

IN THE HIGH COURT OF NAMIBIA

Case Title: RIVOLI NAMIBIA (PTY) LTD vs SALINI NAMIBIA (PTY) LTD	Case No: HC-MD-CIV-ACT-CON-2018/02271
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: Honourable Mrs Justice Rakow, AJ	Date of hearing: 04 November 2019.
	Date of order: 04 December 2019
Neutral citation: <i>Rivoli Namibia (Pty) Ltd vs Salini Namibia (Pty) Ltd</i> (HC-MD-CIV-ACT-CON-2018/02271) [2019] NAHCMD 528 (04 December 2019)	
<p>Having read the record of proceedings as well as submissions made by counsels for the applicants and the respondent:</p> <p>IT IS HEREBY ORDERED THAT:</p> <p>a) The special plea is upheld with costs, costs to include the costs of one instructing and one instructed counsel.</p> <p>Reasons for orders:</p> <p><u>Background</u></p> <p>[1] The parties entered into an equipment lease agreement whereby the plaintiff would lease equipment to the defendant that are in good working conditions for a period of time as per the agreement. The parties performed as per the agreement and when the period of use came to an end, the defendant returned the equipment to the plaintiff. Upon inspection by the plaintiff, the equipment were found not to be in the same condition as given to the defendant at the commencement of the contract. The equipment were damaged in varying scales and the costs of repair thereto were calculated by the plaintiff to reach the areas of N\$ 3 879 667.36.</p>	

[2] The defendant failed to remedy the shortcomings in the machine despite demand and as a result of the breach of its obligations by the defendant, the plaintiff has suffered damage in the amount of N\$ 3 879 667.36.

[3] The defendant defended the plaintiff's claim and during case management, the parties have gone as far as filing a draft pre-trial order. However, the draft pre-trial raised an issue of law whether this court has jurisdiction to hear the matter and whether the defendant submitted to this court's jurisdiction by filing its pleas prior to challenging the jurisdiction of this court in this matter. This is further premised on the special plea of arbitration raised by the defendant's amended plea in reference to Article 14 of the lease agreement as entered into between the parties.

[4] The long and short of the matter is that the plaintiff forms the view that the defendant cannot rely on Article 14 of the lease agreement on the premises that the defendant filed its plea and as a result thereof, submitted to the jurisdiction of this court as opposed to having the matter referred to arbitration in Italy as per the agreement. The defendant, however, submits that a party may introduce any valid legal point at stage in the pleadings, provided that the other party has a decent opportunity to respond and counter such argument.

[5] Seemingly, the aspect surrounding the referral of the matter to arbitration only came about when the defendant amended its amended plea, as filed on 16 November 2018, after having filed its plea initially on 31 July 2018 and amending such plea and filing such on 09 September 2018. Whether it can be deduced that the defendant came to a realization of the arbitration clause in the agreement, as an afterthought, would perhaps be too speculative an exercise for this court to do. However, the parties and this court now find themselves in the current position, wherein a ruling is required by this court on the way forward in this matter.

[6] It is common cause that Article 14 of the lease agreement as entered into between the parties contains an arbitration clause, wherein it provides that:

'Any dispute arising out of or in connection with this Assignment Agreement shall be settled in accordance with the Rules of the Chamber of Arbitration of Milan (the "Rules"), by three arbitrators, appointed in accordance with the Rules. The seat of arbitration proceedings shall be the city of Milan (Italy). The language of the arbitration and final award shall be English. The arbitral award shall be final and binding on the Parties.'

[7] Herbstein and Van Winsen¹ says the following regarding special plea or defence where step in the proceedings has been taken:

'If a step other than giving of notice of intention to defend has been taken or, in cases where the proceedings are not initiated by way of illiquid summons but in some other way, the application for stay is not made in *initio litis* but the merits are dealt with, the defendant or respondent will lose the right to apply for a stay under the Arbitration Act, but will still be entitled to raise the objection by way of a special plea or by way of a defence. ... They accordingly do not deprive a party of the common-law right to plead a condition to submit to arbitration....'

[8] Furthermore, Article 13 of the lease agreement provides that the agreement is governed and construed in accordance with the laws of Italy, neither incorporating nor excluding the jurisdiction of this court in clear concise terms, leaving same to subjective interpretation.

[9] In *Fiona Trust & Holding Corp and Others v Privalov and Others* Lord Hoffmann stated the following:

'In my opinion 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. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.'

[10] It is trite that a court has discretion to refer a matter to arbitration wherein the agreement between the parties makes provision for such. In *Umso Construction Pty Ltd v Bk Investments Holdings (Pty) Ltd*³ 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 - . . .'

[11] In *Opuwo Town Council v Dolly Investments CC*⁴ Prinsloo J said the following:

¹ The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa, 5th edition, Volume 1, 2009 at page 331.

² [2007] 4 All ER 951 (HL) ([2007] UKHL 40).

³ (5541/2011) [2012] ZAFSHC 141 (10 August 2012).

⁴ (HC-MD-CIV-ACT-CON-2017/03148) [2018] NAHCMD 309 (24 September 2018).

'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. 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.'

[12] The plaintiff in this matter has however not shown why the court should exercise its discretion in their favour as it is not enough to say that this court should not refer the matter to arbitration as per the agreement by simply because the defendant has pleaded. The plaintiff was unable to convince the court that there is any exceptional circumstance or compelling reasons which would cause the court to refuse the stay pending the outcome of the arbitration.

In the result, I make the following order:

The special plea is upheld with costs, costs to include the costs of one instructing and one instructed counsel.

E Rakow
Acting Judge

Judge's signature	Note to the parties:
	Not applicable.
Counsel:	
Plaintiff	Respondent
<i>Mr du Pisani</i> <i>Du Pisani Legal Practitioners</i>	<i>Mr Boesak</i> <i>On instruction of ENSafrica Namibia Inc.</i>