REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title:		**Case No:**
		HC-MD-CIV-ACT-CON-2019/02916
Velile Construction CC	Plaintiff	**Division of Court:**
		Main Division
v		**Heard on:**
		13 September 2021
Municipal Council Of Windhoek	Defendant	
Heard before:		**Delivered on:**
Honourable Lady Justice Rakow, J		05 October 2021

Neutral citation: *Velile Construction CC v Municipal Council Of Windhoek (*HC-MD-CIV-ACT-CON-2019/02916) [2021] NAHCMD 463 (05 October 2021)

Order:

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

2. The wasted costs of 13 September 2021 are awarded to Plaintiff.

3. The matter is regarded as finalized and removed from the roll.

Reasons for order:

RAKOW, J:

Background

[1] This matter was initially set down for trial from 12 September 2021 until 18 September 2021 but the special plea was not dealt with before and was previously raised, the court,

therefore, had to deal with it before proceeding with the trial.

[2] The dispute originated from an agreement between the defendant, the Municipal Council of Windhoek, and the plaintiff, Velile Construction CC when the plaintiff was contracted by the defendant to perform some tasks related to the clearance of ponds. The plaintiff tendered for the specific task which was accepted and the parties concluded an agreement to that effect. It seems that the initial agreement was varied at some point with the task is more than was initially agreed upon. It further transpired that an amount of money was retained as retention fees by the defendant which the plaintiff now wants to be paid. The defendant on the other hand also instituted a claim in that they allege that the money is not payable and that they have a counterclaim as the plaintiff was paid too much on the contract and therefore owes them some monies.

[3] The plaintiff caused summons to be issued against the defendant on 28 June 2019 and obtained a default judgment against the defendant on 2 August 2019, which was subsequently set aside by this Honourable Court on 22 May 2020. The defendant has since been granted leave to defend the action, as such it filed its plea and counterclaim to the plaintiff's claim. The defendant raised a special plea, one of an arbitration clause, to the claim as it wants the matter to proceed on arbitration.

[4] It also transpired that the matter was initially referred to arbitration as the parties from the start entered into an arbitration agreement and a certain Mr. de Witt was appointed as the arbitrator. When the matter however needed arbitration and the plaintiff referred it for such, the defendants had a problem with the arbitrator appointed and did not initially participate in the process. The process however came to nothing as it was not further pursued by the plaintiff.

The arbitration clause

[5] Plaintiff claimed arises from clause B2.3 of the contract between the parties under Tender INF 702/2016, part B Unit Bulk and Wastewater which commenced from 30 June 2016 to 30 June 2018. It is common cause between the parties that this agreement came to an end on 30 June 2018.

[6] The defendant pleaded that the parties have a written agreement, and in terms of clause 20.4 of the Conditions of Contract Constructions FIDIC 1999 the parties agreed to resolve any

kind of dispute between themselves by arbitration. The clause reads as follows:

'if any dispute (of any kind whatsoever) arises between the Parties in connection with or arising out of, the Contract or the execution of the works, including any disputes as to any certificate, determination, instructions, opinion, or valuation of the Engineer, either party may refer the dispute in writing to DAB for its decision, with copies to the other party and the engineer….'

[7] Clause 20.2 of the agreement further reads that:

' Disputes shall be adjudicated by a DAB per Sub-Clause 20.4….. The Parties shall jointly appoint a DAB by the date stated in the Appendix to Tender. '

[8] The parties entered into a Dispute Adjudication Agreement in which AJ de Witt was appointed as the member to deal with the dispute. This agreement was signed by Lorraine Bezuidenhout on behalf of the plaintiff and J.S. Husselman on behalf of the defendant. These signatures are dated 3/4/2019 and 13/6/2019. Velile Construction CC further issued to the Chief Executive Officer of the City of Windhoek, Mr. Kahimise a Notice of Adjudication in terms of clauses 20.1 and 20.2 of the agreement between the parties. In essence, this notice informed the recipient that the plaintiff requires a dispute or difference as set out under Appendix A and B, to be referred to adjudication. The dispute set out in these Appendixes is a similar dispute that now forms the basis of the claim of the plaintiff.

The arguments

[9] The plaintiff argues that it is common cause between the parties that the agreement came to an end on 30 June 2018 and on 11 March 2019, the defendant issued a performance certificate in terms of sub-clause 11.9 of the Tender documents certifying that the first respondent has satisfactorily completed its obligations under the contract, including remedying of any defects. It is argued that in light hereof, it is submitted that there is no contractual basis for the defendant to withhold the plaintiff retention fees under clause B2.3 and as such, there is no dispute that must be arbitrated upon. The fact that the defendant also issued a certificate to the plaintiff/respondent certifying that the latter's contractual obligations were satisfactory and that all documents were submitted leaves no issue to be decided upon via arbitration.

[10] The defendant argues that the plaintiff has admitted that its claim arises from the written agreement but that the contract between the parties came to an end. Thus, the adjudication

agreement which was signed between the parties at the commencement of the tender contract in question was terminated when the contract between terminated, although they referred the matter for arbitration. In terms of the referral letter to refer the matter for dispute adjudication, the dispute that the plaintiff has referred to arbitration is under contract INF702/201-2018. The summary of the plaintiff's referral is that plaintiff provided a quotation to the defendant for the cleaning of the ujam ponds. The plaintiff's claim is for non-payment of retention fees under contract INF702/2016.

