REPUBLIC OF NAMIBIA NOT REPORTABLE

HIG COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: HC-MD-CIV-ACT-CON-2018/03205

In the matter between:

RADIAL TRUSS INDUSTRIES (PTY) LTD **PLAINTIFF**

and

SAMUEL MEKONDJO SHIPEFI **FIRST DEFENDANT**

NDAHAFA SHIPEFI **SECOND RESPONDENT**

Neutral citation: *Radial Truss Industries (Pty) Ltd v Shipefi* (HC-MD-CIV-ACT-CON-2018/03205) [2020] NAHCMD 434 (16 September 2020)

Coram: UEITELE J
Heard: 14 September 2020
Delivered: **16 September 2020**
Reasons: **23 September 2020**

Flynote: *Arbitration* - Reference of dispute to arbitration - Contract containing arbitration clause terminated by each party's acceptance of the other's repudiation - Whether arbitration clause survived termination of contract - Reasonable to infer that parties intended arbitration clause to operate even after primary obligation to perform had ended - Arbitration clause not terminated by lapsing of contract.

Rules of Court –Rule 32 (11) – whether it applies to cases where a special plea has been raised and decided in terms of the ceiling of costs applicable thereunder.

Summary: On 20 April 2015, the plaintiff and the first and second defendants entered into a service level agreement in terms of which the plaintiff would construct a dwelling for the defendants on Erf 2239, Stockholm Street Otjomuise, Extension 4, Windhoek, Republic of Namibia.

A dispute arose between the plaintiff and the defendant and as a result of the dispute the plaintiff through its legal practitioners, addressed a letter to the first and the second defendants requesting them to submit the dispute and the plaintiff's claim to arbitration as contemplated in clause 9 of the agreement. The defendants did not respond to the call by the plaintiffs for the parties to submit the dispute and the claim to arbitration as contemplated in clause 9 of the agreement, and as a result which the plaintiff issued summons out of this Court against the defendants claiming payment in the amount of N$ 242 957-80 for breach of contract.

The defendants, upon receipt of the summons, gave notice of their intention to defend the claim instituted by the plaintiff. The defendants also filed their plea and in their plea to the plaintiff's particulars of claim, the defendants raised a special plea (of arbitration) and pleaded that the plaintiff's action must be stayed pending arbitration. The plaintiff replicated and pleaded that the dispute resolution mechanism (clause 9 of the agreement) is not a bar to instituting legal proceedings and this clause does not oust the High Court's jurisdiction to hear the matter.

Held that the issue is not whether the jurisdiction of the High Court is ousted but simply what the effect of their agreement is.

Held that the parties agreed in an unequivocal and peremptory terms that disputes between them which cannot be resolved amicably between them must be referred to arbitration. By including clause 9 and agreeing to arbitration, the parties agreed not to litigate, but to submit to arbitration.

Held further that the real object of the arbitration clause was to provide suitable machinery for the settlement of disputes between Radial Truss Industries (Pty) Ltd and the Shipefis arising from the agreement, and it is reasonable to infer that all the parties intended its provisions to operate even after their primary obligations to perform had come to an end. The arbitration clause consequently survived the cancellation of the agreement.

Held furthermore that, the general rule is that agreements must be honoured and parties will be held to them unless they offend against public policy which would not arise in an agreement to arbitrate of the kind in question.

Held furthermore that, the special plea raised by the defendants was sought to quash the entire claim and was not raised as an interim or temporary measure but, was geared towards having the entire case indirectly dismissed, even though not on the merits. Therefore, the special plea in this matter is not interlocutory and not subject to Rule 32(11).

ORDER

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a) The special plea of arbitration raised by the first and second defendants is upheld.

b) The plaintiff must pay the defendants' costs, including the costs of one instructed and one instructing counsel but limited to 50% of the costs so incurred.

c) The matter is finalised and is removed from the roll.

REASONS FOR RULING

UEITELE J:

Introduction

[1] The plaintiff in this matter is a company, with limited liability duly incorporated and registered in terms of the relevant company laws of the Republic of Namibia, by the name of Radial Truss Industries (Pty) and the first and second defendants are a couple married in community of property. The first defendant is the husband, Samuel Mekondjo Shipefi, and the second defendant is the wife, Ndahafa Shipefi.

