REPUBLIC OF NAMIBIA **NOT REPORTABLE**

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between: Case no: I 1216/2015

TEICHMANN PLANT HIRE (PTY) LTD **PLAINTIFF/APPLICANT**

And

RCC MCC JOINT VENTURE **DEFENDANT/RESPONDENT**

Neutral citation: *Teichmann Plant Hire (Pty) Ltd v RCC MCC Joint Venture (I 1216-2015)*[2015] NAHCMD 278 (19 November 2015)

Coram: MILLER AJ
Heard: **21 September 2015**
Delivered: **19 November 2015**

Flynote: Summary judgment – Construction agreement containing arbitration clause – Arbitration Act, 42 of 1965 applicable – Court having discretion whether to stay the action or proceed with the claim – Such triable and arguable defence against summary judgment – Summary judgment dismissed.

ORDER

I accordingly make the following order:

1. The application for summary judgment is dismissed;
2. The defendant is granted leave to defend the action;
3. Costs shall be costs in the cause;
4. The matter is postponed to the **26th November 2015 at 15h30** for case planning conference.

JUDGMENT

MILLER AJ:

[1] The plaintiff in this matter is a company involved in road construction on the basis of tenders that may be awarded to it. The defendant is described as a joint venture between the Namibian Road Contractor Company limited (RCC) and MCC Communication Engineering Technology Co Ltd from China. RCC, as the employer, entered into the 'main contract' with the joint venture for the upgrading to bitumen standard of main road 125 between Singalamwe, Kongola, Linyanti and Liselo which was concluded during 2011. Part of the main contract was the 'plant hire contract' that was concluded between the plaintiff and the defendant wherein the former is contracted to work on the same road, from kilometre115.25 to Kilometre 186.6, in doing the necessary works up to the top of the base layer, including all priming and surfacing thereafter. The plaintiff was further required to provide personnel for the execution of its part of the main contract.

[2] The 'plant hire contract' was subjected to the terms of the main contract in that, inter alia, the execution had to be carried out according to the specifications incorporated in the main agreement; no design responsibility was given to the plaintiff; comply with the instructions from the engineer; right to cancel the works agreement if

breach is not cured within 10 days of being called upon to do so and that each partner of the defendant shall be jointly and severally liable to the plaintiff in respect of all liabilities arising out of the works contract. A once off fixed charge would be payable to the plaintiff in the amount of N$ 10 032 968.00.

[3] On 10 June 2014, a second contract, 'the hire contract' was entered into between the plaintiff and the defendant in terms of which the defendant hired equipment from the plaintiff. The express terms are that the equipment will generate rental income of a minimum 180 hours per month, excluding breakdown hours or when the equipment is not available. The parties further agreed that payment be made within 30 days of invoice date by bank transfer and interest shall be charged on overdue balances at the bank rate and 2% percent above prime overdraft rate. Breach under the hire contract entitles the innocent party to claim immediate payment of all amounts then due and payable.

[4] The plaintiff alleges that it has complied with all its obligations in terms of the works contract and the hire contract and that an amount of N$ 119 383 183.98 was payable to the plaintiff. The defendant paid the sum of N$ 64 538 630.43, leaving a balance of N$ 55 024 553.55. Accordingly, invoices reflecting the amounts were received and certificates in relation to the work done as well as time sheets acknowledging the correctness of the hours recorded were received and signed by Boet Pretorius (the defendant's contract manager). The defendant accordingly acknowledged its liability in writing on 8 January 2015 but despite demand, no payment has been received by the plaintiff. Interest is claimed on the prime overdraft rate of First National Bank Ltd *a tempoare morae.*

[5] The defendant entered its appearance to defend the claim on 30 April 2015 whereafter the plaintiff brought an application for summary judgment on the opinion that the defendant does not have a bona fide defence to the action and that the notice of intention to defend has been delivered solely for the purpose of delay. The opposing affidavit by the defendant to this application was filed late and since condonation was granted, the matter was subsequently heard.

Defence to the application for summary judgment

[6] The acting CEO of the defendant deposed to the affidavit opposing the granting of summary judgment. The defence raised can be summarized as follows:

a) That the amount reflected on the letter acknowledging liability is based on wrong calculation. Accordingly, the defendant only owes the amount of N$ 32 000 000 .00 whereas the plaintiff owes the defendant and amount of N$ 9 000 000.00.

b) That clause 14 restricts the parties to the agreements (works and hire contract') to refer any dispute first to arbitration in accordance with the Rules of the Association of Arbitrators (Southern Africa) in place at the date if the dispute arising. That such decision shall be final and no right of appeal accrues to any party. The deponent further relies on clause 6 that entitles any party to an arbitration agreement to seek a stay in any proceedings instituted in any court for the resolution of a dispute arising from the contract containing an arbitration clause.

[7] In addition, Counsel on behalf of the defendant, submitted that the defendant before court is wrongly cited and should be RCC MCC JOINT VENTURE (Pty) Ltd and that the current defendant was not party to the main contract that was entered into between the Roads Authority of Namibia (RAN) and RCC MCC JOINT VENTURE (Pty) Ltd. Counsel denies the authority of Mr Boet Pretorius to bind the defendant and that the invoices and the timesheets as well as the certificates would as a result be invalid. Counsel further disputes the validity of the purported letter by Mr Putter acknowledging liability on behalf of the defendant and that such does not constitute an unconditional acknowledgement of indebtedness upon which judgment can be granted.

[8] Counsel further submits that the particulars of claim is excipiable because the specifications in terms of the main contract is not attached to the particulars of claim as referred to and that some of the invoices attached, such as annexure C, F, H, I and G cannot easily establish the amount claimed.

