REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No I 2781/2010

In the matter between:

TRUSTCO GROUP INTERNATIONAL (PTY) LTD **PLAINTIFF**

and

THE NAMIBIA RUGBY UNION **DEFENDANT**

Neutral citation: *Trustco Group International (Pty) Ltd v The Namibia Rugby Union* (I 2781-2010) [2014] NAHCMD 169 (27 May 2014)

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Coram: VAN NIEKERK J

Heard: 19 January 2012

Delivered: 27 May 2014

Flynote: **Practice** – Special plea – Defendant raising defence that action should be stayed, pending determination of dispute by arbitrator in terms of arbitration clause – Onus and jurisdictional facts required to be proved discussed – *In casu* defendant failed to prove facts underlying special plea - In principle possible for parties to agree that question of validity of their agreement would be determined by arbitration even though reference to arbitration was part of agreement being questioned, provided that they foresaw possibility of such dispute arising - In instant matter there is no indication whatsoever that parties intended that any dispute regarding validity of agreement itself should be referred to arbitration – Special plea dismissed.

ORDER

The defendant's special plea is dismissed with costs, such costs to include the costs of one instructing and two instructed counsel.

JUDGMENT

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VAN NIEKERK J:

[1] On 9 September 2009 the parties entered into a sponsorship agreement for five years in terms of which the plaintiff would, *inter alia*, provide funding to establish a national sevens rugby league for Namibia, for the hosting in Namibia of international sevens rugby tournaments sanctioned by the International Rugby Board, and for certain other matters. In return the plaintiff would, *inter alia*, have sole broadcasting and advertising rights in respect of agreed upon events and share in the profits generated during the duration of the agreement.

[2] The agreement is subject to a suspensive condition contained in clause 5.1 which reads as follows:

> '5.1 The Sponsorship is conditional upon the NRU being awarded the right to host an IRB sanctioned Seven A Side International Tournament. Should this suspensive condition not be met this agreement will lapse.'

Clause 5.2 is also relevant. It provides:

> '5.2 A Sponsorship amount not exceeding N$2 500,000.00 .... per tournament will be allocated towards the hosting of an annual international IRB sanctioned tournament to be officially known as "Trustco Namibia Sevens" in Namibia.'

[3] During August 2010 the plaintiff instituted action against the defendant for an order declaring that the sponsorship agreement has lapsed and is consequently of no force and effect. The basis for this relief is the following allegations:

> '4. The agreement, in clause 5.1 thereof, provides that the sponsorship agreement is subject to the suspensive condition that the obligations of the plaintiff in terms of the agreement would only become enforceable once the defendant had obtained and secured the right to host an annual IRB sanctioned Seven-A-Side International Tournament over a period of 5 (five)

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years. It was specifically agreed between the parties that, should this suspensive condition not be fulfilled and the defendant not obtain the right to host an annual IRB sanctioned tournament for a period of 5 (five) years, the sponsorship agreement would lapse.

5. It was an implied, alternatively tacit term of the agreement that the defendant would obtain and secure the required sanctioning from the IRB for a period of five years and timeously, in order for the annual IRB sanctioned tournament to be planned, organised and diarised timeously in any given year. This would have given viable returns to the plaintiff from the income generating sources referred to [in] sub-paragraph 3.5 *supra* and the brand exposure referred to therein.

6. To date the defendant has failed to obtain the right to host an annual IRB sanctioned Seven-A-Side Tournament for a period of five years timeously. As a result of the defendant's failure to do so, no tournament (giving effect to the objects referred to in sub-paragraph 3.5 *supra*) for the year 2010 will take place. Accordingly, the suspensive condition has not been fulfilled. The plaintiff informed the defendant of this fact on 12 May 2010, alternatively, herewith informs the defendant thereof.

7. According to the provisions of clause 5.1 of the written agreement, the plaintiff's obligations to perform had been suspended and could not be validly performed.'

[4] The particulars of claim are not entirely clear but it would seem that the plaintiff further relies on the *condictio indebiti* (which was confirmed by the plaintiff's counsel during argument) by alleging that the defendant was enriched in the amount of N$3 750 874-81, which was expended in the expectation, alternatively in the *bona fide* but erroneous belief, that the suspended condition would be fulfilled. In the result the plaintiff claims payment from the defendant in the said amount plus interest thereon.

[5] The defendant raises a special plea in the following terms:

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‘1.1 Plaintiff’s claim arises upon a written contract between the parties concluded on 9 September 2009.