[2] This matter raises the age old question of the importance that Courts must

accord to agreements concluded between parties. In *Barkhuizen v Napier,*[1] Ngcobo J said *'Pacta sunt servanda is a profoundly moral principle, on which the coherence of society relies'*[2] The Supreme Court[3] articulated the principle in the following words:

'[28] The notions of *'law, morality and public policy'* by which the legality of contracts is assessed accommodate the regulation of contractual freedom by legislation lawfully enacted…. freedom of contract is indispensable in weaving the web of rights, duties and obligations which connect members of society at all levels and in all conceivable activities to one another and gives it structure. On an individual level, it is central to the competency of natural persons to regulate their own affairs, to pursue happiness and to realise their full potential as human beings.' Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity.'

Background

[3] In order to understand the setting in which the dispute between the parties in this matter arose, I find it necessary to briefly sketch the facts giving rise to the question that this Court is called upon to determine. The brief background facts are these: On 20 April 2015, the plaintiff and the first and second defendants entered into a service level agreement (I will, in this judgment and for ease of reference, refer to the service level agreement as the 'agreement'), in terms of which the plaintiff would construct a dwelling for the defendants on Erf 2239, Stockholm Street Otjomuise, Extension 4, Windhoek, Republic of Namibia.

[4] A dispute has arisen between the plaintiff and the defendant, the plaintiff alleges that it complied with all its obligations under the agreement in that it completed the construction of the dwelling on Erf 2239 Otjomuise Extension 4, Windhoek. The plaintiff continued and alleged that the defendants breached the terms and conditions of the agreement in that they failed to pay the amount of N$ 242 957-80 as stipulated in the tax invoice dated 30 March 2016. The defendants, on the other hand, deny that the plaintiff has complied with its part of the bargain. They alleged that the plaintiff has not completed the construction of the dwelling and some of the work performed by the plaintiff is allegedly defective. As a result of the dispute between them, each party

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1 *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

2 Ngcobo J for the South African Constitutional Court at para 87.

3 In the matter *African Personnel Services (Pty) Ltd v Government of the Republic of Namibia and others* 2009 (2) NR 596 (SC) at para 28.

claims to have cancelled the agreement.

[5] The plaintiff claims that it cancelled the agreement on 06 February 2018. After cancelling the agreement, the plaintiff, through its legal practitioners, addressed a letter to the first and the second defendants requesting them to submit the dispute and the plaintiff's claim to arbitration as contemplated in clause 9 of the agreement. The defendants did not respond to the call by the plaintiffs for the parties to submit the dispute and the claim to arbitration. The plaintiff's response to the defendants' silence or non-response was to issue summons out of this Court claiming; payment in the amount of N$ 242 957-80, interest on that amount and costs of suit from the defendants.

[6] The defendants, upon receipt of the summons, gave notice of their intention to defend the claim instituted by the plaintiff. The defendants also filed their plea and in their plea to the plaintiff's particulars of claim, the defendants raised a special plea and that is the special plea that this Court is called upon to consider.

The defendants' special plea.

[7] The defendants' couched their special plea in the following terms:

'1. The Plaintiff relies, for its cause of action, on annexure "A" attached on its particulars of claim.

1.1 Annexure A is written agreement between the parties, which *inter alia* provides under clause 9.1 that "in the event of any dispute arising out of, in connection with this agreement or its interpretation such dispute must be resolved between the parties by arbitration".

2. Notwithstanding the above peremptory provisions of annexure A", the plaintiff instituted action in the High Court in respect of a dispute arising from and in connection with annexure "A".

In the premises the Defendants' pleads that the Plaintiff's action must be stayed with costs pending arbitration.'

[8] The plaintiff replicated to the defendants' special plea and pleaded as follows:

'The plaintiff joins issue with the Defendant with other allegations contained in the plea and in particular the dispute resolution mechanism are not a bar to instituting legal proceedings and this clause does not oust the High Court's jurisdiction to hear the matter.'

