

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 960/2024

In the matter between:

ROADS AGENCY LIMPOPO SOC LTD	**APPELLANT**

and

MATLA CONSULTANTS CC	**FIRST RESPONDENT**
AXTON MATRIX CONSTRUCTION CC	**SECOND RESPONDENT**

and

Case no: 970/2024

In the matter between:

AXTON MATRIX CONSTRUCTION CC	**APPELLANT**

and

ROADS AGENCY LIMPOPO SOC LTD	**FIRST RESPONDENT**
MATLA CONSULTANTS CC	**SECOND RESPONDENT**

Neutral citation: *Roads Agency Limpopo SOC Ltd v Matla Consultants CC and Another* (960/2024); *Axton Matrix Construction CC v Roads Agency Limpopo SOC Ltd and Another* (970/2024) [2026] ZASCA 152 (13 November 2026)

Coram: ZONDI DP and SCHIPPERS and COPPIN JJA and MABESELE and BASSON AJJA

Heard: 2 March 2026

Delivered: 13 November 2026

Summary: Arbitration – Arbitration agreement – Setting aside – Section 3(2) of Arbitration Act 42 of 1965 – Good cause – Onus not easily discharged – Relevant circumstances to be considered cumulatively – Parallel proceedings not, without more, constituting good cause – Substantial overlap of issues and evidence, absence from arbitration of party centrally implicated in dispute, duplication of proceedings and risk of inconsistent findings – Cumulative effect constituting good cause – Arbitration agreement ordered to cease to have effect in relation to disputes concerned.

Appeal – Special leave to appeal – Reasonable prospects of success necessary but insufficient – Special circumstances also required – RAL establishing reasonable prospects and special circumstances – Special leave granted – Axton's counter-application involving material disputes of fact incapable of resolution on motion – No reasonable prospects or special circumstances established – Special leave refused.

ORDER

On application: for special leave to appeal a decision of the Limpopo Division of the High Court, Polokwane (Tshidada J and Bresler and Deane AJJA) sitting as a court of appeal:

1 Special leave to appeal is granted to Roads Agency Limpopo SOC Limited in case number 960/2024.

2 Special leave to appeal is refused to Axton Matrix Construction CC in case number 970/2024.

3 Roads Agency Limpopo SOC Limited RAL's appeal is upheld with costs, including the costs of the application for leave to appeal.

4 Axton Matrix Construction CC appeal is dismissed with costs;

5 The orders of the Court a quo are set aside and substituted with the following order:

'(a) It is ordered that the arbitration agreement contained in clause 10.7 of the General Conditions of Contract attached as annexure LL3 to the applicant's application shall cease to have any effect with reference to the disputes between the applicant and the second respondent in respect of the construction of the D 3537 road in the Limpopo Province.

(b) The second respondent is ordered to pay the costs of the application.

(c) The second respondent's counter-application is dismissed with costs.'

JUDGMENT

Basson AJA (Zondi DP and Schippers and Coppin JJA and Mabesele AJA concurring)

[1] There are two applications for special leave to appeal before this Court, both arising from the same judgment of the full court of the Limpopo Division of the High Court, Polokwane (the high court), delivered on 1 August 2024.[1] The first, under case no 960/2024, is brought by Roads Agency Limpopo SOC Ltd (RAL). The second, under case no 970/2024, is brought by Axton Matrix Construction CC (Axton). This Court referred the two applications for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013.

[2] Both applications arise from the same construction project and share a common procedural history. The parties, however, seek different relief: RAL seeks special leave to challenge the dismissal of its application under s 3(2) of the Arbitration Act 42 of 1965 (the Arbitration Act) to set aside, or render inoperative, the arbitration agreement in its construction contract with Axton. Axton, in turn, seeks special leave to appeal the dismissal of its counter-application in the s 3(2) application.

Factual background

[3] The matter has a protracted history. To place the present dispute in its proper context, it is necessary to consider, in some detail, the events that gave rise to these proceedings.

[4] RAL is a statutory body with legal personality, established under the Northern Province Road Agency Proprietary Limited Act and the Provincial Roads

[1] Under case no 5103/2018.

Act 70 of 1998, as amended by the Northern Province Road Agency Limited and Provincial Roads Amendment Act 3 of 2001. RAL is responsible for planning, constructing, maintaining, and controlling the use of provincial roads in Limpopo Province.

[5] During 2013/2014, RAL and the first respondent, Matla Consultants CC (Matla), concluded an Engineering Services Agreement under which RAL appointed Matla as its professional consulting engineer to upgrade Road D3537 from gravel to tar in the Waterberg District of Limpopo. Matla's members were registered as professional engineers under the Engineering Profession Act 46 of 2000. Under this agreement, Matla was required to exercise reasonable professional skill and diligence in the performance of engineering services and to discharge its duties with due care, skill and diligence. More particularly, Matla was required to conform to RAL's standards in respect of the geometric and structural design of the road to be constructed. Following the conclusion of the Engineering Services Agreement, RAL paid Matla the agreed remuneration for the engineering services rendered. Matla is not a party to this appeal.

[6] Axton conducts business, amongst other things, as a contractor engaged in constructing roads, buildings and other civil engineering infrastructure. Axton was appointed as the contractor responsible for the construction works. To this end RAL and Axton concluded the General Conditions of Contract for Construction Works (Second Edition) (2010) (the construction contract), valued at approximately R108.5 million.

[7] Construction commenced in or about May 2014, with an initial completion date of 14 November 2014. The completion date was subsequently extended to November 2016 due to design-related issues with the works.