1.2 Clause 16 of that agreement provides that any dispute between the parties must be referred to arbitration conducted by a nominated arbitrator.

1.3 The dispute upon which plaintiff’s cause of action is based, concerns and/or relates to defendant’s obligations under the written agreement.

1.4 The plaintiff failed to refer the dispute to arbitration as required by the sponsorship agreement.

1.5 Consequently, plaintiff’s action should be stayed pending the appointed arbitrator’s final determination of the dispute in terms of the written agreement.’

[6] The relevant part of the arbitration clause reads as follows:

’16. Should any differences or disputes at any time arise, which the parties are unable to resolve amicably, whether in regard to the meaning or effect of any terms of this Agreement or implementation of any party’s obligations hereunder or any matter arising therefrom or incidental thereto, then and in that event differences or disputes shall be submitted to arbitration ....’

[7] On the merits the defendant pleads that clause 5.1 merely states that the written agreement shall lapse if the defendant was not awarded the right to host an IRB sanctioned Seven A Side international tournament; and denies that the defendant had to secure the required sanctioning for a period of five years. It further pleads that it was an implied, alternatively, tacit terms of the agreement that the IRB only grants sanctioning per tournament and not on the basis of a five year period; that the suspensive condition in clause 5.1 enjoined the defendant to apply annually for IRB sanctioning to host an annual Seven A Side tournament; and that the award of such sanctioning is entirely in the discretion of the IRB. The defendant further pleads that it did apply for sanctioning from the IRB to host the said tournament in 2010, but that the plaintiff wrongfully and with the settled intention of frustrating fulfilment of the

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suspensive condition in clause 5.1, informed the defendant that it was no longer prepared to sponsor the tournament, which resulted therein that the IRB did not grant the required sanctioning for 2010. In the alternative the defendant pleads that the IRB granted sanctioning for the defendant to host the said tournament during 2009 and that this event was duly sponsored by the plaintiff, but that the plaintiff breached its obligations to pay the account of N$763 726.86 for the hotel accommodation of the international participating teams, which failure led to litigation by the hotel against the plaintiff and the IRB's refusal to sanction the said tournament for 2010. The defendant also denies that the plaintiff ever paid the amount of N$3 750 874.81 to the defendant.

[8] In the parties' joint case management report in this matter it was agreed that the defendant's special dilatory plea should be 'adjudicated' prior to the adjudication of the merits. During the case management hearing the Court used the word 'determined' in place of the word 'adjudicated'. None of the counsel indicated that the intention was to present evidence at the hearing or provided an indication of the number and names of witnesses to be called. Eventually an order was granted that the merits of the special plea shall be 'argued' separately on 19 January 2012. In hindsight it seems that the word 'argued' in the order may not have reflected the agreement accurately, because counsel for the plaintiff enquired at the hearing of the merits of the special plea whether the defendant intended presenting any evidence to prove the factual allegations on which the special plea is based. Counsel for the defendant indicated that he did not intend leading any evidence on behalf of the defendant. I have set out the facts on this issue in some detail, because I was initially concerned that defendant's counsel may have been misled by the wording of the order into thinking that leading evidence was not an option. However, he expressed no such sentiment or that the defendant was prejudiced in any way by the wording of the order. I should also point out that the parties did not indicate at any stage after the order was made that it does not reflect their agreement. In the

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premises it would seem that the Court indeed has no cause for concern on this score.

[9] A party who wishes to rely on an arbitration clause may either bring an application to stay the proceedings in terms of Section 6 of the Arbitration Act, 1965 (Act 42 of 1965), or raise a defence by way of a special plea that the action instituted by the plaintiff should be stayed, pending the determination of the dispute by the arbitrator in terms of the arbitration agreement.

[10] Before me counsel were in agreement as to the correct legal position in regard to onus. It is that the onus is on the defendant as the party who raises the special plea to allege and prove certain jurisdictional facts (*Goodwin Stable Trust v Duohex (Pty) Ltd* 1998 (4) SA 606 (C) 615D-F). At first glance counsel appeared to differ on what these jurisdictional facts are. Mr *Phatela* for the defendant relied on Harms, *Amler's Precedents of Pleadings* (7th ed) p38, where the following are said to be the required jurisdictional facts:

> '(a) the existence of the arbitration clause or agreement, which must be in writing (but not necessarily signed);
>
> *Mervis Brothers v Interior Acoustics* 1999 (3) SA 607 (W)
>
> (b) that the arbitration clause or agreement is applicable to the dispute between the parties;
>
> *Kathmer Investments (Pty) Ltd v Woolworths* [1970] 2 All SA 570 (A), 1970 (2) SA 498 (A)
>
> *Universiteit van Stellenbosch v JA Louw (Edms) Bpk* [1983] 2 All SA 415 (A), 1983 (4) SA 321 (A)
>
> *Stocks Construction (OFS) (Pty) Ltd v Metter-Pingon (Pty) Ltd* [1980] 1 All SA 326 (A), 1980 (1) SA 507 (A)
>
> (c) that there exists a dispute between the parties, which dispute must be demarcated in the special plea.

