

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-OTH-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-OTH-2017/03148) [2018] NAHCMD 389 (23 November 2018)

CORAM: PRINSLOO J

Heard: 19 November 2018

Delivered: 23 November 2018

Reasons: 29 November 2018

Flynotes: Practice – Leave to appeal – On the facts – Arbitration clause – Appellant of the view that the court misinterpreted the agreement as entered into between the parties – Court to determine the intention of the parties in respect of the inclusion of the arbitration clause in the agreement entered into between the parties.

Summary: Appellant filed an application for leave to appeal against the judgment delivered by this court dated 24 of September 2018 and the reasons released on the 27th of September 2018. The appellant raised four grounds of appeal, which in a nutshell indicate that this court erred in upholding the arbitration clause wherein the plaintiff submits the concerned agreement was repudiated by the respondent.

The appellant was ultimately of the view that this court misdirected itself by entertaining an order for specific performance by forcing the parties to comply with the terms of their agreement and thereafter order the alleged dispute to direct arbitration, which is contrary to the agreement between the parties. On this score, the appellant avers that this court effectively wrote a new agreement between the parties.

The respondent is of the view that this court considered the intention of the parties when they entered into the agreement and avers that this court correctly concluded that arbitration clauses and referral to alternative dispute resolution aim at affording the parties the opportunity to resolve their dispute expeditiously and cost effectively. The respondent avers that this court exercised its discretion correctly and referred the matter to arbitration and further that even though the arbitration clause was not positively complied with, the parties can still be referred directly to arbitration.

Held – arbitration is a process whereby the parties to the dispute enter into a formal agreement that an independent and impartial third party, the arbitrator, chosen directly or indirectly by the parties, will hear both sides of the dispute and make an award which the parties undertake through the agreement to accept as final and binding.

Held – Where a contract is dissolved or cancelled by mutual consent, the rights and obligations of both parties to the contract are brought to an end and neither party is left with any claim against the other arising from the contract. Any submission to arbitration contained in the contract is generally speaking also dissolved or cancelled. However, even in the case of consensual termination of a contract which includes an arbitration clause, the arbitration clause will still be operative in relation to disputes *which arose out of or in relation to the agreement*, and where both parties had intended that the arbitration clause should operate even after the agreement itself was at an end in relation to that class of dispute.

Held further – In dealing with an application for leave to appeal, I do not believe that another court might come to a different conclusion on the grounds raised. In my view, the applicant was unable during the hearing of this application to demonstrate that there are prospects of success on appeal on the grounds raised.

ORDER

Application for leave to appeal is refused with costs.

RULING

PRINSLOO J:

Introduction

[1] This court delivered its ruling in this matter on the 24th of September 2018 and consequently released its reasons on the 27th of September 2018. It is the reasons as released by this court that brings rise to the application for leave to appeal to the Supreme Court as filed by the appellant. It is trite that for leave to appeal to be granted,

it must be in accordance with s 18 of the High Court Act and the appellant specifically brings the application for leave to appeal in terms of s 18 (3) of the High Court Act which provides that:

'(3) No judgment or order where the judgment or order sought to be appealed from is an interlocutory order or an order as to costs only left by law to the discretion of the court shall be subject to appeal save with the leave of the court which has given the judgment or has made the order, or in the event of such leave to appeal being refused, leave to appeal being granted by the Supreme Court.'

[2] For purposes of this ruling, I will briefly summarize the submissions by both parties and apply the law to facts in this case.

Submissions on behalf of the appellant

[3] The appellant addresses the aspect on whether the judgment made by this court or the order made in the judgment as indicated in paragraph one of this judgment is final and submits that the question is complicated by the fact that this court referred or postponed the matter to a status hearing, after holding that this court had no jurisdiction to hear the matter because an arbitrator is fit to hear this matter instead. The appellant submits that this is further complicated by this court's ruling that construction matters should be referred to arbitration. The appellant reasons that this ought to have ruled that it has jurisdiction over the dispute and thereafter refer it to arbitration in terms of its rules. With this in mind, the appellant now addresses the following grounds of appeal.

Grounds of appeal

[4] The appellant submits that as a first ground of appeal, the respondent in its plea on the merits denies breach of the agreement but admitted repudiation and termination of the construction agreement. The appellant submits that it is trite law that an admission disposes proof. The appellant avers that this admission is fatal to the respondent's reliance on the arbitration clause and further that the respondent cannot

rely on any terms of the agreement it repudiated especially in circumstances where the agreement itself has no clause severing and surviving the arbitration clause.

[5] With the above, the appellant submits that this court misdirected itself in fact and in law by accepting the *ipsissima verba* of the respondent's counsel from the bar that the respondent was on site fulfilling its obligations and further another submission from the bar that the appellant's termination of the agreement was unlawful.

