

DISPUTE RESOLUTION ALERT

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Challenge of jurisdiction within arbitration proceedings

On a daily basis many individuals and entities enter into agreements that stipulate arbitration as the chosen dispute resolution mechanism, rather than the formal court process. In doing so, the parties relinquish their rights (except under certain circumstances, such as urgent court proceedings) to approach the court for relief, or as dictated by the arbitration agreement itself.



Challenge of jurisdiction within arbitration proceedings

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Whilst parties voluntarily elect to proceed with the arbitration route to resolve their disputes (whether through the Arbitration Foundation of Southern Africa (AFSA) or through private arbitration not convened under AFSA), the question arises as to whether a party to arbitration proceedings, who specifically denies that the arbitrator has jurisdiction to determine the matter, is bound by such proceedings or if they have the option to approach the court for necessary relief.

Although arbitration proceedings tend to be an effective way to obtain an expedited resolution, it may also be a costly exercise and, as such, a party who questions the validity of the underlying agreement (containing the arbitration agreement) may be reluctant to enter into such proceedings if they have a viable alternative.

As a starting point, courts are hesitant to intervene in party autonomy and the election to enter arbitration proceedings that are governed by an arbitrator and result in an arbitration award. In this respect, a party's options to approach the court system once arbitration proceedings have commenced are limited and, in many cases, the only time arbitration is referred to court is to make an arbitration award an order of court. In the result, making the award enforceable (not only final and binding). In such applications, the onus on an applicant in making an arbitration award an order of court is set at a very low threshold. On the contrary, there is a significant onus on the respondent once the applicant has proved a *prima facie* award.

Does a party refusing to participate in arbitration proceedings by rejecting that they are bound to do so (by claiming, for instance, that the underlying agreement triggering the arbitration is invalid) have an alternative remedy or are they bound to the arbitration process for the determination of the dispute?

The AFSA Commercial Rules bestows the following powers on an arbitrator:

"11.2 Without detracting from the generality of the foregoing, the arbitrator shall have the following powers:

...

11.2.2 to rule on his own jurisdiction, including rulings on any dispute in regard to the existence or validity of the arbitration agreement or the scope thereof."

Challenge of jurisdiction within arbitration proceedings

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This makes it clear that when a party believes it is not bound by arbitration proceedings, it cannot merely sit on its hands and not participate in the proceedings, but must actively question the jurisdiction of the arbitrator to determine the dispute.

Whilst courts are hesitant to interfere with an arbitrator's powers, an award made by an arbitrator regarding their own jurisdiction (and particularly regarding the validity of the agreement binding the parties to such arbitration process) is reviewable in the High Court, although there is only a narrow scope within which to do so, based on gross irregularity under section 33(1)(b) of the Arbitration Act.

As a result, a party cannot simply refuse to partake in arbitration proceedings despite the fact it does not believe it is bound by the underlying arbitration agreement. In such instances, the party is required to raise a point *in limine* questioning an arbitrator's jurisdiction to govern the dispute in the arbitration proceedings.

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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