[8] Axton contends that practical completion was achieved in December 2016, thereby triggering, in its view, a 12-month defects liability period that expired in December 2017. Axton further claims that upon expiry of that period, it was entitled to payment of retention monies of R5 257 959.31 (inclusive of VAT). RAL and Matla dispute Axton's account of completion of the works. They maintain that Axton twice abandoned the site before completion and rendered no construction services during a defined period in mid-2016.

[9] On 9 November 2016, Matla issued a certificate of practical completion. The certificate, however, was conditional upon Axton remedying 17 defects recorded in a snag list. RAL maintains that Axton failed to remedy those defects and again abandoned the site in late November or early December 2016.

[10] Following heavy rains in December 2016, further defects in addition to the 17 defects identified in the snag list, were discovered. These included flooding allegedly caused by the incorrect vertical alignment of sections of the road, which caused portions of the road to act as channels rather than elevated roadways.

[11] After Matla and Axton's relationship broke down, RAL appointed BVI Consulting Engineers (BVI) to conduct an independent investigation. In its August 2017 report, BVI identified numerous defects, including incorrect vertical alignment of the road, and concluded that the road was materially defective. In practical terms, portions of the road were constructed so low relative to the surrounding surface level that they resembled channels rather than an elevated roadway. BVI estimated the reasonable and necessary costs of remedial work at approximately R64.9 million. This should be set off against an amount of approximately R108 million that RAL had already paid to Axton for the construction of the road, and a further R13 million to Matla for the design of the road and the supervision of Axton's work.

[12] Axton attributes the defects in the road to Matla's design, while Matla attributes them to Axton's poor workmanship. Both therefore denied responsibility and blamed the other for the condition of the road.

[13] In June 2018, RAL's attorneys allegedly made two written admissions of liability to Axton regarding retention monies and a payment certificate. A part-payment was subsequently made in January 2019. Axton maintains that the balance remains outstanding.

The main action

[14] On 22 August 2018, RAL (the plaintiff) issued summons against Matla (the first defendant) and Axton (the second defendant) for damages of R64 907 543.01 (R64 million) arising from the defective construction of Road D3537 (the main action). The action concerned defects discovered after the 17 defects recorded in the snag list, most significantly the incorrect vertical alignment of sections of the road.

[15] RAL's principal claim is for damages against Matla for breach of contract. RAL also brought a conditional contractual claim against Axton. That claim would arise only if Matla established that its designs and instructions were sound and that the defects resulted from Axton's failure to comply with them. In the alternative, RAL advanced a delictual claim against Axton. It alleged that Axton owed RAL an independent legal duty to perform the construction work properly and not to follow designs or instructions that it knew to be defective. In its plea, Axton maintains that it executed the works in accordance with Matla's designs and instructions and cannot be held responsible if those designs or instructions were defective.

[16] On 8 October 2019, Axton delivered its plea in the main action. Axton raised two special pleas. The first concerns the contractual time-bar in clause 10.3, and

more specifically clause 10.3.1.5, of the construction contract. This clause requires a dispute notice to be delivered within 28 days of the event giving rise to the dispute, failing which the party concerned loses the right to dispute the matter. Axton contended that RAL had failed to comply with this requirement and that its claims in the main action were consequently time-barred. The second special plea concerns RAL's attorney's alleged undertaking that RAL would not institute proceedings against Axton. Axton contended that this constituted a waiver, alternatively a *pactum de non petendo*.

[17] On 23 October 2019, Axton demanded payment of the full retention monies. Matla delivered its plea to RAL's amended particulars of claim on 14 November 2019, and RAL delivered its replication to Axton's plea on 27 November 2019.

[18] On 20 December 2019, Axton applied under rule 33(4) of the Uniform Rules of Court (the Uniform Rules)[2] for the separate determination of the two special pleas, which was opposed by RAL. Makgoba JP heard the application on 26 August 2020 and dismissed it on 31 August 2020. The full court heard Axton's appeal against the order for separation on 5 November 2021 and dismissed it. Axton's application for leave to appeal to this Court was subsequently refused. The two special pleas accordingly remain pending in the action.

The adjudication process

[19] Rather than pursuing its claim for the retention monies by way of a counterclaim in the main action, Axton formally notified RAL on 23 October 2019 of its intention to refer the dispute to adjudication under clause 10.5 of the construction agreement. By then, approximately 24 months had elapsed since the retention monies allegedly became due after the defects-liability period expired in

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[2] Rules regulating the conduct of the proceedings of the several provincial and local divisions of the High Court of South Africa GN R48, *GG* 999, 12 January 1965.

December 2017, and approximately 14 months had elapsed since RAL instituted the main action against Axton in August 2018. Parallel proceedings consequently developed.

[20] On 10 January 2020, Axton delivered a statement of claim. In it Axton sought payment of the retention monies in the sum of R5 383 872.97, together with interest.

[21] From the outset, RAL objected to the institution of separate adjudication proceedings. It maintained that all disputes should be determined in the pending high court action. In a letter dated 19 November 2019, RAL invited Axton to pursue its claim for the retention monies by way of a counterclaim in that action. According to RAL, Axton's entitlement to the retention monies, if any, was directly related to the issues in the main action, particularly whether Axton had fulfilled its obligations under the construction contract and whether its performance was complete or defective. RAL also insisted that the disputes could not properly be determined in Matla's absence, as Matla's design and supervision of the works were directly implicated in the dispute. Because Matla is not a party to the construction agreement, it could not be compelled to participate in the adjudication process.

[22] RAL further maintained that it would not pay any amount the adjudicator might determine was owing to Axton in respect of the retention monies. RAL also maintained that Axton had invoked the contractual dispute-resolution process out of time and informed Axton that it intended to seek an order setting aside the arbitration agreement.