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Parekh v Shah Jehan Cinemas (Pty) Ltd [1980] 1 All SA 239 (D), 1980 (1) SA 301 (D) 306

Delfante v Delta Electrical Industries Ltd [1992] 3 All SA 968 (C), 1992 (2) SA 221 (C)

Withinshaw Properties (Pty) Ltd v Dura Construction Co (SA) (Pty) Ltd 1989 (4) SA 1073 (A)

It is not necessary for the defendant to allege a readiness or willingness to arbitrate; and

Stanhope v Combined Holdings & Industries Ltd 1950 (3) SA 52 (E)

(d) that all the preconditions contained in the agreement for commencing arbitration have been complied with.

Richtown Construction Co (Pty) Ltd v Witbank Town Council [1983] 1 All SA 61 (T), 1983 (2) SA 409 (T)

Santam Insurance Ltd v Cave t/a The Entertainers & The Record Box [1986] 1 All SA 513 (A), 1986 (2) SA 48 (A)

Gerolemou/Thamane Joint Venture v AJ Construction CC [1999] 3 All SA 74 (T)'.

[11] Mr *Heathcote* (who appeared with Ms *Schneider*) for the plaintiff, relied on the following five conditions for obtaining a stay as set out in Jacobs, *The Law of Arbitration in South Africa*, (1977) at paras. 47 – 51 on p. 49 – 51: (i) a valid arbitration agreement in respect of a dispute within the scope of the aforesaid agreement; (ii) the applicant for a stay must be entitled to rely on an arbitration agreement; (iii) no step must be taken after the appearance to defend; (iv) the applicant must be ready and willing to arbitrate; (v) there must be no sufficient reason for refusing a stay. Although counsel submitted that the defendant has not proved that these five conditions have been met, the main focus of the plaintiff's attack related to the first condition and, perhaps, the fifth condition. In my view the

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first condition amounts to the same thing as set out in paragraphs (a) and (b) of the extract of *Amler's* on which the defendant's counsel relies.

[12] As far as the conditions in (iii) and (iv) are concerned, Jacobs states (in respect of (iv), with reference to *Stanhope's* case, *supra*) that these do not apply in the case of a special plea. They do not have to be considered further in the circumstances of this case.

[13] The condition in (v) seems to be a 'catch all' condition. The author relies mostly on rather old English case law. One of the examples cited is the case of *Armstrong v Sivewright* (1893) 10 *CLJ* 257 in which it was apparently held that arbitration could not be demanded where a written demand for arbitration was first required and no demand made. This example appears to be the same as condition (d) mentioned in *Amler's*.

[14] In the end it seems to me, with respect, that there is not much to choose between the requirements as set out by the two authors. However, as the exposition in *Amler's* is based on more recent South African cases, I think it is to be preferred as a useful summary of the requirements in a case such as this where the arbitration clause is raised as a defence by way of a special plea.

[15] Mr *Phatela* submitted that it is clear from the contract, read with the pleadings, that all the jurisdictional facts are present. It is not necessary to deal with all the requirements in detail. In this case the parties differ in their interpretation of the suspensive condition. Mr *Phatela* submitted that this is a matter which should be referred to arbitration as the arbitration clause provides for the arbitrator to resolve any differences or disputes 'in regard to the meaning or effect of any terms of the Agreement'. However, it seems to me that this submission loses sight of the fact that there is a difference between 'conditions' and 'terms' of an agreement (See *R v Katz* 1959 (3) SA 408 (C) 417E-H; *Design and Planning Service v Kruger* 1974 (1) SA 689 (T) 695; *Ogus v Secretary for Inland Revenue* 1978 (3) SA 67 (T) 72H – 73A; *Administrateur-Generaal vir die Gebied Suidwes-Afrika v Hotel Onduri (Edms) Bpk*

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1983 (4) SA 794 (SWA) 799B-G). There is nothing in the agreement which indicates that the word 'terms' in the agreement should be interpreted as including 'conditions.' Apart from this, even if the opposite should be the correct interpretation, it seems to me that any dispute regarding the interpretation of the condition cannot be said to be demarcated in the defendant's special plea and as such does not meet the requirement set out in paragraph (c) of the extract from *Amler's* on which Mr *Phatela* relies.