The issue

[9] After the parties exchanged pleadings, the Court, in terms of rule 26, held a pre-trial conference on 10 February 2020 at which Conference the Court adopted the parties jointly proposed pre-trial order. The issue for determination is then crystallised in the Pre-trial order and is set out as follows:

'Whether the arbitration clause in terms of the Service Level Agreement between the parties precludes the Plaintiff from instituting legal proceedings in the matter, as it did during August 2018.'

[10] Against the background sketched above, I now turn to consider the arguments that were advanced by the parties.

The parties' positions

[11] Mr Chibwana who appeared for the defendants, argued that clause 9 of the agreement is an agreement to refer any dispute between them to arbitration. He submitted that clause 9 of the agreement is not ambiguous and is to the effect that all disputes must be determined by way of arbitration. He continued and argued that the Supreme Court in *Namibia Wildlife Resort (Pty) Ltd v Ingplan Consulting Engineers and Project Managers and Another*[4] authoritatively laid down the legal principle that as a general rule, agreements must be honoured and parties will be held to them unless they offend against public policy.

[12] Ms Kavitjene, who appeared for the plaintiff, on the other hand, argued that

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4 *Namibia Wildlife Resort (Pty) Ltd v Ingplan Consulting Engineers and Project Managers and Another* 2019] NASC 584 (12 July 2019) at paras. 26 – 29.

both the plaintiff and the defendant each claim to have terminated the agreement, thereby resiling from it. Arising from this situation, Ms Kavitjene contended that, irrespective of which party had justifiably cancelled the agreement, the parties were *ad idem* that the agreement had come to an end. The legal relationship between them had accordingly been dissolved, and the arbitration clause had fallen away. The resulting situation, so Ms Kavitjene argued, is analogous to one where a contract containing an agreement to arbitrate is terminated by mutual consent.

[13] Counsel further argued that the *Namibia Wildlife Resort (Pty) Ltd v Ingplan Consulting Engineers and Project Managers and Another* matter is distinguishable from the present matter on the basis that the agreement in the *Namibia Wildlife Resort (Pty) Ltd* case had a clause (clause 9.6) which specifically provided for the severance of the arbitration clause from the rest of the agreement, whereas in the present matter, the agreement does not have a severance clause. Clause 9.6 of the agreement in the *Namibia Wildlife Resort (Pty) Ltd* provides as follows:

'9.6 The "arbitration" clause in this agreement shall be severable from the rest of this agreement and therefore shall remain effective between the parties after this agreement has been terminated.'

Did the arbitration clause survive the termination of the agreements?

[14] The starting point in this dispute is the interpretation one places on clause 9 of the agreement.[5] In the Zimbabwean case of *Scriven Bros v Rhodesia Hides &*

[5] Clause 9 of the agreement reads as follows:

'[9] DISPUTE RESOLUTION

9.1 In the event of any dispute arising out of or in connection with this Agreement or its interpretation, such dispute shall be resolved between the Parties by arbitration as set out hereunder.

9.2 The dispute shall be finally resolved by such arbitration, which shall be subject to the conditions set out hereunder:

9.2.1 The arbitration shall be held in Windhoek in a summary manner, in accordance with the agreed form Arbitration Rules.

9.2.2. The arbitration shall be held immediately with a view of being completed within 21 (twenty-one) business days after it is demanded.

9.2.3 The arbitration shall be held in terms of the applicable Namibia arbitration laws.

9.2.4 There shall be one arbitrator only, who shall be an independent person, and who shall be, if the person is:-

a) Primary an accounting matter, an independent practising chartered accountant in Namibia with not less than five(5) years practical experience in private practice;

b) Primary a legal matter, a legal practitioner in Namibia or South Africa with no less than 5 (five) years practical experience in the field of laws;

c) Any other matter, an appropriately qualified independent person agreed upon

Produce Co & Others,[6] the then Appellate Division quoting from the speech of Viscount SIMON, L.O., in the English case of *Heyman v Darwins Ltd*[7] said:

'An arbitration clause is a written submission, agreed to by the parties to the contract, and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made. If the dispute is as to whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void ab initio (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself is also void.

