Should I stay or should I go to arbitration proceedings?

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Arbitration is often viewed as a better suited forum than litigation to make use of when a dispute arises. However, not all parties are swayed by this appeal, as was the case in the recent decision of *Delta (Pty) Ltd v Blakey Investments (Pty) Ltd and Others*.

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In terms of this decision, Delta Beverages (Delta) and Schweppes Zimbabwe Limited (SZL) brought an application for the stay of arbitration proceedings against Blakey Investments (Blakey), pending the finalisation of legal proceedings in the High Court of Zimbabwe for the supply agreement entered into between the parties to be declared void, alternatively voidable or unenforceable.

When Delta proceeded with litigation against Blakey in May 2020, they referred the matter to arbitration in South Africa, in terms of the arbitration clause under the supply agreement. Delta participated in pre-arbitration hearing meetings to "protect their interests" but shortly after, applied for a stay of the arbitration proceedings, pending the outcome of the court case in Zimbabwe.

To this end, Delta advanced two arguments in the Durban High Court in South Africa (Court). Firstly, if the supply agreement is susceptible to being set-aside as void during the court proceedings, arbitration cannot proceed based on the tainted agreement. Secondly, they argued that the High Court of Zimbabwe is the appropriate court to determine the validity of the supply agreement.

The Court noted that if there is an arbitration clause in an agreement, any party might validly refer a dispute to arbitration. The only prohibition for a party to refer a dispute to arbitration is when an agreement is null and void, inoperative or incapable of being performed, as it would then also render the dispute resolution clause null and void. At no stage did Delta dispute the existence of the agreement and, as a result, the Court held that they are bound by the confines of the supply agreement, as the quintessence of arbitration proceedings is to declare whether it is valid or not.

Furthermore, the issue raised by Delta was that Zimbabwean, not South African, laws govern the supply agreement and that the dichotomy of legislation and rules would result in an improper award handed down by the arbitrators. The Court firmly dismissed this argument and referred to the matter of *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews*. The Court held that South Africa's law of arbitration is not only consistent with, but also in full harmony with, prevailing international best practice in the field.

It should be noted that courts have generally been slow to encroach upon a decision to refer a dispute to private arbitration, for to do so would be to disregard the principle of party autonomy. A party to an agreement has the right to have a dispute resolved expeditiously and cost effectively, following what was contracted into. This alone is a consideration that must be heavily considered when there is a valid agreement opting for an alternate dispute resolution mechanism.

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