

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title: O & L Leisure (Pty) Ltd // Kelanna Investment CC T/A Chicago's Pub & Grill	Case No: HC-MD-CIV-ACT-CON-2020/01118
	Division of Court: High Court
Heard before: Honourable Mr Justice Ndauendapo	Delivered on: 25 February 2021
Neutral citation: <i>O & L Leisure (Pty) Ltd v Kelanna Investment CC T/A Chicago's Pub & Grill</i> (HC-MD-CIV-ACT-CON-2020/01118) [2021] NAHCMD 107 (25 February 2021)	
The order: <ol style="list-style-type: none">1. The special plea is upheld.2. The action is stayed pending the resolution of the dispute by arbitration.3. The matter is referred to arbitration as per clause 39 of the lease agreement. The defendants shall be the referring party as per clause 39.3.4. The matter is postponed to 29 April 2021 at 14h15 for status hearing.	
<u>Introduction</u> [1] The plaintiff instituted action against the defendants claiming payment of arrear rental and other monies, confirmation of cancellation of the lease agreement and ejection of the defendants from the premises. The defendants opposed the action and	

raised a special plea to the effect that the matter must be referred to arbitration.

Background facts

[2] The plaintiff, O&L Leisure (Pty) Ltd a private company with limited liability incorporated in accordance with the applicable laws in Namibia, entered into a lease agreement with the first defendant, Kellanna investment cc t/a Chicago's Pub & Grill, a close corporation incorporated in accordance with the applicable laws in Namibia and the second defendant, Brownwine Faradipa Morris, an adult business person, whereby the plaintiff let Shop1 Kaiser Krohne, Erf 1171, Post street Mall, Windhoek for a period of 3 (three) years, commencing on 1 June 2019 and terminating on 31 May 2022. The following amounts were, *inter alia*, payable by the First Defendant to the plaintiff in terms of the lease agreement: (a) Monthly basic rental in an amount N\$106.00/m²; (b) monthly operating costs in an amount of N\$20.00/m. The second defendant bound herself as surety and co-principal debtor with the first defendant, for the due and proper fulfilment of the obligations of the first defendant, in terms of the lease agreement between first defendant and the plaintiff.

[3] The plaintiff alleges that the defendants are in breach of the agreement for failing to pay the rent and other amounts, seeks confirmation of the cancellation of the lease agreement and ejection of the first defendant and employees from the premises and damages from the defendants. The defendants entered an appearance to defend the action. They filed a special plea in the following terms:

Defendants' special plea – Arbitration

[4] ' On 18 April 2019 the parties concluded a lease agreement, which is marked "C" to the plaintiff's Amended Particulars of Claim. Clause 39 of the lease agreement provides for the resolution of disputes between the parties and defines dispute in its widest sense to include 'any dispute or difference in connection with or in respect of the conclusion or existence of the agreement, the carrying into effect of this agreement, the interpretation or application of the provisions of this agreement, the parties' respective rights and obligations in terms of and arising out of this agreement, including also (but not limited in any matter whatsoever) the Landlord's right to evict the Tenant, the claim payment of any amounts payable in accordance with the provisions of the agreement (including any holding-over), the determination of any amounts payable, to claim payment of recoveries, to relocate the Tenant, to terminate this agreement in case of redevelopment and/or renovation and/or upgrading of the premises or the Building and to effect any alterations or additions to the premises or the Building, as well as in respect of the

validity, enforceability, rectification, termination or cancellation, whether in whole or in part, of this agreement...’

[5] Sub-clause 39.10 of the lease agreement stipulates that clause 39 ‘constitutes an irrevocable consent by the parties to the arbitration proceedings provided herein and none of the parties shall be entitled to withdraw from the provisions of this clause or claim at any such proceedings that it is not bound by this clause or such proceedings.

[6] The plaintiff seeks confirmation of the cancellation of the lease agreement and to evict the defendant from the property, the dispute in the present matter accordingly falls within the category of disputes defined in the lease agreement.

[7] The plaintiff did not refer the matter to arbitration.’

Submissions by defendants

[8] Counsel submitted that the lease agreement provides for the matter to be referred to arbitration as per. clause 39 (10). The arbitration clause does not oust the jurisdiction of the court, but the plaintiff must plead exceptional circumstances why this court must hear the matter, but that was not done. (See: *Union of Stellenbosch v Louw* (EDMS) (Bpk) 1983 (4) SA 32(A), Counsel argued that the jurisdictional facts are present for the defendant to succeed with the special plea, and they are:

- (a) Arbitration clause in writing
- (b) Arbitration clause applicable between the parties.
- (c) That there is a dispute existing between the parties.

(d) That all preconditions contained in the agreement for commencing arbitration have been complied with.(See: *Trustco Group International (Pty) Ltd v The Namibia Rugby Union* (I 2781-2010) [2014] NAHCMD 169 (27 May 2014), para 10 read with para 14)

[9] Counsel submitted that there is an arbitration clause 39 which is applicable between the parties, there is a dispute between the parties: cancellation and ejection; claim for unpaid rental and claim for damages. The dispute is sufficiently set out in the particulars of claim and fall squarely within the disputes to be referred to arbitration. According to counsel the parties ‘irrevocable’ agreed to arbitration and that was the intention of the parties and therefore the special plea must succeed.