[23] RAL nonetheless filed its opposing submissions on 21 January 2020, relying, among other grounds, on the time-bar in clause 10.3.1.5. This defence is substantially identical to Axton's first special plea in the main action, although it

concerned a different claim. RAL contended that Axton had to give notice of its claim within the contractually prescribed period of 28 days of the event giving rise to the dispute; that the period had expired; and that Axton had consequently lost its right to pursue its claim for the retention monies. RAL also argued its damages claim in the main action was approximately R64 million and substantially exceeded Axton's retention claim. RAL accordingly regarded a separate adjudication as serving no practical purpose.

[24] The adjudicator, Bryan Westcott (Mr Westcott), handed down his first decision on 27 February 2020. He rejected RAL's time-bar defence and held that Axton's claim for the retention monies was not time-barred. In doing so, he held, among other things, that enforcing the principle of *pacta sunt servanda* would be 'contrary to public policy' in the circumstances. However, he upheld RAL's complaint that Axton had failed to remedy the 17 defects recorded in the snag list. Axton was directed to return to the site and remedy those defects within 28 days, failing which the cost of the remedial work would be quantified and deducted from the retention monies. Although the adjudicator recognised that the broader dispute raised contractual and delictual issues involving Matla, he did not consider this sufficient to displace the contractual dispute-resolution process.

[25] On 9 March 2020, Axton elected not to return to the site. Instead, it had the cost of the outstanding remedial work quantified and set off against the retention monies. In a second decision delivered on 7 August 2020, the adjudicator quantified that work, applied the set-off, and determined that RAL owed Axton R2 564 944.37.

[26] On 17 August 2020, RAL informed Axton that it would not make payment under the adjudicator's determination. It was stated that, should Axton seek to enforce that determination, RAL would rely upon its claim in the main action as a defence and set-off.

[27] On 18 November 2020, Axton served a notice of arbitration on RAL. Under clause 10.6.2 of the construction agreement, a party may refer the decision to arbitration or the court proceedings, inter alia, when one of the parties fails to comply with the adjudicator's decision. Clause 10.7 governs arbitration, which proceeds under the Arbitration Act.

[28] This referral prompted RAL to bring the present application in the high court under s 3(2) of the Arbitration Act. It sought an order setting aside the arbitration agreement contained in clause 10.7 or, alternatively, declaring that it had ceased to have effect in relation to the disputes between RAL and Axton.

[29] Axton opposed the application and brought a counter-application seeking payment of R5 257 959.31 (inclusive of VAT), the amount allegedly owing to it and admitted on RAL's behalf on 11 June 2018. It also sought payment of R125 913.66 (inclusive of VAT), the difference between the amount of R1 630 617.18 allegedly admitted on RAL's behalf on 11 June 2018 in respect of a payment certificate and the amount of R1 504 703.52 paid by RAL to Axton on or about 17 January 2018, together with interest.

[30] In the alternative, Axton sought an order declaring the adjudicator's decisions on the merits and quantum to be binding. It further sought payment of R2 440 031.05 (inclusive of VAT), the retention amount ordered by the adjudicator on 7 August 2020, described by Axton as the balance remaining after the deduction of R2 459 373.40 from the retention amount of R5 257 959.31. It also claimed R127 684.01, representing RAL's 50% share of the adjudication costs, together with interest. Lastly, Axton sought a declaration to the effect that it was not liable to RAL in respect of any of the claims arising from the defects pleaded in the particulars of claim in the main action, together with costs.

[31] Axton therefore elected not to pursue its claim for the retention monies by way of a counterclaim in the main action but instead invoked the dispute-resolution process provided for in the construction contract. Parallel proceedings consequently developed.

The high court application

[32] The application in terms of s 3(2) of the Arbitration Act served before the high court. The question before the court was whether RAL met the onus of establishing good cause to set aside the parties' agreed dispute-resolution mechanism.

[33] Lithole AJ dismissed RAL's application with costs. The court was not persuaded that RAL's considerations established good cause to release it from the arbitration agreement. It concluded that RAL failed to prove that implementing the arbitration agreement would unjustifiably diminish or limit protections afforded by the Constitution. The court was also not persuaded that the inconvenience and expense of a multiplicity of proceedings were sufficient to establish good cause to set aside the arbitration agreement.

[34] The court also dismissed Axton's counter-application with costs. The high court held that the relief sought could not properly be granted on motion in the face of genuine disputes of fact, including disputes concerning liability, set-off and the authority underlying the alleged admissions. Leave was granted to both parties to appeal the order to a full court.

The full court's decision

[35] The full court dismissed both appeals. In relation to RAL's appeal, it upheld the high court's conclusion that RAL had failed to establish good cause under s 3(2) of the Arbitration Act for setting aside the arbitration agreement. It accepted that the enquiry is fact-sensitive and that RAL had to assess the considerations it

relied on cumulatively. The full court was, however, not persuaded that Matla's involvement, the prospect of a multiplicity of proceedings, the increased costs and inconvenience, or the possibility of inconsistent findings justified releasing RAL from the arbitration agreement by which it was bound.

[36] The full court also dismissed Axton's appeal against the court a quo's refusal of its counter-application. It upheld the high court's conclusion that genuine disputes of fact, including disputes concerning liability, set-off and the authority for the alleged admissions, precluded the grant of final relief on motion. Those matters remained to be determined in the appropriate arbitration or trial proceedings.

Proceedings in this court

The alleged lapse of RAL's full court appeal

[37] In this court, Axton, for the first time, raised in its answering affidavit in case no 960/2024 the contention that RAL's appeal to the full court had lapsed because RAL had failed to comply with rule 49(6)*(a)* of the Uniform Rules of Court and had not subsequently obtained reinstatement of its appeal. On that basis, Axton argued that the full court ought not to have entertained the appeal.

