

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2017/03148

In the matter between:

OPUWO TOWN COUNCIL

PLAINTIFF

and

DOLLY INVESTMENTS CC

DEFENDANT

Neutral Citation: *Opuwo Town Council v Dolly Investments CC* (HC-MD-CIV-ACT-CON-2017/03148) [2018] NAHCMD 309 (24 September 2018)

CORAM: PRINSLOO J

Heard: 03 September 2018

Delivered: 24 September 2018

Reasons: 27 September 2018

Flynotes: Contract – Arbitration clause – Whether peremptory or discretionary in nature as formulated in the agreement entered into between the parties.

Summary: The parties in this matter entered into a building contract agreement – What came up for consideration by this court is the special plea of arbitration raised by the defendant as a defence against the plaintiff's damages claim against the defendant for breach of contract – The plaintiff is of the view that the arbitration clause is worded in a discretionary nature whereas the defendant submits that the dispute must proceed to arbitration, staying the present proceedings.

ORDER

Special plea is upheld with costs.

JUDGMENT

PRINSLOO J:

[1] The parties before me entered into a written agreement wherein the defendant undertook to design, manufacture and construct a close storm water system and the work to be done were subject to specifications as per the agreement and as per instructions of an engineer.

[2] It is alleged that the defendant failed to perform as per the written agreement and the plaintiff instituted proceedings against the defendant with the following prayers:

- a) for payment of monies paid to the defendant as advance payment for the work to be concluded by the defendant under the written contract between the parties;
- b) for payment of monies necessary for the construction of the remainder of the works, resulting from the defendant's alleged repudiation of the contract and subsequent vacating of the work site.

[3] In opposition, the defendant filed a special plea for the plaintiff's action to be stayed pending the final determination of the dispute in terms of the written agreement under clause 20 thereof, providing for the conditions of contract for construction and dispute arising out of the terms of the agreement to be settled by a Dispute Adjudication Board (DAB).

Contentions of the parties

On behalf of the Defendant

[4] The defendant relied on clause 20 of the written agreement which clauses specifically made the following provisions:

Clause 20.2

'Disputes shall be adjudicated by a Dispute Adjudication Board (DAB) in accordance with sub-clause 20.4. the parties shall jointly appoint a DAB by the date stated in the Appendix to Tender...'

Clause 20.4

'If a dispute (of any kind whatsoever) arises between the parties in connection with or arising out of, the contract or the execution of the works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either party may refer the dispute in writing to the DAB for its decision...'

Clause 20.6

'Unless settled amicably, any dispute in respect of which DAB's decision (if any) has not become final and binding shall be finally settled by International Arbitration...'

[5] As the defendant is of the view that the plaintiff's claim arises out of the execution of the contract, the aforementioned clauses for dispute resolution should be applied over the plaintiff's claim.

[6] The defendant cites *Teichman Plant Hire (Pty) Ltd v RCC MCC Joint Venture* (11216-2015) NAHCMD 278 wherein Miller AJ stated that arbitration clauses, voluntarily entered into by the parties, relinquish most of the rights of access to public courts. The defendant further cites *Trustco Group International (Pty) Ltd v The Namibian Rugby Union* (I 12781/2010) 2014 NAHCMD 169 at para 9 wherein Van Niekerk J enunciated that a party who wishes to rely on an arbitration clause may bring an application to stay the proceedings in terms of s 6 of the Arbitration Act 42 of 1965 or raise a special plea defence that the plaintiff's action should be stayed, pending the outcome of the arbitration.

[7] The defendant submits that as per s 6 of the Arbitration Act, an application for stay of legal proceedings must be granted by a court in the event that the agreement, upon which the cause of action is based, contains an arbitration clause which is applicable to the dispute and further that valid reasons compelling the court not to grant the order are not provided. The defendant further submits that if this court is to grant the special plea, the parties would then proceed as per the agreement in a step by step order to undergo the arbitration process as outlined in the agreement.

[8] In concluding, the defendant argues that at the time of the plaintiff's termination of the agreement the defendant was on site fulfilling its obligations as per the agreement and as such the plaintiff's termination of the agreement was unlawful and therefore the argument advanced on behalf of the plaintiff the entire agreement falls away, including the arbitration clause does not hold water.

On behalf of the Plaintiff

[9] The plaintiff is of the view that the agreement between the parties was terminated and where there is not provision catering for the survival of certain clauses in an agreement, the entire agreement falls away as a consequence. In the result, the plaintiff submits that the defendant cannot rely on arbitration clause in a contract that is no longer existent.