[16] Mr *Heathcote* submitted that it is incumbent upon the defendant to prove that the suspensive condition has been fulfilled. In this case, he contended, the defendant should have presented evidence to prove that the suspensive condition was fulfilled. As I stated before, the defendant expressly indicated at the hearing by way of its counsel that it intended presenting no evidence. The plaintiff's counsel further submitted, in a nutshell, that if the suspensive condition was not fulfilled, the contract is void; and, if this is the case, the arbitrator would have no jurisdiction, as his or her alleged jurisdiction is based solely on the agreement. In such a case the matter should not be referred to arbitration. Indeed, counsel emphasised that the plaintiff's action is not based on the agreement, because it is void.

[17] It is indeed so that where a condition suspending a contract is not fulfilled, the contract is normally void *ab initio* (*Administrateur-Generaal vir die Gebied Suidwes-Afrika v Hotel Onduri (Edms) Bpk (supra)*; *Basson v Remini* 1992 (2) SA 322 (N) 327C; *Hill v Hildebrandt* 1994 NR 84 (HC) 97G; *Mudge v Ulrich No and Others* 2007 (2) NR 567 (HC)). In this case no argument was addressed on whether the true meaning of the agreement is not that non-fulfilment of the suspensive condition in any year renders the contract void only for that particular year and I express no opinion on the matter.

[18] The rule is that the litigant, whether the plaintiff or the defendant, relying on a contract that is subject to a condition must plead and prove the condition and its fulfilment (*Pillay v Krishna and Another* 1946 AD 946 at 952; *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd* 1963 (1) SA 632 (A) at 644G-H). Furthermore,

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the onus rests on the defendant to prove the facts underlying the special plea (*Masuku v Masuku* 1998 (1) SA 1 (SCA)). In this matter the defendant did not prove that the suspensive condition in clause was actually or fictionally fulfilled.

[19] Counsel for the plaintiff referred to LAWSA, Vol 1, Second Edition, para. 558, in which the following is stated:

> 'The courts have accepted the severability of the arbitration clause both in the case of a contract terminated by accepted repudiation and of a voidable main agreement, but contrary to the position in other jurisdictions, have not been prepared to accept it in case of a void main contract.
>
> ....
>
> If it is alleged that the main contract is voidable, for example because of a misrepresentation, the dispute as to the alleged misrepresentation will be covered by an appropriately worded arbitration clause. The wording of the clause must nevertheless be sufficiently wide to cover such disputes and to indicate an intention that the clause should have a separate existence. Where the main contract is alleged to be void, the court has however categorically rejected the possibility of the arbitration clause having a separate existence, even where this was specifically provided for in that clause, which would be necessary to enable the arbitral tribunal to decide on the validity of the main contract.'

[20] The author appears to be critical of the approach by South African courts to void main contracts and refers to international trends, also in English law, to recognise the severability of an arbitration clause from an allegedly void main contract (see footnotes 10 and 12).

[21] In a case which was decided after the hearing in the instant matter, namely, *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) SA 1 (SCA) the South African Supreme Court of Appeals held that it was in principle possible for parties to agree that the question of the validity of their agreement would be determined by arbitration even though the reference to arbitration was part of the

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agreement being questioned — provided that they foresaw the possibility of such a dispute arising. Whether this was so would depend on a purposive construction of the arbitration clause itself and the agreement generally, having regard to the context of the agreement and what the parties probably intended. (Paragraphs [12] – [13], [16] – [18] and [20] – [23] at 5F – 6D, 7C – 8A and 8E – 9D.) I respectfully agree with this approach. In the instant matter there is no indication whatsoever that the parties intended that any dispute regarding the validity of the agreement itself should be referred to arbitration.

[22] For the above reasons the special plea must fail.

____(signed on original)________

K van Niekerk

Judge

APPEARANCE

For the plaintiff: Adv R Heathcote SC,

Assisted by Adv H Schneider,

Instr. by Van der Merwe-Greeff Inc.

For the defendant: Adv T C Phatela,

Instr. by Tjitemisa & Associates