[38] The point was neither raised nor considered in the full court's judgment and did not feature in Axton's heads of argument before that court. More fundamentally, it was never raised as a point *in limine* before the full court. Axton nevertheless asserts in its papers before this court that the point was addressed during the hearing. RAL disputes this, contending that it was mentioned only in passing at the end of the argument. RAL, in any event, denies that its appeal had lapsed, arguing that Axton's contention rests on an incorrect interpretation of rule 49(6)*(a)*.

[39] The following facts are relevant to determining this point. On 13 December 2022, Axton filed an application for leave to appeal against paragraph 2 of the order. The following day, RAL filed an application for leave to appeal against paragraph 1 of the order. On 3 February 2023, leave to appeal was granted to both parties.

[40] Axton delivered its notice of appeal on 28 February 2023. On 1 March 2023, RAL delivered a notice headed 'Applicant's/Plaintiff's Notice of Appeal and Cross-Appeal'. This notice specifically records that RAL gave notice of a cross-appeal against Axton's notice of appeal. The following orders are sought: first, that RAL's appeal be upheld and that the order of the court a quo be set aside and substituted with an order that the arbitration clause in 10.7 shall cease to have any effect with reference to the disputes between RAL and Axton relating to the construction of the road; and second, that Axton's cross-appeal be dismissed, alternatively suspended pending the outcome of RAL's claim for unliquidated damages against Axton in the main action.

[41] Rule 49(6)*(a)*(i)[3] requires an appellant, within 60 days after delivery of the notice of appeal, to apply in writing to the Registrar for a hearing date. If the appellant fails to do so, the respondent may make the application within a further 10 days. The rule provides that, if neither party applies, 'the appeal and cross-appeal shall be deemed to have lapsed …'.

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[3] Rule 49(6)*(a)*(i) 'An appellant shall within 60 days after delivery of a notice of appeal, apply to the registrar of the division where the appeal is to be heard, for a date for the hearing of such appeal and shall –
(aa) furnish the registrar with the appellant's legal representative's physical and electronic mail addresses; or if the appellant is unrepresented, then the appellant's full residential address and an electronic mail address, if the appellant has an electronic mail address; and
(bb) furnish the name and address of every other party to the appeal.
(ii) Should the appellant fail to apply for a date of hearing as referred to in sub-paragraph (i) [*sic*], a respondent may within 10 days after the expiry of the said period of 60 days apply for the set down of the appeal or any cross-appeal which such respondent may have noted.
(iii) If no application for a date of set-down is made by either party, the appeal and any cross-appeal shall be deemed to have lapsed and either party may apply to the court for an order confirming the lapsing of the appeal: Provided that the respondent shall have the right to apply for an order for any wasted costs.
(b) The court to which the appeal is made may, on application of the appellant or cross-appellant, and upon good cause shown, reinstate an appeal or cross-appeal which has lapsed.'

[42] Axton duly applied for an (appeal) case number, and the Registrar allocated case number HCAA07/23. Axton delivered its notice of appeal under that case number. It submitted that RAL's appeal against paragraph 1 of Lithole AJ's order had lapsed because RAL had failed to prosecute it.

[43] RAL explained that it first approached Axton to secure its cooperation in jointly appointing a service provider to prepare the appeal record, thereby avoiding duplicated costs. When Axton's attorneys did not respond, RAL approached Elliott Appeals to prepare the record. The service provider informed RAL that it had already prepared the record for Axton and furnished RAL with an electronic copy. The cover of each of the eight volumes described the proceedings as an 'appeal and cross-appeal' and recorded the respective challenges by Axton and RAL as follows:

'APPEAL AND CROSS-APPEAL

1. THE APPELLANT NOTES AN APPEAL AGAINST THE WHOLE OF THE JUDGMENT RELEVANT TO AND PARAGRAPH 2 OF THE ORDER HANDED DOWN BY ACTING JUSTICE LITHOLE ON THE 29TH NOVEMBER 2023.

2. THE FIRST RESPONDENT NOTES AN APPEAL AGAINST PART OF THE JUDGMENT AND PARAGRAPH 1 OF THE ORDER HANDED DOWN BY ACTING JUSTICE LITHOLE ON THE 29TH NOVEMBER 2023.'[4]

[44] Axton applied for a hearing date and, at the same time, filed copies of the appeal record as required by rule 49(6)*(a)*. RAL submits that the record made it clear that both parties were prosecuting their respective appeals and that the record encompassed both. Because Axton had already applied for a hearing date, RAL considered a separate application unnecessary. In its view, a further application would have risked allocating two hearing dates for the same appeal proceedings and required filing two sets of the same record. RAL accordingly submitted that,

[4] The reference to 2023 is an obvious error as Lithole AJ's order was handed down on 29 November 2022.

on a proper interpretation of rule 49(6)*(a)*, its appeal had not lapsed: both parties were appellants, and Axton had already applied for a hearing date in proceedings encompassing both appeals.

[45] I agree. An appeal does not lapse merely because one of the appellants failed separately to apply for a hearing date within the initial 60-day period. On a proper interpretation of rule 49(6)(*a*), lapsing occurs only where neither party makes the prescribed application. The reference to 'either party' must be understood in relation to the appeal and cross-appeal forming part of the same appellate proceedings. Insofar as it is necessary to determine the point, I am satisfied that RAL's appeal did not lapse.