[10] The plaintiff cites *Telecall (Pty) Ltd v Logan* 2000 (2) SA 782 (SCA) wherein Plewman JA stated that:

'I conclude that before there can be a reference to arbitration a dispute, which is capable of proper formulation at the time when an arbitrator is to be appointed, must exist and there cannot be an arbitration and therefore no appointment of an arbitrator can be made in the absence of such a dispute. It also follows that some care must be exercised in one's use of the word "dispute". If for example the word is used in a context which shows or indicates that what is intended is merely an expression of dissatisfaction not founded upon competing contentions no arbitration can be entered upon'.

[11] With the above, the plaintiff submits that the defendant in this matter merely alleges a dispute and demands referral to arbitration but omits to formulate the dispute, thus failing to make out a case for referral.

[12] Furthermore, the plaintiff submits that the defendant relied on arbitration clauses as mentioned above in this judgment that do not support its referral to arbitration in that the clauses mentioned required positive acts by the parties to be concluded first, (i.e. the appointment of a DAB in clause 20.2 and the discretionary nature of the wording in clause 20.4 that either party may refer a dispute to arbitration) and as a result, the arbitration clauses relied on by the defendant cannot be enforced at this stage.

The law applicable and application to the facts

[13] A party wishing to rely on an arbitration clause must allege and prove the underlying jurisdictional facts¹. In the matter *in casu* this onus rests on the defendant as the party who raises the special plea.

[14] In Harms, *Amler's Precedents of Pleadings* (7th ed) p38, the following are said to be the required jurisdictional facts:

¹ *Goodwin Stable Trust v Duohex (Pty) Ltd* 1998 (4) SA 606 (C) 615D-F.

- (a) the existence of the arbitration clause or agreement, which must be in writing (but not necessarily signed)²;
- (b) that the arbitration clause or agreement is applicable to the dispute between the parties³;
- (c) that there exists a dispute between the parties, which dispute must be demarcated in the special plea⁴;

It is not necessary for the defendant to allege a readiness or willingness to arbitrate⁵ and

- (d) that all the preconditions contained in the agreement for commencing arbitration have been complied with⁶.

[15] However, on the other hand the party resisting the stay-of-court proceedings bears the onus of convincing the court that owing to exceptional circumstances the stay should be refused. In other words, courts will enforce an agreement to arbitrate unless there are compelling reasons to order otherwise⁷. Courts, as a general rule, must refer matters which have arbitration clauses to arbitration if agreements so provide. In *Umso Construction Pty Ltd v Bk Investments Holdings (Pty) Ltd*⁸, the following was stated at para 7 of the judgment –

'The onus is on the respondent to satisfy the court that it should not in its discretion refer the matter to arbitration - . . . A court will only refuse to refer the matter to arbitration where a very strong case has been made out - . . .'

² *Mervis Brothers v Interior Acoustics* 1999 (3) SA 607 (W).

³ *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); *tocks Construction (OFS) (Pty) Ltd v Metter-Pingon (Pty) Ltd* [1980] 1 All SA 326 (A), 1980 (1) SA 507 (A).

⁴ *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).

⁵ *Stanhope v Combined Holdings & Industries Ltd* 1950 (3) SA 52 (E).

⁶ *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).

⁷ Harms, *Amler's Precedents of Pleadings* (7th ed) p39.

⁸ (5541/2011) [2012] ZAFSHC 141 (10 August 2012).

[16] What should be born in mind is that arbitrations do not automatically bar legal proceedings. Didcott J in *Parekh v Shah Jehan Cinemas (Pty) Ltd & Others* 1980 (1) SA 301 at 305 had this to say:

'While the arbitration is in progress, the Court is there whenever needed to give appropriate directions and to exercise due supervision. And the award of an arbitrator cannot be enforced without the Court's imprimatur, which may be granted or withheld. But that is by no means all. Arbitration itself is far from an absolute requirement, despite the contractual provision for it. If either party takes arbitrable disputes straight to Court, and the other does not protest, the litigation follows its normal course, without pause. The check it, the objector must actively request a stay of the proceedings. Not even that interruption is decisive. The Court has discretion whether to call a halt for arbitration or to tackle the dispute itself... Throughout, its jurisdiction, though, sometimes latent, thus remains intact'.

[17] There is an issue between the parties as to the interpretation of the contract. More specifically in respect of the appointment of a DAB in clause 20.2 and the discretionary nature of the wording in clause 20.4 that either party may refer a dispute to arbitration.

