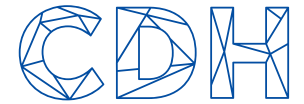


# Dispute Resolution

ALERT | 23 September 2025



## In this issue

SOUTH AFRICA

Party autonomy does not usurp the power of our courts



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**DISPUTE RESOLUTION  
ALERT**

## Party autonomy does not usurp the power of our courts

Often, commercial agreements have arbitration clauses that make it peremptory for parties to the agreement to refer a dispute between them to arbitration. The effect of such clauses is that they oust a court's jurisdiction to determine a dispute between the parties emanating from the agreement. However, despite these clauses in commercial agreements, courts are empowered by section 3(2) of the Arbitration Act 42 of 1965 (Arbitration Act), on good cause shown by an applicant, to set aside an arbitration agreement and order that the dispute between the parties not be referred to arbitration.

**AIG South Africa Limited (AIG) successfully brought such an application in *AIG South Africa Limited v Molefe* [2025] JDR 3456 (GP).**

### **Background**

AIG issued a management liability insurance policy (Policy) to Eskom as the policy holder in 2017, in terms of which AIG agreed that in consideration for the payment of the premium due under the Policy, it would provide liability cover to Eskom's directors, officers and employees on the terms set out in the Policy.

Mr Brian Molefe (Molefe), the former Group CEO of Eskom was covered under the Policy as an insured person, and was eligible to be indemnified by AIG, subject to the terms and conditions of the Policy.

It later came to pass that Molefe became embroiled in various legal proceedings and sought an indemnity from AIG under the Policy in respect of his legal costs in opposing these proceedings.

AIG agreed to pay Molefe's defence costs on condition that if it was found by a court that Molefe had gained a profit or an advantage to which he was not legally entitled or that there was a commission of a dishonesty or deliberate fraudulent act, that Molefe would have to repay those costs that had been disbursed.

In correspondence exchanged between the parties dated 27 October 2017 (2017 Agreement), AIG advised Molefe that it would advance his defence costs on a "without prejudice" basis and on condition that should it transpire in due course that Molefe was not entitled to indemnification under the Policy, Molefe would refund such costs in full to AIG.

AIG disbursed approximately R4,398,849 to Molefe for his defence costs in terms of the Policy, whereafter judgments from both the Supreme Court of Appeal and Constitutional Court in the legal proceedings instituted against Molefe found that he had acted unlawfully.

Flowing from these judgments, AIG instituted proceedings against Molefe for repayment of the defence costs disbursed to him in terms of the Policy.

### **Submissions by the parties**

AIG contended that it was entitled, pursuant to the exclusion in the Policy, the 2017 Agreement and Molefe being unjustifiably enriched at its expense, to repayment of the funds disbursed by it to Molefe.

Molefe took issue with the non-joinder of Eskom in the action proceedings on the basis that it, and not Molefe, was the holder and signatory of the Policy. Consequently, as Molefe's arguments went, he could not be held liable to repay the costs paid out for his defence on his behalf and AIG must look to Eskom for repayment of the disbursed funds.

DISPUTE RESOLUTION  
ALERT

# Party autonomy does not usurp the power of our courts

CONTINUED



In addition, Molefe relied on clause 7.6 of the Policy, which provided that:

*"[E]xcept as otherwise specifically provided, any dispute regarding any aspect of this policy or any matter relating to cover thereunder which cannot be resolved by agreement within 30 days, shall be referred to binding arbitration by either party upon 7 days' notice to the other in terms of the Arbitration Act."*

Moreover, Molefe argued that he did not agree to the provisions of the 2017 Agreement and that AIG's claims against him, although misplaced, should be determined under the arbitration clause of the Policy.

Section 3(2) of the Arbitration Act provides that:

*"The court may at any time on the application of any party to an arbitration agreement, on good cause shown – set aside the arbitration agreement; or order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or order that the arbitration agreement shall cease to have effect with reference to any dispute referred."*

## The court's decision

In addressing the parties' respective submissions, the court found that AIG's claim based on the 2017 Agreement was self-standing and independent of the Policy. Therefore, it was not a dispute contemplated in the arbitration clause of the Policy.

It also found that AIG's claim for unjustified enrichment was not a claim regarding an aspect of the Policy or matter related to cover under it. This claim too was self-standing, independent of the Policy and not contemplated in the arbitration clause of the Policy.

The court, in exercising its discretion, held that it would be untenable for AIG's claims to be dealt with in a piecemeal fashion under multiple proceedings with the "attendant unnecessary and unjustifiable wasteful increase in costs and witnesses potentially testifying on more than one occasion on the same facts".

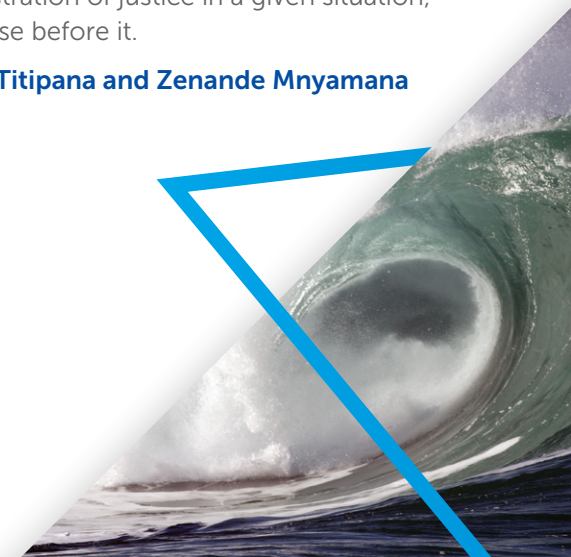
Relying on the decision in *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* [2014] (3) SA 265 (GP) that a multiplicity of claims proceedings in different forums on the same facts should be avoided in light of conflicting decisions, the court held that all three of AIG's claims should be dealt with simultaneously in a single proceeding before one forum to facilitate the administration of justice.

## Takeaway

This case illustrates that our courts will not shy away from exercising their discretion, on good cause shown, to bypass arbitration clauses in agreements.

Such exercise of discretion does not throw party autonomy to the wayside, but aligns with what is practical and facilitates the administration of justice in a given situation, on the facts of the case before it.

**Corné Lewis, Dipuo Titipana and Zenande Mnyamana**





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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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