Application for special leave to appeal

[46] The law governing special leave to appeal under s 16(1)*(b)* of the Superior Courts Act is settled. An applicant for special leave to appeal must meet the threshold as set out in *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd*,[5] where the court held that the legislature's use of the word 'special' signifies that, in addition to reasonable prospects of success, some further factor or criterion must be present. In *Cook v Morrison and Another*,[6] this Court held that reasonable prospects of success are a necessary but insufficient condition for the granting of special leave: 'something more, by way of special circumstances, is needed'. Such circumstances may include that the appeal raises a substantial point of law; that the prospects of success are so strong that refusing leave would result in a manifest denial of justice; or that the matter is of very great importance to the parties or the public. The list is not exhaustive. This test has since been reaffirmed by this Court, including in *Bayport Securitisation RF Ltd v Sakata*[7]

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[5] *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) at 561E–F.
[6] *Cook v Morrison and Another* [2019] ZASCA 8; 2019 (5) SA 51 (SCA); [2019] 3 All SA 673 (SCA) para 8.
[7] *Bayport Securitisation RF Ltd v Sakata* [2019] ZASCA 73; 2019 JDR 1004 (SCA) para 5.

and *Grupo Bimbo SAB de CV v Takis Biltong (Pty) Ltd and Another*.[8] More recently, it was restated in *Moloi v Road Accident Fund*.[9]

[47] RAL submits that its application satisfies both requirements. It contends that it enjoys reasonable prospects of establishing good cause under s 3(2) of the Arbitration Act and that special circumstances warrant a further appeal, for the following reasons. It argues that refusing special leave would result in a manifest denial of justice because it would be compelled to pursue substantially related disputes piecemeal in different fora. Matla, whose conduct and responsibility for the alleged defects are directly implicated in the dispute, is a party to the high court action but is not bound by the arbitration agreement and cannot be compelled to participate in the arbitration. RAL accordingly maintains that the respective responsibilities and alleged failures of Matla and Axton in relation to the project should be determined in one forum.

[48] The considerations upon which RAL relies in seeking special leave extend beyond mere inconvenience. The dispute concerns the construction of a public road and RAL's liability to pay the retention monies, against the background that more than R108 million has already been spent on a road that has proved to be materially defective. Two parties are directly implicated in the cause of the alleged defects, one of whom was not a party to the adjudication and will not be a party to the intended arbitration. This is significant because there is substantial overlap between the evidence that will be led in the arbitration and that which will be led in the pending high court action concerning the respective roles of Matla and Axton in causing the alleged defects.

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[8] *Grupo Bimbo SAB de CV v Takis Biltong (Pty) Ltd and Another* [2023] ZASCA 175; 2023 JDR 4805 (SCA); 2023 BIP 9 para 6.
[9] *Moloi v Road Accident Fund* [2026] ZASCA 13; 2026 JDR 0650 (SCA) para 9.

[49] More particularly, the same contractual time-bar provisions contained in the dispute-resolution procedure governing the construction agreement between RAL and Axton arise in both proceedings. The court and the arbitrator may therefore each be required to make a definitive finding on the interpretation and applicability of that clause. A finding either way on the time-bar defence may fundamentally affect the outcome on the merits. Accordingly, there is a reasonable prospect that another court may conclude that the cumulative effect of the parallel proceedings, Matla's absence from the arbitration, the duplication of evidence and costs, and the risk of inconsistent findings constitutes good cause under s 3(2).

[50] In my view, RAL has demonstrated reasonable prospects of success as well as special circumstances warranting a further appeal. Refusing special leave would require substantially related disputes to proceed in different fora without an authoritative determination of whether the interests of justice require their resolution in a single forum. The requirements for special leave are accordingly met in RAL's application under case number 970/2023.

[51] Axton's application stands on a different footing. In its counter-application,[10] it principally sought payment of R5 257 959.31 (inclusive of VAT) and various other amounts it alleged RAL owes. In the further alternative, it sought a declaration that it was not liable to RAL in respect of any of the claims arising from the alleged defects and forming the subject of the summons in the main action.

[52] RAL opposed the counter-application on the basis that substantial disputes of fact existed concerning Axton's entitlement to the retention monies. It also disputed the alleged admissions, including the authority of the attorneys who allegedly made them, the context in which they were made and whether they constituted unconditional acknowledgements of liability. These disputes were not

[10] Ibid para 29.

peripheral to Axton's principal claim. They concerned the existence and extent of the liability upon which that claim depended.

[53] Axton's claim for payment of the full retention monies cannot be determined without considering the material defects in the road and the parties' respective responsibility for them. Axton maintained that it had constructed the road in accordance with Matla's designs and instructions, while Matla attributed the defects to Axton's workmanship and its failure to comply with those designs and instructions. Matla's role as the engineer responsible for the design and supervision of the works is therefore central to the factual enquiry. These competing allegations cannot be properly resolved on affidavit.

[54] RAL disputes the amount allegedly owing to Axton. Even if Axton established an entitlement in principle to the release of the retention monies, it remains necessary to determine whether the full amount was due. The adjudicator himself found that Axton had failed to remedy the 17 items on the snag list and deducted the estimated remedial costs from the retention monies. Axton nevertheless claims in the counter-application the full retention amount as its principal relief and relied on the adjudicator's quantified determination only in the alternative. The papers therefore disclosed a dispute not only about Axton's entitlement to payment, but also about the amount, if any, that is payable.

[55] The further alternative declaratory relief posed an even more fundamental difficulty. Axton sought, in motion proceedings, a declaration that it was not liable for any of the claims advanced against it in the pending action. Those claims raise contested questions concerning the cause of the defects, the respective conduct of Axton and Matla, the terms and performance of the construction agreement, and the existence and breach of the independent legal duty alleged by RAL. The declaration sought would, in effect, determine the merits of RAL's contractual and delictual claims against Axton without the evidence necessary to resolve those

disputes and in advance of the trial at which they were to be adjudicated. There are no reasonable prospects that another court would grant such wide declaratory relief on the papers.

[56] The competing versions concerning liability, the authority and effect of the alleged admissions, responsibility for the defects and the amount payable required oral evidence. In my view, Axton has therefore not demonstrated reasonable prospects of another court granting either its principal monetary claim or its alternative declaratory relief in motion proceedings.

