



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
RULING**

Case no: HC-MD-CIV-ACT-DEL-2020/00381

In the matter between:

SIMON PETRUS KASHUPULWA EKANDJO

PLAINTIFF

And

O'B DAVIDS PROPERTIES CC

DEFENDANT

Neutral citation: *Ekandjo vs O'B Davids Properties CC* (HC-MD-CIV-ACT-DEL-2020/00381) [2021] NAHCMD 448 (01 October 2021)

Coram: SIBEYA J

Heard: 13 SEPTEMBER 2021

Delivered: 01 OCTOBER 2021

Flynote: Arbitration - Reference of dispute to arbitration – court not convinced that exceptional circumstances were raised to prevent the court from referring the matter to arbitration as per the agreement – special plea upheld.

Summary: This court was called upon to determine a narrow issued between the parties, whether to have the matter referred to arbitration as per clause 15 of the agreement entered into between the parties. After submissions by counsel for the parties, the court was however not convinced that exceptional circumstances existed for this court not to refer the matter to be arbitration. Subsequently, the special plea as raised by the defendant is upheld.

ORDER

1. The special plea is upheld with costs, such costs to include the costs of one instructing and one instructed counsel.
 2. The action is stayed pending arbitration proceedings in terms of clause 15 of the Sale and Building Agreement.
 3. The matter is postponed to 07 December 2021 for status hearing to record the outcome of arbitration.
 4. Parties must file a joint status report on or before 02 December 2021.
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REASONS FOR RULING

SIBEYA J:

Introduction

[1] Before me is an opposed application sought by the defendant to have the arbitration clause enforced in terms of the agreement entered into with the plaintiff.

[2] The plaintiff is Simon Petrus Kashupulwa Ekandjo, an adult male employee of Ohorong Cement. The defendant is O'B Davids Properties CC, a close corporation duly incorporated in terms of the Close Corporations Act 26 of 1988 with its registered address situate at the corner of Hosea Kutako Road and John Meinert Street, Windhoek. The plaintiff and the defendant will be referred to herein as such, and jointly as the parties.

Background

[3] The plaintiff alleges that the parties entered into a partly oral and partly written agreement for the purchase of an erven the construction of a residential house on such erven. The parties agreed that the plaintiff will pay for the purchase of the erven and the construction of the property while the defendant will construct the property on

the erven. The plaintiff alleges that he paid the defendant for the purchase of the erven and the construction of the property. The defendant constructed the property not in a workmanship manner and left the property with material defects which made occupation of the property unsuitable. Despite several promises to attend to the defects, the defendant did not remedy the defects notwithstanding being notified of same.

[4] The plaintiff claims that as a result of the poor workmanship and persistent failure to rectify the defects, the plaintiff instituted this action for damages suffered.

[5] The defendant has arsenal in its string and seeks to invoke the arbitration clause by means of a special plea based on clause 15 of the agreement between the parties. The plaintiff opposes the special plea on the basis that the dispute between the parties is based on damages which he sustained due to material breach of the agreement between the parties.

[6] The plaintiff in essence does not dispute that the agreement contains an arbitration clause but rather pleads that same is not compulsory when regard is had to the basis of the plaintiff's claim against the defendant and the interpretation of clause 15 of the agreement. The plaintiff further takes the position that the damages claim is far and beyond the circumference of clause 15.

Analysis

[7] Clause 15 of the agreement entered into between the parties, states as follows:

“In the event of a difference of opinion arising between the parties in respect of the buildings, the amount due to the developer, the measurement thereof, in the event of it being necessary to measure and value the same, or in the event of an alteration or any other matter which relates to the building of the dwelling, then it is agreed that the dispute shall be referred to the architect who shall be appointed in terms of the Arbitration Act Number 42 of 1965 or any amendment thereof and his decision shall be final and binding on the developer and the Purchaser”.

[8] The main reasons for the plaintiff to oppose the referral of the dispute between the parties to arbitration are that:

- a) The claim is based on damages sustained by the plaintiff due to a material breach of the agreement, which is breach of a contractual obligation.
- b) The claim is based on pecuniary damages sustained by the plaintiff for monies paid to the defendant for work which was not done in a proper and workmanship manner.
- c) The cause of action on which the claim is based falls outside the scope of the arbitration clause of the agreement.

[9] The law on arbitration clauses is trite and in Amler's precedents of pleadings (7th Ed) at p 38 and as was held in the matter of *Trustco Group International (Pty) Ltd v The Namibia Rugby Union*,¹ the following are said to be the required jurisdictional facts for the special plea of arbitration to be successfully raised:

- (a) That there must be in existence the arbitration clause or agreement, which must be in writing (but not necessarily signed);²
- (b) That the arbitration clause or agreement must be applicable to the dispute between the parties;³
- (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 has been complied with.

[10] Mr Coetzee who appeared for the plaintiff submitted that the claim in question does not falls within the category of matters where clause 15 finds application. I further understood Mr Coetzee to submit that the jurisdictional facts referred to above for the arbitration clause to be present were not met in

¹*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),*

² See also *Mervis Brothers v Interior Acoustic* 1999 (3) SA 607 (W).

