, the dispute is not referred back to court, certain interlocutory processes are merely adjudicated and decided by a court, while the dispute still remains in arbitration.

The courts are also involved in making arbitral awards Orders of Court and, therefore, enforceable. Section 31 of the Arbitration Act entitles parties to apply to court to have an arbitral award made an Order of Court. Furthermore, in making the arbitral award an Order of Court, the court is empowered to correct any clerical mistake or any patent error arising from any incidental slip or omission.

What is "good cause" in terms of section 3(2)(b)?

The Constitutional Court in *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being and Another* 2016 (1) BCLR 1 (CC), considered what could constitute "good cause". It was held that a court's discretion to set aside an existing arbitration agreement must be exercised only where a persuasive case has been made out. It was further held that it would be undesirable for a court to precisely define what circumstances would constitute a persuasive case. In deciding whether good cause existed, an inquiry into whether the arbitration agreement, if implemented, would unjustifiably diminish and/or limit protections afforded by the Constitution, would be included. Furthermore, courts would hesitate to set aside an arbitration agreement that was untainted by misconduct or irregularity, unless a truly compelling reason existed. Should a court be quick to find fault with the manner in which an arbitration was conducted, the goals of arbitration would be defeated.

Furthermore, in *Brisley v Drotzky* 2002 (4) SA 1 (SCA), the Supreme Court of Appeal held that courts are required to respect contracting parties' contractual autonomy as it informs the constitutional values of dignity and equality. It was further held in *Stieler Properties CC v Shaik Prop Holdings (Pty) Ltd* that special circumstances must be shown why the parties' choice of arbitration, should not be respected. Moreover, a party who is resisting that a dispute be referred to arbitration bears a heavy onus of showing why the matter should not proceed to arbitration. The courts' discretion to refuse arbitration is to be exercised judicially and only when a very strong case has been made out.

Conclusion regarding the Arbitration Act

The above provisions of the Arbitration Act indicate that an arbitration agreement is

binding between the contracting parties and may only be terminated by consent between the parties. Therefore, if the arbitration agreement is terminated by consent and the dispute still subsists, then the matter can proceed before a court. Furthermore, the Arbitration Act empowers the court, upon application by a party on good cause shown, to order that such dispute not proceed to arbitration. The effect of this would be that the matter would proceed before a court. Courts are, however, reluctant to set aside an arbitration agreement unless a persuasive case is made out and where arbitration agreements have been concluded based on some form of misconduct, irregularity or infringement of constitutional rights.

Lastly, the Arbitration Act does include certain circumstances under an arbitration agreement, which may be decided before a court. However, the dispute is not transferred to a court, the dispute still proceeds in arbitration but certain processes can be decided by a court. Therefore, the court's involvement in arbitrations is limited.

Article by Tamara Druckman, candidate attorney

[> Read the full article online](#)