[18] Wessels CJ said the following in respect of the interpretation of contracts in *Scottish Union & National Insurance Company Ltd v Native Recruiting Corporation Ltd* 1934 AD 458 at 465:

'We must gather the intention of the parties from the language of the contract itself, and if that language is clear, we must give effect to what the parties themselves have said; and we must presume that they knew the meaning of the words they use. It has been repeatedly decided in our Courts that in construing every kind of written contract the Court must give effect to the grammatical and ordinary meaning of the words used therein. In ascertaining this meaning, we must give to the words used by the parties there plain, ordinary and proper meaning, unless it appears clearly from the contract that both parties intended them to bear a different meaning. If, therefore, there is no ambiguity in the words of the contract, there is no room for a more reasonable interpretation than the words themselves convey. If, however, the ordinary sense of the words necessarily leads to some absurdity or some repugnance or inconsistency with the rest of the contract, then the Court may modify the words just so much as to avoid that absurdity

or inconsistency but no more . . .'

[19] Having the above in mind, I agree with the submissions by the plaintiff that the defendant may have relied on the wrong clauses to refer the dispute to arbitration but it does not detract from the fact that clause 20.8 of the agreement entered into by the parties provides that:

'If a dispute arises between the parties in connection with, or arising out of, the contract or the execution of the works and there is no DAB in place, whether by reason of the expiry of the DAB's appointment or otherwise:

- a) Sub-clause 20.4 (Obtaining Dispute Adjudication Board's Decision) and Sub-clause 20.5 (Amicable Settlement) shall not apply, and
- b) The dispute may be referred directly to arbitration under Sub-clause 20.6 (Arbitration).'

[20] The argument advanced by the defendant in that once the referral to arbitration is granted, the parties are to follow the procedural steps as outlined in the agreement to undergo arbitration proceedings does not sit well practically. Clause 20.2 provided that the parties had to appoint a DAB in order to adjudicate disputes arising between the parties and this clause was framed in a mandatory fashion with the word "shall". Consequently, it turned out the parties failed to do for reasons not provided by either party to this court and it begs the question whether this court is in a position to force the parties to do what they agreed as per the agreement entered into between the parties. Consequently, it seems as though either party may have relied on this clause to halt any proceeding instituted in this court in order to comply with the arbitration clauses once the need for it arose, in this case being the defendant.

[21] It is common practice that building contracts always contain arbitration clauses and the practice directions under PD 19 also make provision for building contract claims to be referred to alternate dispute resolution. Generally, one would opine that the arbitration clauses and referral to alternate dispute resolution aims at affording the parties the opportunity to resolve their disputes expeditiously and cost effectively.

Running a trial for a dispute that could have been arbitrated effectively therefore defeats the purpose of judicial case management and overriding objectives that this court aims for.

[22] As per clause 20.2 of the agreement entered into between the parties, a DAB would then have to be established and an adjudicator will have to be appointed and the parties will then naturally be required to formulate the dispute in order for the adjudicator to effectively adjudicate the dispute. If this is to be so, would it not further run up the costs of this dispute between the parties where this court is all terms and purposes already seized with the matter?

[23] An arbitrator well versed with building contracts or an arbitrator with considerable experience in the building industry might be in a better position to analyze the dispute between the parties and reach a conclusion quicker and more effectively wherein the parties can consent to. In those circumstances, it would then be practical to refer the matter to arbitration. What makes this decision easier is the fact that the parties themselves failed to adhere to the provisions of the agreement they themselves voluntarily entered into and clause 20.2 was one such clause that required the parties to positively comply with.

[24] This court has a discretion whether to call a halt to the proceedings to permit arbitration to take place or to tackle the disputes itself.⁹ I am however satisfied that the defendant has proven the underlying jurisdictional fact in that the arbitration clause exists in the agreement between the parties and that the arbitration clause relates to the dispute between the parties, i.e. the completion of work as set out in the agreement. The dispute between the parties was clearly delineated in the special plea and even though clause 20.2 was not positively complied with the parties can still be referred directly to arbitration.

⁹ *Parekh v Shah Jehan Cinemas (Pty) Ltd* 1980 (1) SA 301 (D - C) at 305G - H).

[25] The plaintiff was unable to convince me that there are any exceptional circumstance or compelling reasons which would cause the court to refuse the stay pending the outcome of the arbitration.

[27] The result is therefore that the dispute must be referred for arbitration and plaintiff's action must be stayed pending the outcome thereof.

[28] For these reasons, I make the following order:

Special plea is upheld with costs.

J S Prinsloo
Judge

APPEARANCES:

FOR THE PLAINTIFF:

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of Dr Weder, Kauta & Hoveka Inc., Windhoek.

FOR THE DEFENDANT:

N Shilongo

of Sisa Namandje & Co Inc., Windhoek.