³ See also *Kathmer Investments (Pty) Ltd v Woolworths* [1970] 2 All SA 570 (A), 1970 (2) SA 498 (A).

this matter. Mr Diedericks who appeared for the defendant submitted to the contrary. The parties therefore locked horns on the applicability or not of clause 15 to the matter before.

[11] I am cognisant of the fact that the court, as is generally practice, must refer matters which have arbitration clauses to arbitration, if agreements so provide. In *Umso Construction Pty Ltd v Bk Investments Holdings (Pty) Ltd*,⁴ 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 - . . .’

[12] The Supreme Court in *Namibia Wildlife Resort (Pty) Ltd v Ingplan Consulting Engineers and Project Managers and Another*,⁵ while discussing the binding effect of an arbitration clause in an agreement between the parties, said the following:

‘[26] ...The parties agreed in 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 not to litigate, save that the parties would not be precluded by clause 9 from seeking interim relief from the High Court as was expressly reserved to the parties in clause 9.7 (and by the Arbitration Act⁶).

[27] 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. As was made clear by this court:

‘... (F)reedom of contract is indispensable in weaving the web of rights, duties and obligations which connect members of society at all levels and in all inconceivable activities to one another and gives it structure. On an individual level, it is central to the competence 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.” For juristic persons, it is the very essence of their existence and the means through which they engage in transactions

⁴ *Umso Construction Pty Ltd v Bk Investments Holdings (Pty) Ltd* (5541/2011) [2012] ZAFSHC 141 (10 August 2012).

⁵ *Namibia Wildlife Resort (Pty) Ltd v Ingplan Consulting Engineers and Project Managers and Another* (SA-2017/55) [2019] NASC 584 (12 July 20019).

⁶ Act 42 of 1965.

towards the realisation of their constituent objectives.⁷

[28] As was also said by Ngcobo J for the South African Constitutional Court in *Barkhuizen v Naper*⁸ and approved by this court⁹:

'*Pacta sunt servanda (sic)* is a profoundly moral principle, on which the coherence of society relies'

[29] 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.'

[13] It is interesting to note that the submissions by the plaintiff are mainly that the relief sought does not fall within the ambit of the arbitration clause.

[14] Clause 15, as cited above, clearly indicates that "... In the event of a difference of opinion arising between the parties in respect of the buildings, the amount due to the developer, ... or any other matter which relates to the building of the dwelling, then the matter should be referred to an architect who will consider the dispute between the parties.

[15] It is apparent that clause 15 is in writing and it is applicable to the existing dispute between the parties. From the reading of clause 15 (the clause that refers to arbitration proceedings), no preconditions surface therein except for compliance with the Arbitration Act.

[16] The onus rests with the party who claims the inapplicability of the arbitration clause to the matter to satisfy the court that, in the exercise of its discretion, it should not refer the matter for arbitration. In *casu*, it is the plaintiff who bears such onus.

[17] It is clear that the plaintiff seeks relief arising from a breach of a contractual obligation, specifically being pecuniary damages sustained by the plaintiff for monies paid to the defendant for work which was not done in a proper and workmanlike manner. The ordinary interpretation of the words used in the arbitration clause goes

⁷ *African Personnel Services (Pty) Ltd v Government of the Republic of Namibia and Others* 2009 (2) NR 596 (SC) at para 28.

⁸ *Barkhuizen v Naper* 2007 (5) SA 323 (CC) at para 87.

⁹ *Old Mutual Life Assurance Company (Namibia) Ltd v Symington* 2010 (1) NR 239 (SC) at para 26.

hand in hand with the facts that brings rise to the activation of the arbitration clause, being the difference in opinion of the amounts due and paid to the developer, and a difference in opinion in respect of the buildings, being the work not done in a property and in a workmanlike manner, which further falls within the reference to any other matter which relates to the building of the dwelling.

[18] It is not rocket science to realise that clause 15 refers to disputes in relation to the property, as it covers disputes in respect of the buildings and the money owed to the developer. Most importantly the clause further provides that it extends to any other matter which relates to the building.

[19] Considering the above, this court finds it very difficult to determine how the relief sought falls outside the ambit and scope of the arbitration clause when in fact it is a claim that bears the marks of the building written all over it. I harbour no doubt that the plaintiff's claim in is respect of the building and befits the terms of clause 15.

Conclusion

[20] As a result, the plaintiff was unable to establish that there are any exceptional circumstances or compelling reasons which would cause the court to refuse the stay of the proceedings pending the outcome of the arbitration.

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

1. The special plea is upheld with costs, such costs to include the costs of one instructing and one instructed counsel.
2. The action is stayed pending arbitration proceedings in terms of clause 15 of the Sale and Building Agreement.
3. The matter is postponed to 07 December 2021 for status hearing to record the outcome of arbitration.
4. Parties must file a joint status report on or before 02 December 2021.

O S SIBEYA

Judge

APPEARANCES

FOR THE PLAINTIFF : P COETZEE
P D THERON AND ASSOCIATES

FOR THE DEFENDANT : J DIEDERICKS
Instructed by ENGLING STRITTER
AND PARTNERS