Submissions by plaintiff

[10] Counsel argued that the defendants must set out the dispute in the special plea in order to refer the matter to arbitration. What is set out in the special plea is the characterization of the plaintiff's claim. There is no dispute formulation in the special plea. The defendants' failure to pay rental does not automatically translate into a "dispute". They do not inform the court what exactly their dispute is.

[11] Counsel argued that referring the matter to arbitration is an election: "Either one" if you want you can refer to arbitration – is an election. It is not compulsory. The parties consented to the jurisdiction of this court. At its sole discretion the plaintiff may institute proceedings the arbitration clause is not mandatory. Once the election is exercised to refer the matter to arbitration, then clause 39 kicks in, then the party's irrevocable consent to arbitration and neither party must withdraw from arbitration.

[12] Counsel argued that before the plaintiff is called to raise exceptional circumstances then the defendant must first comply with jurisdictional factors as set out in *Trustco*.

Discussion

[13] The heading to the arbitration clause is styled: '*Dispute resolution*' and what constitutes disputes are set out in clause 39(1) of the lease agreement. It reads:

' for the purpose of this Clause, the term "dispute" will be interpreted in its widest sense and shall include any dispute or difference in connection with or in respect of the conclusion or existence of the agreement, the carrying into effect of this agreement, the interpretation or application of the provisions of this agreement, the parties' respective rights and obligations in terms of and arising out of this agreement, including also (but not limited in any manner whatsoever) the Landlord's right to evict the Tenant, to claim payment of any amounts payable in accordance with the provisions of the agreement (including any holding-over), the determination of any amounts payable, to claim payment of recoveries, to relocate the Tenant, to terminate this agreement in case of redevelopment and/or renovation and/or upgrading of the premises or the building and to effect any alterations or additions to the premises or the building, as well as in respect of the validity, enforceability, rectification, termination or cancellation, whether in whole or in part, of this agreement...'(Emphasis provided)

So, there is no doubt as to what constitute a dispute in terms of clause 39(1).

Clause 39.2 provides 'anyone of the parties will be entitled to refer a dispute to arbitration in accordance with the provisions of this clause 39'.

Clause 39.10.1 provides 'the provisions of this clause 39 constitutes an irrevocable consent by the parties to the arbitration proceedings provided herein and none of the parties shall be entitled to withdraw from the provisions of this clause or claim at any such proceedings that it is not bound by this clause or such proceedings.'

[14] In Amler's precedents of pleadings (7th Ed) p38 and *Trustco*, supra, the following are said to be the required jurisdictional facts:

(a) The existence of the arbitration clause or agreement, which must be in writing (but not necessarily signed); *Mervis Brothers v Interior Acoustic* 1999 (3) SA 607 (W).

(b) That the arbitration clause or agreement is applicable to the dispute between the parties; *Kathmer Investments (Pty) Ltd v Woolworths* [1970] 2 All SA 570 (A), 1970 (2) SA 498 (A).

(c) That there exists a dispute between the parties, which dispute must be demarcated in the special plea.

(d) That all the preconditions contained in the agreement for commencing arbitration have been complied with.

[15] 'The onus of satisfying the court that it should not, in the exercise of its discretion, refer the matter to arbitration is on the party who instituted legal proceedings, In *Universiteit van Stellenbosch v J A Louw* (Edms) Bpk 1983 (4) 321,p 333 H the court said:

[16] 'The court has a discretion whether to call a halt for arbitration or to tackle the dispute itself' P 305G 1980(1).'

[17] Clause 39 clearly sets out which disputes can be referred to arbitration. They include claim to recover arrear rental, termination of the agreement and eviction, and that

is exactly the relief that the plaintiff seeks. From the particulars of claim and from the reading of clause 39 (1) the disputes are clearly demarcated and which disputes must be referred to arbitration. Clause 39.1 clearly states that the parties “irrevocable consent” to arbitration. It is clear that by inserting the arbitration clause in the lease agreement, the intention of the parties was that disputes arising from the agreement should be referred to arbitration.

[18] The defendants have clearly established the jurisdictional requirements as set out in *Trustco*. Even if I am wrong (which is denied), the court has a discretion to either refer the matter to arbitration or to hear the matter. I exercise my discretion in favor of referring the matter to arbitration as a way of resolving the matter expeditiously and less costly.

[19] Order

1. The special plea is upheld.
2. The action is stayed pending the resolution of the dispute by arbitration.
3. The matter is referred to arbitration as per clause 39 of the lease agreement. The defendants shall be the referring party as per clause 39.3.
4. The matter is postponed to **29 April 2021** at **14h15** for status hearing.

G.N. NDAUENDAPO	
JUDGE	
For the Plaintiff: Mr J. Diedericks Of Michelle Saaiman Incorporated Windhoek	For the Defendants: Ms Uno Katjipuka (together with R Mondo) Of Nixon Markus Law Chambers Windhoek