[57] Axton has consequently failed to demonstrate either the requisite prospects of success or anything beyond the ordinary requirements for leave to appeal that would justify a further appeal. In particular, it has not established the special circumstances required by *Cook*. Accordingly, special leave must be refused.

Good cause under s 3(2) of the Arbitration Act

[58] Section 3(2) of the Arbitration Act provides that, unless the arbitration agreement otherwise provides, it may not be terminated except by consent of all the parties. Section 3(2), however, empowers a court, on the application of a party and on good cause shown, to set aside an arbitration agreement, to order that a particular dispute shall not be referred to arbitration, or to order that the agreement shall cease to have effect in relation to a particular dispute. The section thus confers a discretion upon a court to relieve a party from its agreement to arbitrate but places the onus of establishing good cause upon the party seeking that relief.

[59] The court in *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd*[11] explained the nature of that onus. Colman, J held that it 'is not

[11] *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) at 391E-F. Dictum applied in *De Lange v Presiding Bishop, Methodist Church of Southern Africa and Another* [2014] ZASCA 151; 2015 (1) SA 106 (SCA); [2015] 1 All SA 121 (SCA) para 23; *De Lange v Methodist Church and Another* [2015] ZACC 35; 2016 (2) SA 1 (CC); 2016 (1) BCLR 1 (CC) para 36 and *Crompton Street Motors CC t/a*

easily discharged'. A party who has contracted to afford its opponent the advantages of arbitration, including finality, 'will not readily be absolved from his undertaking'. The Court relied upon *The Rhodesian Railways Ltd v Mackintosh,*[12] where it was held that the discretion must be exercised judicially and that a 'very strong case' is required before a party will be released from an arbitration agreement.

[60] The Appellate Division endorsed this approach in *Universiteit van Stellenbosch v JA Louw (Edms) Bpk*,[13] (*Universiteit van Stellenbosch*). Galgut AJA accepted that the party seeking to avoid arbitration bears the onus of persuading the court to exercise its discretion against referral to arbitration. Referring to the requirement of a 'very strong case', the Court cautioned that it is neither possible nor desirable to define with precision the circumstances that would satisfy that standard.[14] It also referred with approval to *Metallurgical*, where Colman J stated that there should be 'compelling reasons' for refusing to hold a party to its contractual undertaking to have the dispute resolved by arbitration.[15]

[61] *Universiteit van Stellenbosch* specifically considered the desirability of parallel proceedings and the possibility of conflicting decisions. There, the concern was not simply that two proceedings would exist. In that matter, the claim against the building contractor was subject to the contractual dispute-resolution procedure, whereas the subcontractor and architects were not parties to the building contract and the claims against them were not subject to arbitration. The parties whose conduct was implicated in the underlying dispute would therefore not all be before

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Wallers Garage Service Station v Bright Idea Projects 66 (Pty) Ltd t/a All Fuels [2021] ZACC 24; 2022 (1) SA 317 (CC); 2021 (11) BCLR 1203 (CC) para 41.

[12] *The Rhodesian Railways Ltd v Mackintosh* 1932 AD 359 at 375.

[13] *Universiteit van Stellenbosch v JA Louw (Edms) Bpk* 1983 (4) SA 321 (A) at 333G-334B. Dictum applied in *Foize Africa (Pty) Ltd v Foize Beheer BV and Others* [2012] ZASCA 123; 2013 (3) SA 91 (SCA); [2012] 4 All SA 387 (SCA) para 21.

[14] Ibid at 334A.

[15] *Metallurgical* fn 10 at 391H.

the same tribunal, even though their respective liabilities arose from the same factual matrix.

[62] Apart from the consideration of multiple parties who are not all before the same tribunal, an examination of the pleadings in that case revealed what the Court described as ‘'n kruisvuur van beskuldigings tussen die bestaande partye sowel as buitestaanders …’ and ‘grave conflicts of fact’.[16] Those disputes concerned, among other matters, the existence and cause of the defects, whether the architect had instructed or approved the relevant work, whether the defects were patent or latent, and the respective responsibility of the contractor, subcontractor and architects. The architect or arbitrator would have to investigate these matters in determining the dispute between the owner and the contractor, while the high court would have to consider substantially the same matters in determining the claims against the subcontractor and architects. The court concluded that there was accordingly a real danger that the different tribunals might reach conflicting conclusions on the same factual issues.

[63] Galgut AJA regarded the reasoning in *Taunton-Collins v Cromie and Another*[17] (CA) as ‘very apposite’. Lord Denning’s concern was that requiring separate tribunals to determine the same factual questions could produce inconsistent findings, additional costs and delay, as well as procedural difficulties arising from the absence in each forum of parties directly implicated in the dispute.[18] The Court accordingly held that there was ‘no doubt’ that the parallel proceedings created a ‘grave danger of conflicting decisions’ and that it was ‘most undesirable’.[19] In the same matter Lord Pearson held that ‘a multiplicity of proceedings is highly undesirable for the reasons which have been given. It is

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[16] *Universiteit van Stellenbosch* at 335F-H. “A crossfire of accusations between the present parties as well as outsiders.”
[17] *Taunton-Collins v Cromie and Another* [1964] 2 All ER 332.
[18] *Universiteit van Stellenbosch* at 335H-336A.
[19] Ibid at 335H.

obvious that there may be different decisions on the same question and a great confusion may arise' More in particular, Lord Pearson cautioned against the 'serious procedural difficulties which might arise if one had an arbitration between two parties and an action between different parties'.[20]

[64] Ultimately, the cumulative effect of the multiplicity of proceedings, the danger of conflicting decisions, and the real risk that an impartial decision could not be given under the contractual procedure established a strong case. This constituted compelling reasons which required that court to depart from that procedure.