[6] As a second ground of appeal, the appellant submits that the referral of the matter to arbitration by this court opens a defence to the respondent that the arbitrator lacks jurisdiction to arbitrate the dispute. The appellant avers that an arbitrator cannot determine a dispute between the parties when one of the parties alleges that the contract was repudiated and cancelled. On this score, the appellant submits that an arbitrator has no jurisdiction to determine the validity of the cancellation of the contract, because in doing so, he would be forced to determine his own jurisdiction, which is impermissible in law. The appellant submits that a party may not repudiate a contract and at the same time seek the advantage of a stipulation in the very contract it has repudiated.

[7] As a third ground of appeal, the appellant submits that this court agreed with the appellant that the respondent relied on the wrong clause to refer the matter to arbitration, however, the appellant submits that this court then proceeded to amend the respondent's plea by reading the necessary clause into its plea without the mandatory requirements of Rule 52. On this score, the appellant submits that a party must stand and fall on its pleadings and with the fact that the respondent relied on the wrong clause, this court misdirected itself by reading into the respondent's plea the correct clause. The appellant avers that this court was only required to determine whether, the plea filed and the clauses the respondent relied on in the special plea were adequate to oust the jurisdiction of this court.

[8] As a fourth ground of appeal, the appellant submits that this court misdirected itself by entertaining an order for specific performance by forcing the parties to comply with the terms of their agreement and thereafter order the alleged dispute to direct arbitration, which is contrary to the agreement between the parties. On this score, the appellant avers that this court effectively wrote a new agreement between the parties.

Submissions on behalf of the respondent

[9] The respondent submits that this court summarized the submissions by both parties and that this court never accepted the version of the respondent from the bar as alleged but rather summarized the arguments presented. On this score, the respondent submits that this court never amended the respondent's plea but rather considered the applicable clauses as per the agreement entered between the appellant and the respondent as a whole and give it judicial interpretation.

[10] The respondent further submits that this court considered the intention of the parties when they entered into the agreement and that this court equated the arbitration clause to PD 19 which makes provision for building contract claims to be referred to alternative dispute resolution. The respondent avers that this court correctly concluded that arbitration clauses and referral to alternative dispute resolution aim at affording the parties the opportunity to resolve their dispute expeditiously and cost effectively. The respondent avers that this court exercised its discretion correctly and referred the matter to arbitration.

[11] The respondent further submits that the appellant misdirected itself by alleging that this court relied solely on the arbitration clause of the agreement. The respondent avers that this court correctly found under paragraph 24 of the judgment, that the respondent proved that the underlying jurisdictional facts in that the arbitration clause exists in the agreement between the parties and that the arbitration clause relates to the dispute between the parties. The respondent further avers that this court correctly found that the dispute between the parties was clearly delineated in the special plea and

further that even though the arbitration clause was not positively complied with, the parties can still be referred directly to arbitration.

[12] The respondent further submits that it is trite law, as reflected in the judgment by this court, that the applicable criteria for the successful reliance of a party on an arbitration clause is that such party must prove:

- a) The existence of a written arbitration clause/agreement which is concluded between the parties to the dispute;
- b) The arbitration clause applies to the dispute between the parties;
- c) A dispute between the parties exists and such dispute has been delineated in the special plea raised by the respondent and
- d) That the requisites for commencing arbitration have been fulfilled.

[13] On the above, the respondent avers that that appellant will not have prospects of success in the Supreme Court on this point as it failed to state exceptional circumstances why the stay of proceedings should be stayed.

[14] In addressing the appellant's submission that the agreement concluded between the parties contain no clause severing the arbitration provision from the rest of the agreement and in circumstances where the agreement is null and void due to the cancellation by the appellant and the alleged repudiation by the respondent, the respondent submits by virtue of the holding in *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd*,¹ the question of the validity of an arbitration clause which comes into doubt as a result of the contract's validity being in doubt may be adequately and competently addressed at arbitration proceedings.

¹ 2013 (5) SA 1 (SCA).

The law applicable

[15] As a general overview, arbitration is a process whereby the parties to the dispute enter into a formal agreement that an independent and impartial third party, the arbitrator, chosen directly or indirectly by the parties, will hear both sides of the dispute and make an award which the parties undertake through the agreement to accept as final and binding.²

[16] In *Fiona Trust & Holding Corporation & others v Privalov & others* [2007] 4 All ER 951 (HL), Lord Hoffman put it this way:

'Arbitration is consensual. It depends on the intention of the parties as expressed in their agreement. Only the agreement can tell you what kind of disputes they intended to submit to arbitration. But the meaning which parties intended to express by the words which they used will be affected by the commercial background and the reader's understanding of the purpose for which the agreement was made. Businessmen in particular are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language.'