If, however, the parties are at one in asserting that they entered into a binding contract, but a difference has arisen between them as to whether there has been a breach by one side or the other, or as to whether circumstances have arisen which have discharged one or both parties from further performance, such differences should be regarded as differences which have arisen 'in respect of', or 'with regard to', or 'under' the contract, and an arbitration clause which uses these, or similar, expressions, should be construed accordingly.'

[15] In the present matter, the parties agreed in unequivocal and peremptory terms that disputes between them which arise out of or in connection with the agreement and which cannot be resolved amicably between them must be referred to arbitration. By including clause 9 and agreeing to arbitration, the parties agreed not to litigate, but to submit to arbitration. The Supreme Court said:

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by the Parties.

9.2.5 If within 7 (seven) business days after arbitration has been demanded unanimous agreement cannot be reached between the parties on the identity of the arbitrator shall be a legal practitioner with not less than 5 (five) years practical experience in private practice agreed upon between the parties or, falling agreement, appointed by the President for the time being of Law Society of Namibia.

9.2.6 The arbitrator shall decide the matter submitted to him according to the laws of Namibia, which shall include the aspect of cost of the arbitration. The arbitrator shall conduct the arbitration in accordance with the agreed form Arbitration Rules contained in **Schedule c.**

9.2.3 The Parties irrevocably agree that the decision in the arbitration proceeding shall be final and binding on the parties, and shall be carried into effect by all the parties and may be made an order of any court of competent jurisdiction in Namibia.'

6 *Scriven Bros v Rhodesia Hides & Produce Co & Others* 1943 AD 393

7 *Heyman v Darwins Ltd.* (1942, A.E.R. 337).

'By so agreeing to arbitration, the parties exercised their contractual freedom to define how disputes between them are to be resolved – by arbitration, and not to litigate their disputes.'

[16] In the matter of *Atteridgeville Town Council and Another v Livanos t/a Livanos Brothers Electrical,*[8] Smalberger JA quoting from the case of *Scriven Bros v Rhodesia Hides & Produce Co & Others* said:[9]

'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 that 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.'

[17] To paraphrase what I have said in the preceding paragraphs and what was said in the quotation from *Scriven's* case, the real object of the arbitration clause was to provide suitable machinery for the settlement of disputes between Radial Truss Industries (Pty) Ltd and the Shipefis arising from the agreement, and it is reasonable to infer that all the parties intended its provisions to operate even after their primary obligations to perform had come to an end. The arbitration clause consequently survived the cancellation of the agreement and as the Supreme Court said, the general rule is that agreements must be honoured and parties will be held to them unless they offend against public policy which would not arise in an agreement to arbitrate of the kind in question.

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

9 *Supra* footnote 6.

[18] Ms Kavitjene sought refuge in the fact that when the plaintiff realised that a dispute arose, it, through its legal practitioners, addressed a letter to the defendants entreating them to submit to arbitration. She said her clients' (the plaintiff) approach to refer the matter to arbitration was met by a wall of silence, thus justifying and entitling them to approach this Court. The short answer to this argument is that Clause 9 (particularly clause 9.2.5) of the agreement does make provision for the eventuality complained of by the plaintiff, therefore there is no merits in Ms Kavitjene's argument.

[19] In conclusion on this question, the manner in which the legal practitioners for the plaintiff framed its replication to the special plea raised by the defendants is testimony to the fact that the legal practitioners either did not understand or read the Supreme Court's judgement in the *Namibia Wildlife Resort* matter. In that judgement the Court said:

> 'Mr Barnard made much of the finding by the High Court that it lacks jurisdiction and contended that the High Court retains its jurisdiction to determine a valid referral to arbitration. This submission is correct. An agreement to arbitrate would not deprive the High Court of jurisdiction in respect of a dispute, particularly when it relates to the validity of a referral. Whilst an agreement to arbitrate would not be an automatic bar to court proceedings, as the High Court understood matters, a respondent facing such proceedings may raise a special plea of arbitration, as was raised by Ingplan to part B of the application. It was rightly upheld. But this did not mean that the court would have no jurisdiction but rather that it correctly declined it, given the agreement to arbitrate and arbitration rule.'

[20] From the above quotation, it is abundantly clear that the issue is not whether the jurisdiction of the High Court is ousted but simply what the effect of their agreement is. What is now left is the question of costs. And it is to it that I now turn.