[11] The defendant's defence is that the plaintiff has been overpaid for work instruction 0157 under contract INF702/216. The defendant then withheld the retention fees subject to the defendant investigating the actual work carried out by the plaintiff. The investigations established that the plaintiff did not submit all documents to prove the amount invoiced. The dispute thus emanates from the work instructions issued under the contract INF702/2016 and therefore the arbitration clause is still valid and should be utilized to resolve the dispute.

The case law

[12] In *Fiona Trust & Holding Corp and Others v Privalov and Others Fiona Trust & Holding Corp and Others v Privalov and Others*[1] 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.'

[13] It is trite that a court has the 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* [2] 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

[1] *Fiona Trust & Holding Corp and Others v Privalov and Others Fiona Trust & Holding Corp and Others v Privalov and Others* [2007] 4 All ER 951 (HL) ([2007] UKHL 40).

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

case has been made out - . . .'

[14] In *Opuwo Town Council v Dolly Investments CC*[3] Prinsloo J said the following:

'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.'

[15] In *Radial Truss v Shipefi*[4], the court stated the following:

'The starting point in this dispute is the interpretation one places on clause 9 of the agreement. In the Zimbabwean case of *Scriven Bros v Rhodesia Hides & Produce Co & Others 143 Ad 393*[5], the then Appellate Division quoting from the speech of Viscount SIMON, L.O., in the English case of *Heyman v Darwins*[6] *Ltd* 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 'concerning', or 'under' the contract, and an arbitration clause which uses these, or similar, expressions, should be construed accordingly."

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[3] *Opuwo Town Council v Dolly Investments CC* (HC-MD-CIV-ACT-CON-2017/03148) [2018] NAHCMD 309 (24 September 2018).

[4] *Radial Truss v Shipefi* NAHCMD 434 (16 September 2020).

[5] *Scriven Bros v Rhodesia Hides & Produce Co &* Others [6] 1943 AD 393.

[6] *Heyman v Darwins Ltd*. (1942, A.E.R. 337).

[16] And further:

‘ 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 the public policy which would not arise in an agreement to arbitrate of the kind in question.'

Conclusion

[17] From the above, it must be clear that the court will have regard to the wishes expressed by the parties when they entered into the said agreement. From the start, the parties wished for disputes under the said agreement to be dealt with by way of arbitration. This is further supported by the fact the parties entered into a Dispute Adjudication Agreement and identified the person who would deal with any disputes. The Notice of Adjudication issued by the plaintiff further supports the contention that the parties understood that disputes under the said agreement will be referred for arbitration, which was then also done by the plaintiff.

[18] The dispute before court originated as part of the contract entered into between the parties and therefore, should be dealt with under the agreement and its specific mechanisms for dealing with dispute resolution. The retention monies due to the plaintiff originate from the current contract INF702/2016 and no new agreement was entered into between the parties that now provides for the payment of the retention money. As a result, the court finds that the parties agreed that disputes will be referred for dispute adjudication and the special plea is upheld.

[19] The plaintiff further elected to follow the route of arbitration and indicated as such in the notice to the CEO of the City of Windhoek. To now say that the defendants did not give their co-operation that is why the plaintiff came to court, cannot negate the selection already made and the course set into motion. There are alternative ways provided to deal with such a situation, which should have been followed e.g. to enforce the agreement and to proceed with the arbitration even though the defendants did not participate.

Costs

[20] Costs normally follow the suit and in this instance, the defendants were successful in their application as the special plea was upheld and accordingly they should be awarded the costs of the application.

[21] However, this matter was set down for trial and the parties were ordered by my sister Justice Prinsloo on 22 June 2021 as follows regarding the raising of the special plea:

'In the event that the Defendant intends to pursue the special plea of Arbitration it must approach the Managing Judge on or before 2 August 2021 to indicate its position and request further directions.'

[22] The defendant never indicated to the Managing Judge that it intended to proceed with the special plea and also did not so indicate to the Judge dealing with roll call on 10 September 2021 that the matter will not continue with trial as the special plea needs to be dealt with first. During the appearance before me, counsel for the defendant still had to take instructions from the legal practitioners when asked by the court whether they wish to proceed with the special plea. This conduct is frowned upon and should be discouraged as it is not in line with the spirit of the court rules which among others seek the speedy and cost-effective resolution of disputes.

[23] As a result, the court awards one court day's wasted costs for 13 September 2021 to the plaintiff.

[24] In the result, I make the following order:

1. The special plea is upheld with costs, costs to include the costs of one instructing and one instructed counsel.
2. The wasted costs of 13 September 2021 are awarded to Plaintiff.
3. The matter is regarded as finalized and removed from the roll.

Judge's signature	**Note to the parties:**
E RAKOW Judge	Not applicable
Counsel:	

Plaintiff:	**Defendant**:
Ms Kavitjene Metcalfe Attorneys Windhoek	Adv. Shifotoka Instructed by Uanivi Gaes Inc. Windhoek