[65] An overlap or duplication of proceedings does not, without more, constitute good cause. The case in *Universiteit van Stellenbosch* demonstrates that the significance of parallel proceedings must be assessed against a multiplicity of factors, including the nature and extent of the factual disputes, the degree of overlap between the issues and evidence, the parties before each forum, the risk of inconsistent findings, and the practical consequences of allowing the proceedings to continue separately.

[66] The Constitutional Court considered the principles governing the good-cause enquiry in *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being and Another* (*De Lange*).[21] Although *De Lange* was not decided in the context of a commercial arbitration but concerned a dispute within a church involving its doctrine and values, the principles stated there are important in the general context of s 3(2) of the Arbitration Act. The Court considered whether good cause had been advanced to escape the arbitration agreement. Moseneke DCJ observed that the courts have not expressly defined good cause, but

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[20] Ibid at 336C.
[21] *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being and Another* 2016 (2) SA 1 (CC).

that 'the onus to demonstrate good cause is not easily met' and that the discretion to set aside an arbitration agreement 'must be exercised only where a persuasive case has been made out'. It was 'neither possible nor desirable' to define precisely the circumstances constituting such a case.[22] Importantly, in determining whether good cause had been established, the Court had regard to the terms of the arbitration agreement itself, observing that the matter was 'best met by looking at the terms of the arbitration agreement'.[23] Thus, although *De Lange* arose in a different context, it confirms the stringent onus resting upon a party seeking to escape an arbitration agreement and the importance of considering the terms of the particular agreement in determining whether good cause under s 3(2) has been established.

Commercial arbitration

[67] These principles are particularly relevant where, as here, the arbitration agreement forms part of a commercial contract. By agreeing to arbitration, commercial parties choose the forum in which disputes falling within the arbitration clause are to be resolved. That choice is part of their bargain. When a party later seeks to avoid arbitration under s 3(2), the court must weigh the reasons advanced against the parties' agreement to resolve such disputes by arbitration. The fact that, once a dispute has arisen, litigation may appear more convenient or avoid some procedural difficulties does not, without more, justify a departure from that agreement.

[68] The significance of that contractual choice is reflected in this Court's approach to interpreting commercial arbitration clauses. In *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* (*North East Finance*)[24] this Court considered the approach of the House of Lords in *Fiona Trust & Holding*

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[22] Ibid para 36.
[23] Ibid para 39.
[24] *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76; 2013 (5) SA 1 (SCA); [2013] 3 All SA 291 (SCA).

Corporation and Others v Privalov and Others (*Fiona Trust*).[25] Lewis JA described that approach as 'instructive', while emphasising that the question remained one of construing the arbitration clause and the contract generally.[26] The court, referred to Lord Hoffmann's observation in *Fiona Trust* that '[a]rbitration is consensual' and 'depends upon the intention of the parties as expressed in their agreement'.[27] Lord Hoffmann explained that the meaning of the words used by the parties is informed by the commercial background and the purpose of the agreement. Consistent with that approach, this Court held that the contract must be considered as a whole and in the context in which it was concluded, and given a commercially sensible meaning.[28]

[69] Lord Hoffmann developed the point further in *Fiona Trust*. He explained that parties who agree to arbitration choose a tribunal to determine disputes arising from their relationship, often because of considerations such as neutrality, expertise and privacy and, particularly in international commercial transactions, the desire for a quick and efficient determination.[29] Against that background, he observed that there would ordinarily be no rational commercial basis for supposing that the parties intended some questions arising from their relationship to be determined by an arbitrator and others by a court.[30] He concluded that:

'… the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal.'[31]

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[25] *Fiona Trust & Holding Corporation and Others v Privalov and Others* [2007] UKHL 40; [2007] 4 All ER 951 (HL) (*Fiona Trust*).
[26] *North East Finance* fn 23 para 18.
[27] Ibid para 20.
[28] Ibid paras 24-25. Dictum applied in *Dis-Chem Pharmacies Ltd v Dainfern Square (Pty) Ltd and Others* [2023] ZASCA 115; 2024 (4) SA 489 (SCA) para 20.
[29] *Fiona Trust* para 6.
[30] *Fiona Trust* para 7.
[31] *Fiona Trust* para 13.

[70] This Court subsequently referred to that passage in *Zhongji Development Construction Engineering Co Ltd v Kamoto Copper Co SARL* (*Zhongji*).[32] It also referred to the 'presumption in favour of one-stop arbitration' and quoted Longmore LJ's observation that it is 'not to be expected that any commercial man would knowingly create a system' under which the court would first determine questions concerning the validity of the contract and, if the contract survived, the arbitrator would thereafter determine the remaining disputes.[33]

[71] Although *North East Finance*, *Fiona Trust* and *Zhongji* concern the interpretation and scope of arbitration agreements rather than the exercise of the discretion under s 3(2) of the Arbitration Act, they remain significant in the context of commercial agreements. They emphasise the importance of the parties' choice of arbitration and the commercial purpose underlying that choice. The enquiry under s 3(2) must accordingly take into account that the agreement was concluded in a commercial setting in which the arbitration clause formed part of the parties' bargain.

Conclusion

[72] Each application under s 3(2) must be determined on its particular facts and circumstances. The starting point in this case is that the construction agreement is a commercial contract concluded by parties who deliberately chose adjudication and arbitration, rather than litigation, as the means by which the identified disputes between them would be resolved. That choice formed part of their commercial bargain and must be accorded considerable weight. A court will therefore not release the parties from their agreement merely because litigation might subsequently appear more convenient or economical. RAL bears the onus of establishing compelling reasons sufficiently strong to satisfy the stringent

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[32] *Zhongji Development Construction Engineering Co Ltd v Kamoto Copper Co SARL* [2014] ZASCA 160; 2015 (1) SA 345 (SCA); [2014] 4 All SA 617 (SCA) para 31.
[33] Ibid para 32.

requirement of good cause. The enquiry is fact-specific and requires consideration of the relevant circumstances cumulatively. Although no single consideration may be decisive, their combined effect may establish the compelling justification required for releasing the parties from their agreed dispute-resolution process.