Costs

[21] At the close of arguments, I asked counsel to address me on the question of whether or not the costs in this matter are subject to Rule 32 (11). Mr Chibwana, as could be expected, argued that because the parties litigated '*full steam'* up to the trial stage, there is therefore no justification to limit the costs in the matter as contemplated under Rule 32(11). Ms Kavitjene, on the other hand, argued that what the Court dealt

with is the interlocutory application and the costs must thus be curb as contemplated under rule 32(11).

[22] The question of whether or not a special plea is an interlocutory matter or not came up for determination in the matter of *Uvanga v Steenkamp & Others*[10] where Masuku J held that a special plea is capable of being dispositive of the entire cause of action between the parties, a characteristic that does not normally attach to interlocutory proceedings, which normally deal with preliminary issues that do not go to the essence of the core issues in dispute. He continued and said:

'…a special plea can either be dilatory or peremptory. In the instant case, the plea of *locus standi* was not dilatory but peremptory as it sought to quash the proceedings altogether. It could not, in the circumstances, be said to interlocutory and preparatory in nature, as it were, and dedicated to deciding side issues, necessary to be put to bed before the determination of the actual cause of action. Interlocutory proceedings remove temporary impediments and conduce to the hearing of the real issues raised in the cause of action.

[19] On the other hand, the Black's Law Dictionary, defines 'interlocutory' as meaning 'interim or temporary, not constituting a final resolution of the whole controversy.' I am of the considered view that the special plea in this matter was sought to quash the entire claim and the fact that it was dismissed does not detract from the its intended effect. More importantly, in my view, it was not raised as an interim or temporary measure but, as stated, was geared towards having the entire case indirectly dismissed, even though not on the merits…. In the premises, I am of the considered view that the special plea raised in this matter was not, as held by the Taxing Officer, an interlocutory application within the meaning of rule 32.'

[23] In this matter, the special plea raised by the defendants also sought to quash the entire claim and was not raised as an interim or temporary measure but, as stated, was geared towards having the entire case indirectly dismissed, even though not on the merits. I am thus of the view that the decision or rationale arrived at by Justice Masuku reflects the correct legal position and the special plea in this matter is therefore not interlocutory and not subject to Rule 32(11).

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[10] *Uvanga v Steenkamp & Others (I 1968/2014) [2016] NAHCMD 378 (2 December 2016) at paras [16]- [18].*

[24] The basic rule is that, except in certain instance where legislation otherwise provides, all awards of costs are in the discretion of the court[11] It is trite that the discretion must be exercised judiciously with due regard to all relevant considerations. The court's discretion is a wide, unfettered and equitable one.[12]

[25] There is also, of course, the general rule, namely that costs follow the event, that is, the successful party should be awarded his or her costs. This general rule applies unless there are special circumstances present.

[26] In the exercise of my discretion, one factor that I took into account is the overriding objectives of the Rules of this Court, which amongst others, are to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable by saving costs and ensuring that cases are dealt with expeditiously and fairly.[13]

[27] In my view, had the defendants applied to the Managing Judge early in the proceedings to determine the special plea, a lot of costs and time (in my view more than 50% of the costs) would have been saved in this matter. I therefore am of the view that the defendants are only entitled to no more than 50 % of the costs they incurred in this matter.

Conclusion

[28] For the above reasoning, I make the following order:

a) The special plea of arbitration raised by the first and second defendants is upheld.

b) The plaintiff must pay the defendants' costs, including the costs of one instructed and one instructing counsel but limited to 50% of the costs so incurred.

c) The matter is finalised and is removed from the roll.

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[11] *Hailulu v Anti-Corruption Commission and Others* 2011 (1) NR 363 (HC) and *China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd v Pro Joinery CC* 2007 (2) NR 674.

[12] See *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045.

[13] Rule 1(3) of the High Court Rules.

UEITELE S F I
Judge

APPEARANCES:

PLAINTIFF:	C KAVITJENE Of Tjombe & Elago Inc. Windhoek
1st & 2nd DEFENDANTS:	T CHIBWANA Instructed by Sisa Namandje Inc Windhoek