[9] Counsel on behalf of the plaintiff submits that the plaintiff relies on the works done in terms of the Main contract as well as the Hire contract for the amounts due and not on the purported 'acknowledgment of debt'. Counsel stated that the delays relied on and the damages incurred by the defendant are irrelevant in light of the fact that time extensions were granted for the work to be completed. As regards Mr Putter, counsel submits that the decisions of the joint venture, which vests in the board, is represented by the CEO, and Mr Putter was the acting CEO. The Plaintiff disputes that a wrong party is before court and that the agreement does not contain any details of the RCC MCC JOINT VENTURE (Pty) Ltd which is alleged to have been before court and that such company is not part of these proceedings. The plaintiff accordingly sued the joint venture that paid the plaintiff.

[10] Counsel for the plaintiff did not address the defence raised as regards the arbitration clause in the agreement.

Effect of an Arbitration Clause in an agreement

[11] The defendant raised the defence that any dispute arising from the agreement between the parties shall be resolved through arbitration as contained in terms of clause 14 of the agreement which reads:

'**Dispute Resolution**

14.1 All disputes arising out of or in connection with this agreement shall be finally settled by arbitration in accordance with the Rules of the Association of Arbitrators (Southern Africa) current at the date of the dispute arising.

14.2 The arbitrator shall be a person mutually agreed upon and, in the absence of agreement within five working days of a party having declared its intention to have the dispute determined by arbitration, the arbitrator shall be appointed, at the written request of either party, by the Chairman of the Association of Arbitrators (Southern Africa), subject to the proviso that the arbitrator so appointed shall be a practicing senior counsel, a retired judge or an attorney with at least 15 years' experience in construction law, whether South African or Namibian.

14.3 The decision of the arbitrator shall be final and binding on the parties and there shall be no right of appeal against that decision.

14.4 The seat of the arbitration shall be Windhoek, and subject to the above provisions, the arbitration proceedings shall be conducted in accordance with the provisions of the Namibian Arbitration Act'

[12] Trans-national agreements have over the years included arbitration clauses in their agreements as an alternative dispute resolution mechanism. The effects of an arbitration clause are that a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute (say, as here, its obligation under a contract). But, where the party has agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value. However, the party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances.'[1] The Arbitration Act,42 of 1965 states that any legal proceedings instituted in any court against any other party to the agreement containing an arbitration clause must be stayed on application by either party and that the court may order such stay if there are no reasons why the dispute cannot be referred to arbitration.[2]

[13] In the case of *Telcordia Technologies Inc v Telkom SA Ltd*[3] the court emphasised on the effect of arbitration that firstly, arbitration proceeds from an agreement between parties who consent to a process by which a decision is taken by the arbitrator that is binding on the parties. Secondly, the arbitration agreement provides for a process by which the substantive rights of the parties to the arbitration are determined. Thirdly, the arbitrator is chosen, either by the parties, or by a method to which they have consented. Fourthly, arbitration is a process by which the rights of the parties are determined in an impartial manner in respect of a dispute between parties which is formulated at the time that the arbitrator is appointed.' In light of the constitutional principle that each party has right to access public courts, the court in this case stated that there is nothing to

[1] First Options of Chicago Inc v Kaplan 115 SCt 1920 (514 US 938).
[2] Section 6 of the Arbitration Act, 24 of 1965.
[3] 2007 (3) SA 266 (SCA) at 290I.

prevent parties from defining (at least in private consensual disputes) what is fair for purposes of their dispute but parties are left at liberty to regulate their lives by freely engaging in contractual arrangements.

[14] Intruding on apparently voluntarily concluded arrangements is therefore a step that judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties' individual arrangements.' Parties are therefore free to waive their constitutional rights by agreeing to arbitration and make the arbitration award binding, as in this case. Parties therefore agreed that the fairness of the hearing will be determined by the provisions of the Act and nothing else; they agree to waive the right of appeal, which in context means that they waive the right to have the merits of their dispute re-litigated or reconsidered. They may, obviously, agree otherwise by appointing an arbitral appeal panel, something that did not happen in this case.

[15] Lastly, by agreeing to arbitration, the parties limit interference by courts to the ground of procedural irregularities. When parties agree to refer a matter to arbitration, unless the submission provides otherwise, they implicitly, if not explicitly abandon the right to litigate in courts of law and accept that they will be finally bound by the decision of the arbitrator.[4] An arbitration clause does not oust the jurisdiction of the Court and is no automatic bar to legal proceedings in respect of disputes covered by the agreement The court has a discretion whether to call a halt to the proceedings to permit arbitration to take place or to tackle the disputes itself.[5]

[16] The plaintiff did not discharge its onus as regards the enforceability of the arbitration clause in the agreement and no fact has been placed before court to contradict to put the validity of the arbitration clause in question. As such, I am inclined to hold the parties to their agreement. I’m therefore persuaded that the defendant has a bona fide defence against the plaintiff’s application for summary judgment.

[4]Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd 1994 (1) SA 162 (A) at 169H-G.
[5] Parekh v Shah Jehan Cinemas (Pty) Ltd 1980 (1) SA 301 (D - C) at 305G - H).

[17] I accordingly make the following order:

5. The application for summary judgment is dismissed;

6. The defendant is granted leave to defend the action;

7. Costs shall be costs in the cause;

8. The matter is postponed to the **26th November 2015 at 15h30** for case planning conference.

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Miller, AJ

Acting

APPEARANCE

Plaintiff	R Heathcote, SC, C van der Westhuizen
Instructed by:	Andreas Vaatz & Partners, Windhoek
Defendant	G Coleman, R Maasdorp
Instructed by:	AngulaCo. Inc, Windhoek.