[73] The circumstances of this case extend well beyond considerations of convenience, cost or delay. Two parallel processes are under way: the contractual dispute-resolution process and the pending high court action. They involve substantial disputes of fact and considerable overlap in the issues and evidence to be determined. Central to both is Axton's and Matla's alleged respective responsibility for the road defects. Axton attributes the defects to Matla's design and instructions, while Matla attributes them to Axton's workmanship and performance. These conflicting positions cannot readily be separated into distinct enquiries that can be determined in different fora.

[74] Axton contends that the two processes are unrelated because they concern separate causes of action. That distinction, however, does not eliminate the substantial factual overlap between them. Both arise from the same project and require consideration of Axton's performance under the construction agreement, including whether Axton breached its contractual obligations or caused RAL loss of the kind alleged in the delictual claim. If RAL establishes that Axton abandoned the project or performed the works defectively, that finding may materially affect whether any retention monies are payable to Axton. Likewise, if the high court finds, as alleged in the delictual claim, that Axton constructed the road in accordance with Matla's defective designs despite knowing that those designs were defective, Axton may be held liable in damages to RAL. Such liability may defeat Axton's claim to the retention monies or, at best for Axton, render those monies susceptible to set-off against RAL's damages claim once that claim has been liquidated. The fact that the claims rest upon separate causes of action therefore does not mean that they should be determined independently of the substantially

overlapping factual enquiry into Axton's performance and responsibility for the defects.

[75] Of particular importance is the fact that Matla, the consulting engineer whose design and supervision of the works are directly implicated, is a party only to the high court action. It is not bound by the arbitration agreement and cannot be compelled to participate in the arbitration. The arbitrator may therefore be required to determine Axton's entitlement to the retention monies in Matla's absence, notwithstanding that Matla's conduct and evidence may materially affect that entitlement. The high court, with all three parties before it, will in turn be required to determine their respective responsibility for the defects.

[76] A similar concern arose in *Universiteit van Stellenbosch*, where the subcontractor and architects were not subject to the contractual dispute-resolution process binding the building contractor. The court regarded their absence from that process as an important factor because the factual disputes involving them would have to be determined separately, contributing to the multiplicity of proceedings and the grave danger of conflicting decisions. The same concern arises here: a party central to the resolution of the dispute will be before only one of the two fora, creating a real danger that the arbitrator and the high court may reach conflicting findings on materially related questions of fact.

[77] The danger of inconsistent findings is not confined to factual matters. The contractual time-bar in clause 10.6 is raised in both proceedings. RAL relied upon it in the adjudication as a defence to Axton's claim for the retention monies. Axton, in turn, relies upon the same time-bar provisions in support of its special plea to RAL's claim in the main action. If the retention-money dispute proceeds to arbitration while the action continues, both the arbitrator and the high court will be required to determine the meaning, ambit and applicability of the time-bar provisions, albeit in relation to different claims.

[78] A determination of those provisions may have far-reaching consequences for the parties' respective rights and liabilities. It may affect not only Axton's entitlement to the retention monies but also RAL's right to pursue its substantial claim against Axton for the defects in the road.

[79] Returning to the full court's judgment, setting aside the arbitration agreement would not deprive Axton of its claim for the retention monies. Axton may pursue that claim in the high court, where it can be determined together with the related claims concerning the defects, with RAL, Axton and Matla before the same forum. The consequence is therefore a change of forum, not the loss of Axton's substantive claim. A further procedural complication that may arise is that, if the retention dispute proceeds to arbitration, RAL would be entitled to pursue its counterclaim for unliquidated damages in the arbitration. Since Matla is not a party to the arbitration, RAL would still have to pursue its claim against Matla in the main action before the high court. RAL would consequently be required to pursue related claims arising from substantially the same factual matrix in two separate fora. This would duplicate proceedings, evidence, and costs, with the attendant risk of inconsistent findings.

[80] I am, in view of the above, satisfied that the court erred in finding that RAL failed to demonstrate such good cause as envisaged in s 3(2) of the Arbitration Act. In the event it is concluded that RAL has discharged its onus. It follows that its appeal must succeed.

Order

[81] The following order is made:

1 Special leave to appeal is granted to Roads Agency Limpopo SOC Limited in case number 960/2024.

2 Special leave to appeal is refused to Axton Matrix Construction CC in case number 970/2024.

3 Roads Agency Limpopo SOC Limited RAL's appeal is upheld with costs, including the costs of the application for leave to appeal.

4 Axton Matrix Construction CC appeal is dismissed with costs;

5 The orders of the Court a quo are set aside and substituted with the following order:

'(a) It is ordered that the arbitration agreement contained in clause 10.7 of the General Conditions of Contract attached as annexure LL3 to the applicant's application shall cease to have any effect with reference to the disputes between the applicant and the second respondent in respect of the construction of the D 3537 road in the Limpopo Province.

(b) The second respondent is ordered to pay the costs of the application.

(c) The second respondent's counter-application is dismissed with costs.'

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A C BASSON

ACTING JUDGE OF APPEAL

Appearances

For appellant:	D Mills SC
Instructed by:	Mchaba Incorporated, Polokwane
	Phatshoane Henny Attorneys, Bloemfontein
For respondents:	S Tshikila SC
Instructed by:	Orelowitz Incorporated, Johannesburg
	Lovius Block Inc., Bloemfontein.