[17] In the present matter, the appellant states that the respondent, who relied on the arbitration clause, cannot do so in light of it having repudiated the agreement. Looking at s 3 of the Arbitration Act 42 of 1965, it provides that:

(1) Unless the agreement otherwise provides, an arbitration agreement shall not be capable of being terminated except by consent of all the parties thereto.

(2) The court may at any time on the application of any party to an arbitration agreement, on good cause shown-

² Ramsden, P. 2009. "*The Law of Arbitration: South African & International Arbitration*". Cape Town: Juta, pg. 5.

- (a) set aside the arbitration agreement; or
- (b) order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or
- (c) order that the arbitration agreement shall cease to have effect with reference to any dispute referred.'

[18] Primarily, what the above provision indicates is that an arbitration agreement is a distinct and separate contract, surviving the ending of the obligation of the parties to perform the primary obligations created by the main contract or the termination of the main contract.³

[19] This concept has been described in the case of *South African Transport Services v Wilson NO and Another* 1990 (3) SA 333 (W) at 341E – G as a *self-contained contract collateral or ancillary* to the main agreement which remains *in esse* (in being) even if the main agreement (in which it was contained) was terminated for any reason.

[20] Where a contract is dissolved or cancelled by mutual consent, the rights and obligations of both parties to the contract are brought to an end and neither party is left with any claim against the other arising from the contract.⁴ Any submission to arbitration contained in the contract is generally speaking also dissolved or cancelled.⁵ However, even in the case of consensual termination of a contract which includes an arbitration clause, the arbitration clause will still be operative in relation to disputes *which arose out of or in relation to the agreement*, and where both parties had intended that the arbitration clause should operate even after the agreement itself was at an end in relation to that class of dispute.⁶

³ Ramsden (2009: p. 46).

⁴ Ramsden (2009: p. 47).

⁵ *Atteridgeville Town Council and Another v Livanos t/a Livanos Brothers Electrical* 1992 (1) SA 296 (A).

⁶ *Gardens Hotel (Pty) Ltd and Others v Somadel Investments (Pty) Ltd* 1981 (3) SA 911 (W).

[21] In *Scriven Bros v Rhodesian Hides & Produce Co Ltd and Others*,⁷ an argument was presented that on cancellation of a contract, the contract lost all efficacy and was of no further force and effect. Incidentally, the case dealt with an arbitration clause and the attempt to circumvent the operation of the dispute resolution clause which gave rise to the following dictum:

'But the heads of argument of Mr de Villiers, who appeared for Scrivens in this Court, make the point that the company repudiated the contract *in toto* and was therefore not entitled to avail itself of the arbitration clause, the claim and the counterclaim going to the root of the contract. The fallacy underlying this contention is the assumption that a repudiation of a contract (in the sense of a refusal to continue performance under it) by one party puts the whole contract out of existence. It is true that a repudiation of a contract by one party may relieve the other party of the obligation to carry out the other terms of the contract after the date of repudiation, but the repudiation does not destroy the efficacy of the arbitration clause. The real object of that clause is to provide suitable machinery for the settlement of disputes arising out of or in relation to the contract, and as that is its object it is reasonable to infer that both parties to the contract intended that the clause should operate, even after the performance of the contract is at an end. If, for example, this contract had come to an end on a date stipulated for its termination I do not think it could have been contended successfully that the arbitration clause was no longer operative. So, too, it seems to me, that when the contract is prematurely terminated by repudiation by one of the parties, the arbitration clause is still operative. When such repudiation takes place it may or may not be justified; whether it is justified or not will be a question of difference arising out of or in relation to the contract.'

[22] By incorporating an arbitration clause in their contract both parties hereto for all intents and purposes recognized arbitration as an effective means of solving any disputes that could arise.

[23] In light of the relevant case law referred to, I am the opinion that arbitration clause is still very much alive between the parties.

⁷ 1943 AD 393 at 401.

[24] In dealing with an application for leave to appeal, the court must caution itself against the temptation to deal with the application as if it was the appeal court, for this would have the undesirable effect of pre-judging the outcome of the appeal. However, having considered the grounds of appeal, I do not believe that another court might come to a different conclusion on the grounds raised. In my view, the applicant was unable during the hearing of this application to demonstrate that there are prospects of success on appeal on the grounds raised.

[25] In the result, I then make the following order:

- a) Application for leave to appeal is refused with costs.

J S Prinsloo
Judge

APPEARANCES:

FOR THE PLAINTIFF:

V Kauta

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

FOR THE DEFENDANT:

N Shilongo

of Sisa Namandje & Co Inc., Windhoek.